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THE
FEDERAL REPORTER.

VOLUME 69

CASES ARGUED AND DETERMINED
IN THE
CIRCUIT COURTS OF APPEALS AND CIRCUIT
AND DISTRICT COURTS OF THE
UNITED STATES.

PERMANENT EDITION.

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FEDERAL REPORTER, VOLUME 69.

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¹ Commissioned January 21, 1895.² Resigned January 21, 1895.³ Commissioned March 1, 1895.⁴ Commissioned May 17, 1895.⁵ Resigned May 17, 1895.

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¹Commissioned March 1, 1895.

²Commissioned Nov. 8, 1895.

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CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

MICHIGAN CENT. R. CO. v. CONSOLIDATED CAR HEATING CO.

(Circuit Court of Appeals, Sixth Circuit. June 14, 1895.)

No. 250.

APPEAL—ASSIGNMENTS OF ERROR—WAIVER OF DEFECTS—REHEARING.

Where counsel have discussed in their briefs a question as to the effect of amending the specifications of a patent in the patent office, under a general assignment that the court erred in holding the patent valid, without raising any objection in regard to the sufficiency of the assignment of errors, they cannot afterwards insist, on motion for rehearing, that the assignment was not sufficiently specific.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This was a suit in equity by the Consolidated Car Heating Company against the Michigan Central Railroad Company for infringement of letters patent No. 329,017, for improvements in steam car heaters granted October 27, 1885, to Elmore D. Cody. The circuit court entered a decree for complainant. Defendant appealed to this court, which, on April 2, 1895, reversed the decree, and ordered the bill dismissed, holding that the second claim of the patent was void for reasons stated in the opinion. 14 C. C. A. 232, 67 Fed. 121. A petition has now been filed for a rehearing.

J. C. Sturgeon and J. B. Foraker, for appellant.

R. A. Parker, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge. The grounds upon which a rehearing is prayed in this case are such only as have been already argued by counsel and fully considered by the court in its former opinion, with the exception of one, which is that there was no assignment of error upon which the court could consider the effect of the amendment of the specifications of the Cody patent while his application was pending in the patent office. The first of the errors assigned

was that the court erred "in that it ordered, adjudged, and decreed that the letters patent No. 329,017, granted on the 27th day of October, 1885, to Elmore D. Cody and John W. Hayes, assignee of a one-half interest therein, for a new and useful improvement in steam car heaters, are good and valid letters patent." In the brief of the appellant's counsel the objection to the validity of the patent, founded upon the change of the specifications, was distinctly taken. The brief of counsel for appellee, under a distinct head of the argument, took up and discussed this subject at considerable length without any suggestion that the assignment of error was not sufficiently specific. As the assignment in general terms covered this subject-matter, and it was treated and discussed as falling under the assignment, we think it is too late to complain of the failure to more specifically assign the error, and that the appellee should be deemed to have waived a more definite assignment, if indeed that was necessary.

The petition is overruled.

KILDARE LUMBER CO. v. NATIONAL BANK OF COMMERCE et al.¹

(Circuit Court of Appeals, Fifth Circuit. May 7, 1895.)

No. 350.

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP—ARRANGEMENT OF PARTIES.

A Texas corporation gave a trust deed to secure its notes to several parties. By inadvertence in naming the place at which the trustee was authorized to make sale in case of default, he was disabled from legally selling the property under the state statutes. Default having been made upon the notes held by one of the parties, the latter filed a suit to foreclose the trust deed, joining as defendants the trustee and one of the other beneficiaries under the trust, who was also president of the defendant corporation. Both of these persons were citizens of Texas, and it was contended by defendant that their interests in the controversy was adverse to it; that they must therefore be considered as parties plaintiff; and that the jurisdiction was consequently ousted. For complainant it was claimed that the trustee was a merely formal party; that under the Texas decisions, he was not even invested with the legal title, and was not a necessary party; and that the jurisdiction was not affected by his citizenship; further, that the claim of the other defendant was not in fact disputed by the defendant corporation, and that he in truth joined with it in fighting plaintiff's claim. *Held*, that the court had jurisdiction.

2. CONSTRUCTION OF CONTRACT.

Certain creditors of an insolvent corporation purchased its property at judicial sale, agreeing among themselves to form a new corporation, by which their debts were "to be paid" by the issuance to each of them of 60 per cent. of their claims in stock, and by giving the new company's notes for the remainder, secured by a trust deed. The arrangement was carried out, and the new company having defaulted upon the notes given to one party, he sued to foreclose the trust deed. *Held*, that the fact that he had not surrendered his old evidences of indebtedness was not a defense.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This was a bill in equity by the National Bank of Commerce of Kansas City, Mo., against the Kildare Lumber Company (a corpora-

¹ Rehearing denied June 4, 1895, without an opinion.

tion of Texas) and W. R. Camp, George T. Todd, the Atlanta Bank (a Texas corporation), the Citizens' Bank of Jefferson (a Texas corporation), James H. Bemis, W. B. Ward and Louis S. Schluter,—all citizens of Texas. The bill was brought to foreclose a trust deed, and a decree was rendered below for complainant. The Kildare Lumber Company appeals.

In July, 1891, the Jefferson Lumber Company, a corporation organized under the laws of the state of Texas, became insolvent, and executed several deeds of trust, whereby it conveyed to W. R. Camp, trustee for the use and benefit of certain parties, therein named, as creditors of said corporation, all of its property. J. H. Bemis was at that time the president of said corporation, and the owner of nearly all of the stock in the same. At the time of the failure of this corporation, J. H. Bemis & Co., a firm composed of James H. Bemis and his two sons, Charles F. and William N. Bemis, also failed. At the time of said failures, the corporation and J. H. Bemis & Co. were indebted to the National Bank of Commerce of Kansas City, Mo., the complainant herein, in the sum of about \$65,000. The Jefferson Lumber Company had been, for several years prior to its failure, engaged in the manufacture of lumber, and J. H. Bemis & Co. had been engaged in the business of lumber dealers. The indebtedness of the Jefferson Lumber Company and J. H. Bemis & Co. to the National Bank of Commerce of Kansas City, Mo., accrued by said bank, at the request of J. H. Bemis & Co., purchasing drafts drawn by J. H. Bemis & Co. on divers and sundry lumber dealers located at different points in the states of Kansas, Nebraska, Colorado, and the Indian Territory. These drafts were indorsed by the Jefferson Lumber Company, and accepted by the drawees respectively. Shortly after the failure of the Jefferson Lumber Company the Galveston National Bank brought suit in the district court of Marion county, Tex., for, and procured, the appointment of a receiver of the property of the Jefferson Lumber Company. In its complaint it attacked the validity of the deeds of trust executed by the corporation. The said district court did not adjudicate the questions involving the validity of the deeds of trust, but made an order directing the sale of the property, and appointing commissioners for that purpose, leaving the validity of the deeds of trust to be controverted by the beneficiaries therein named and purchasers at the sale. Just prior to the sale under this order, an agreement was entered into, by and between W. B. Ward (who, individually and as president of the Jefferson National Bank, represented claims amounting to about \$90,000), J. M. Bemis (who held, or claimed to hold, a claim amounting to about \$30,000), W. B. Chew (who represented a national bank at Houston, Tex., which was also a creditor of the Jefferson Lumber Company to a large amount), and Elijah Robinson (attorney for the complainant herein). This agreement was induced by a desire upon the part of these creditors to avoid the litigation which would necessarily result unless some such agreement should be entered into. By the terms of this agreement the parties were, in the event they should purchase said property, to form a corporation, which would buy from them the said property. The following is a copy of the agreement in full:

"This agreement, entered into this 3d day of May, 1892, between W. B. Ward, J. M. Bemis, W. B. Chew, and Elijah Robinson, witnesseth that, whereas the said Ward, Bemis, Chew, and Robinson have this day purchased, at sale by H. A. O'Neal, receiver of the Jefferson Lumber Company, all the property and effects of said company; and that, whereas it is proposed by the said Ward, Bemis, Robinson, Erastus Jones, and others, or their assigns, to organize a corporation under the laws of the state of Texas, and with a capital stock equal to \$185,000 of the preferred claims against the Jefferson Lumber Company and the claims of the National Bank of Commerce of Kansas City, Mo., against said company, and the claim of said bank against J. H. Bemis & Co., and the claims of the National Bank of Jefferson against said lumber company, and the interest of all of said claims from maturity thereof, less 40 per cent. of the said claims of said National Bank of Commerce and said National Bank of Jefferson; and, whereas it is proposed by said Erastus Jones, J. M. Bemis, J. B. Alexander (or their assignee), Grigsby Bros., Sulphur Lumber

Company, Southern National Bank of New York, and W. B. Ward, to release and convey to said corporation, to be hereafter formed, all the property conveyed by the Jefferson Lumber Company, by deed of trust or otherwise, to them or to any other trustee for their benefit,—now, therefore, the parties hereto do hereby agree that, upon the confirmation of the said receiver's sale, and a conveyance being by said receiver made to them of the property by them purchased at the sale this day made, and upon the release and conveyance to said new corporation of all the property conveyed by deeds, deeds of trust, or otherwise, as hereinbefore mentioned, they, the said parties hereto, will convey to said new corporation all the right, title, and interest in them vested by said receiver's sale and conveyance, they to be paid for said property as follows: The said Chew is to be paid one-fourth of the amount bid for said property, to wit, one-fourth of \$13,000, which is to be paid in cash. The said Ward is to be paid one-fourth of \$13,000 in the note of said corporation, secured by a deed of trust on the property thereof, and, in addition thereto, the amount of the indebtedness of the Jefferson Lumber Company to the National Bank of Jefferson, and interest thereon, 40 per cent. of which is to be paid in the note or notes of said new corporation, secured by a lien on its property, and the other 60 per cent. in the stock of said corporation at par. The said Bemis is to be paid one-fourth of \$13,000 in the note or notes of said corporation, secured by a lien on its property, and in addition thereto a sum equal to the indebtedness of said Jefferson Lumber Company to him, mentioned in the general deed of trust executed by said Jefferson Lumber Company, and the interest thereon, which is to be paid in the stock of the new corporation at par. And for said Robinson's interest in said property there is to be paid one-fourth of \$13,000, which is to be paid in the note or notes of said corporation, secured by a deed of trust on its property, and in addition thereto the amount of the claims of the National Bank of Commerce of Kansas City, Mo., against J. H. Bemis & Co., and its claims against the Jefferson Lumber Co., and interest on said claims, of which 40 per cent. is to be paid in the notes of said new corporation, secured by deed of trust on its property, and the remaining 60 per cent. in the stock of said new corporation, at par, the said note or notes to be payable to said National Bank of Commerce of Kansas City, Mo., and said stock to be issued to said bank or such person as it may direct. The said notes to be made by the new corporation are to be all on an equal footing, so far as the security is concerned,—that is, no note or notes to have a preference or priority over any other note or notes. And said notes are to be secured by deed of trust on all the property of said new corporation, unless the parties to whom the same may be made agree to take a deed of trust on a less amount of property. If said Erastus Jones, J. M. Bemis, J. B. Alexander (or his assignee), Grigsby Bros., Sulphur Lumber Co., Southern National Bank, W. B. Ward, or any of them, refuse or fail to execute for said new corporation releases and conveyance herein provided for, then this agreement is to be of no further force or effect. The stock mentioned herein as going to J. M. Bemis and W. B. Ward is to be issued to them, respectively, or to such person or persons as they may direct. Witness our names hereunto subscribed the day and year first above written.

Elijah Robinson.

"W. B. Ward.

"J. M. Bemis,

"By W. B. Ward, Agent.

"W. B. Chew.

The notes to be given to the National Bank of Commerce for the forty per cent. of their claim (40 per cent.) shall be made in equal amounts, payable in 6, 12, and 18 months with six per (6) cent. per annum interest from date of note; and the other notes herein provided for are to bear 6 per cent. per annum interest from date of note, and run 4 and 6 months, with privilege of renewing.

Elijah Robinson."

A sale was had, and the property was bought in by the parties to the foregoing agreement, as provided therein. This sale was reported to and approved by the said district court; and, as soon as a deed was made by the commissioners, the new corporation was formed, and the purchasers conveyed to it the said property. A resolution adopted by the board of directors of the cor-

poration authorized the purchase of the property, and set forth the consideration to be paid therefor. The said consideration was to be paid partly in notes, secured by deed of trust on the property, and partly in stock of the corporation; that is, Ward was to receive notes secured by deed of trust, equal to one-fourth of the amount paid for the property at the commissioner's sale, and 40 per cent. of the claims which he represented against the Jefferson Lumber Company, and the stock of the corporation equal to 60 per cent. of the amount of said claims. John M. Bemis was to receive a note, secured by deed of trust on the property, equal to one-fourth of the purchase price at the commissioner's sale, and stock of the corporation equal to the whole of his claim against the Jefferson Lumber Company. Chew was to receive a note, secured by deed of trust on the property, equal to one-fourth of the purchase price at the commissioner's sale. And Robinson was to receive notes, secured by deed of trust on the property, equal to one-fourth of the purchase price at the commissioner's sale, and 40 per cent. of the claims of the National Bank of Commerce against the Jefferson Lumber Company, and the stock of said corporation, equal to 60 per cent. of said claims. In pursuance of this agreement, the parties conveyed the property to the Kildare Lumber Company, and in payment therefor notes were executed, and stock issued, as in the agreement provided. These notes were secured by deed of trust, in which one of the defendants in this case, Mr. L. S. Schluter, was named as trustee. By the terms of the deed of trust he was authorized to sell the property on default in the payment of the notes thereby secured. In the preparation of this deed of trust, the provisions of an act of the legislature of the state of Texas, requiring property in such cases to be sold in the county where located, was overlooked, and it was provided that said property should be sold in Marion county, when, in point of fact, the larger portion of it was located in Cass county. For this reason the trustee could not execute the power. The notes given to John M. Bemis and Chew were paid in full, and the notes executed to Ward were partly paid, but nothing was paid on the notes given to Robinson, which were indorsed to the complainant. Upon default being made in the payment of the notes, complainant began this suit to foreclose the deed of trust, and for the appointment of a receiver of the property of the Kildare Lumber Company. This suit was brought by complainant, not only as the holder of said notes and for foreclosure of said deed of trust, but also as a stockholder in the corporation and for the appointment of a receiver, etc. Besides the Kildare Lumber Company, said W. D. Ward and L. S. Schluter, the trustee in the deed of trust executed by the Kildare Lumber Company, and others, were made defendants. Upon the filing of said bill a receiver of the property of the Kildare Lumber Company was appointed, but was, on motion of that company, subsequently discharged. The Kildare Lumber Company filed an answer, setting forth that a part of the consideration for the notes held by the complainant was an agreement upon its part to surrender to J. H. Bemis the original claims held by it against the Jefferson Lumber Company and J. H. Bemis & Co., and that the agreement had not been complied with. The Citizens' Bank, one of the defendants, by J. H. Rodgers, trustee, filed an answer setting forth its indebtedness against the Jefferson Lumber Company, and that the deeds of trust securing the same were valid and binding. It also filed a cross bill, praying that its debt be established as a lien against the property prior to that of the beneficiaries in the Kildare Lumber Company deed of trust, etc. After the taking of the evidence in the cause, and just prior to the hearing, the Kildare Lumber Company filed a demurrer, and also a plea to the jurisdiction of the court, based on the fact that the trustee, Schluter, and the other defendants were all citizens of the state of Texas. This demurrer and plea to the jurisdiction were overruled. The cause was heard, and a decree entered foreclosing the deed of trust, but giving to the Citizens' Bank claim priority. From this decree the defendant the Kildare Lumber Company appealed to this court, filing the following assignment of errors:

"The appellant, the Kildare Lumber Company, respectfully assigns and submits the following as error committed by the court below in this cause: (1) The court erred in overruling the appellant's demurrer and plea to the jurisdiction of the court and motion in arrest of judgment, because it appeared, from the original bill and from the evidence uncontroverted, that the defendants the Kildare Lumber Company, W. B. Ward, and Lewis S. Schluter were

and are citizens of the same state and district, to wit, the state and Eastern district of Texas, and the plaintiff a citizen of Missouri; and that the said W. B. Ward and Lewis S. Schluter, trustee, were real plaintiffs in interest and should be considered as such,—wherefore it appears that the controversy was not and is not wholly between citizens of different states. (2) The court erred in rendering a decree in favor of defendant T. J. Rogers, assignee of the Citizens' Bank of Jefferson, Texas, upon his cross bill for foreclosure of the deed in trust from the Jefferson Lumber Company to W. R. Camp as trustee, because—First, the court had no jurisdiction of the original bill, nor of the cross bill, for the reasons stated above. Second, the undisputed evidence shows that said trust deed to W. R. Camp, trustee, was made by an insolvent corporation, sought to prefer creditors, and was therefore void as to the creditors and as to appellant. Third, the undisputed evidence shows that the claim of indebtedness alleged to be due by the Jefferson Lumber Company to the Citizens' Bank, and attempted to be secured by said trust deed to W. R. Camp, trustee, was barred by the statutes of limitations of Texas, which was duly pleaded by appellant and defendant the Jefferson Lumber Company. Fourth, no personal judgment is prayed in said cross bill, nor rendered in the decree against the Jefferson Lumber Company. (3) The court erred in rendering decree of foreclosure in favor of defendant W. B. Ward for \$5,099.25, because—First, the court had no jurisdiction to render such decree in this cause; second, there was no cross bill or other pleadings by said W. B. Ward upon which to base such decree. (4) The decree of the court is not supported by, and is against, the evidence, because the evidence shows that plaintiff has failed and refused to surrender the evidences of indebtedness held by it against the Jefferson Lumber Company and J. H. Bemis & Co., which surrender was the sole consideration for the notes sued on, and was a condition precedent, the performance of which by plaintiff was essential before any cause of action accrued on the notes sued on by plaintiff in this cause. (5) The court erred in dismissing, without prejudice as to the defendant the Atlanta Bank of Atlanta, Tex., and not rendering its final decree against said Atlanta Bank, and adjudging that it take nothing and pay its costs; because the pleadings of said defendant Atlanta Bank and the evidence put in issue all its rights and equities, if any it had, and required the judgment of the court upon the merits thereof, if any, and appellant was entitled to a final judgment in its favor as against said Atlanta Bank. Of all of which the appellant prays the judgment of the honorable United States circuit court of appeals."

The questions mainly argued in this court were two: First, whether the parties must be so arranged in respect to the matters in controversy as tooust the jurisdiction of the court; second, the question whether the note sued on, as well as the stock delivered to complainant by the Kildare Lumber Company, were issued and delivered wholly upon the consideration of the settlement and satisfaction of the claims and written obligations held by complainant against J. H. Bemis, J. H. Bemis & Co., and the Jefferson Lumber Company, and upon the condition precedent of the surrender of such evidences of indebtedness by the complainant. In regard to the first point, it was contended in behalf of the appellant that Lewis S. Schluter, the trustee in the trust deed sought to be foreclosed, and who was named as a defendant, must of necessity be arranged on the side of the complainant; that his interest was with the beneficiaries under the trust deed, and that consequently there was necessarily a controversy between him and the defendant. It was also insisted that, as W. B. Ward was a coincumbancer with complainant, he must be arranged on the same side with the latter. As both Ward and Schluter were citizens of Texas, this would necessarily defeat the jurisdiction. On the second question, it was argued for appellant that, both by the terms of the agreement between Robinson, Ward, Bemis, and Chew, for the purchase of the property at the sale and the organization of the Kildare Lumber Company, and also upon the other evidence adduced, the contract was that the evidences of indebtedness held by complainant against the Jefferson Lumber Company, Bemis, and J. H. Bemis & Co. should be surrendered before the new notes could be enforced.

For the appellee it was contended, upon the first point, that Schluter, the trustee, was a mere formal party, without any real interest in the controversy, and that the fact of his being a party did not affect the question of jurisdiction.

tion; further, that, under the rule prevailing in the courts of Texas, the execution of the deed of trust did not vest the legal title in him, but merely conferred a power of sale, for which reason he had no interest in the subject-matter, and was not a necessary party to the foreclosure suit. In respect to the citizenship of Ward, it was argued that there was no controversy whatever between him and the defendant; that he merely set up in his answer the amount of his claim, as he was required to do by the bill; that the claim was in no way controverted; and, Ward being president of the defendant company, it was asserted as a matter of fact that he joined with the company in fighting plaintiff's claim, which was the only controversy in which he was involved. In regard to the second point, it was contended that the agreement contained no implications that the original evidences of indebtedness held by complainant must be surrendered on receiving the new notes and stock for which the agreement provided, and that, on the evidence produced, no such agreement was shown.

Chas. S. Todd and M. L. Crawford, for appellant.

R. R. Taylor and F. H. Prendergast, for appellee Rodgers.

G. J. R. Armistead, for appellee Ward.

Elijah Robinson, for appellee National Bank of Commerce.

L. S. Schluter, for appellee Atlanta Bank.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. In our opinion, none of the assignments of error urged by the appellant are well taken, and therefore the decree appealed from is affirmed.

COUPER et al. v. GABOURY et al.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 362.

MECHANICS' LIENS—RAILROAD CONTRACTORS—FLORIDA STATUTES.

The Florida statute of June 3, 1887, which gives a superior lien to any persons "who shall perform any labor upon or for the benefit of any railroad," etc., is to be construed as extending its benefits to a railroad contractor who has furnished work and labor for construction, as well as to those actually performing labor.

Appeal from the Circuit Court of the United States for the Southern District of Florida.

This was a suit by Gaboury, Armstrong & Co., contractors (J. King joining as assignee of the account), against the Arcadia, Gulf Coast & Lakeland Railroad Company and the De Sota County Bank, as mortgagee of the railroad company, to enforce a lien alleged to arise under a construction contract. Numerous parties intervened, setting up claims against the railroad company, and the cause was referred to a special master. The master, among other things, found in favor of the lien set up by complainants, and an exception to this finding was overruled by the court, and a decree entered accordingly. From this decree appeals were taken by W. P. Couper & Co., interveners, and by Ziba King, receiver of the De Sota County Bank. In overruling the exceptions, LOCKE, District Judge, delivered the following opinion:

The only question in this case that seems to demand a very careful investigation is whether or not section 2 of chapter 3747 of the Laws of Florida (the act of June 3, 1887), which gave a lien to any person performing any labor upon or for the benefit of any railroad, gave a lien to a contractor who performed such labor by others. At the time the contract in this case was made this act was in force. Subsequently, by a special act, legislative commissioners were appointed to prepare and cause to be printed the laws of Florida then in force, and they prepared and caused to be printed and published what is known as the "Revised Statutes of the State of Florida," which were finally approved June 8, 1891. In this revision the commissioners, in section 1727 of such revision, provided that any person performing by himself or others any labor upon any railroad should have a lien upon the property of said road. It is under this provision that petitioner Couper claims a lien, his contention being that, as the law stood before revision, no contractor had a lien, but under the revision such right was given. There was no legislation upon this subject in order to effect the change of right given under the statute, and, if such change was made, it must be held to be in violation of the intention of the legislature. The presumption is, therefore, that there was no change in the force and effect of the former statute, but the revision only more clearly and plainly expressed the intention in enacting the law of 1887. This revision and construction was approved by the legislature, very many members of which had been members of the legislature which had passed the original statute. This construction is supported by the language of the eighth section of the act of 1887, which provides that contractors or subcontractors shall furnish a list of all persons employed to the person having the work done, under the penalty of having such contractors' or subcontractors' lien barred. It is an elementary principle in the construction of statutes that the entire statute shall be considered together, and not one particular section of it; and, examining the second section of this law in the light of the language of the eighth section, it is impossible to conclude that it was the intention of the legislature to confine the benefits of such act to the wageworkers, excluding contractors, although the courts of numerous other states have given such construction to somewhat similar statutes. In the act of 1885 it is plainly seen that contractors or subcontractors were not considered as having a lien, but the eighth section of the act of 1887, which in all other respects takes the place of section 2 of the act of 1885, shows that that change was intentional, and treated contractors as entitled. Not only this, but the supreme court of Florida, in *Trustees of Wyly Academy v. Sanford*, 17 Fla. 163, has plainly and clearly recognized the right of a lien in contractors. The exception to the master's report in this respect must therefore be overruled.

J. B. Wall, for appellants.

James B. Guthrie, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. The question raised on this appeal is whether the act of June 3, 1887 (chapter 3747 of the Laws of Florida), gives to a contractor a lien upon a railroad upon which he has under contract furnished work and labor. We concur with the ruling and opinion of the court below in favor of such lien, and the decree appealed from is therefore affirmed.

FARMERS' LOAN & TRUST CO. v. ROCKAWAY VALLEY R. CO. et al.

(Circuit Court, D. New Jersey. July 11, 1895.)

1. EQUITY PRACTICE—OPENING DECREE—LACHES.

After a decree of sale had been duly entered in a railroad foreclosure suit, and the property advertised for sale, a bondholder applied to have the decree opened, and for leave to file an answer to the bill, and interpose certain defenses. The petitioner averred that he had first heard of the foreclosure suit after the advertisements of sale were posted; but he was directly contradicted upon this point by one witness, and impliedly by another, and it appeared, without contradiction, that the foreclosure had long been a matter of general discussion in the neighborhood where the petitioner lived. *Held*, that the petitioner had not sustained the burden of proving that he was not guilty of laches excluding him from the relief sought.

2. RAILROAD BONDS—VALIDITY—COST OF CONSTRUCTION.

Railroad bonds issued to pay for the construction of the road are not rendered invalid by proof that the road could have been, or was, constructed for less than the amount of such bonds, if the contract for its construction was fairly made and carried out, and called for the amount of bonds actually issued, and no fraud is charged in the inception or execution of such contract.

B. RAILROAD FORECLOSURE—DEFENSES—CONTRACTS OF BONDHOLDERS.

Certain bondholders of a railroad company, which was operating its road at a loss, and owed a considerable floating debt, made an agreement with a proposed lessee of the road not to seek to enforce payment of the interest on their bonds for 10 years. This agreement was unknown to the railroad company and to the trustee of the mortgage securing the bonds. It was violated by all parties to it, almost immediately, and apparently repudiated. Some of the parties to it sold their bonds without notice to the purchasers of the existence of the agreement. *Held*, that such agreement could not be interposed by a bondholder, to prevent the foreclosure of the mortgage for default in payment of interest, in a suit by the trustee of the mortgage.

This was a suit by the Farmers' Loan & Trust Company against the Rockaway Valley Railroad Company and others for the foreclosure of a mortgage. W. T. Melick petitioned to have the decree of sale opened, and for leave to file an answer. Denied.

Charles E. Hill, for petitioner.

Robert L. Lawrence, for complainant.

Flavel McGee, for First Nat. Bank of Jersey City, bondholder.

GREEN, District Judge. The Rockaway Valley Railroad Company, a corporation organized under the laws of the state of New Jersey, in the year 1890 made executed and delivered to the Farmers' Loan & Trust Company, of the state of New York, its indenture of mortgage, covering all its property and franchises, to secure certain coupon bonds given by it, in all amounting to \$200,000; the trust company being, as well, the mortgagee, and the trustee for the owners and holders of the said bonds. Among other things, it was provided in and by the said mortgage that if default should be made in the payment by the mortgagor of any installment of interest as the same might become due upon said bonds, and if such default should continue for a period of 90 days, the whole principal sum of the said bonds should immediately become due and payable,

and if, after demand, the principal and accrued interest should not be paid, the trust company, as trustee, was authorized, upon the request of the holders of a majority, in value, of the bonds, to foreclose the mortgage, and cause the mortgaged premises and franchises to be sold in satisfaction of the bonded debt. It appears from the bill of complaint in this case that such default in the payment of interest has occurred; that it has continued for a long time; that the holders of more than \$140,000 of said bonds have requested the trustees to take the necessary steps to protect them by foreclosure of the mortgage; and that to that end the trustee commenced an action in this court, which has progressed in an orderly and customary manner, and has resulted in a decree of foreclosure, with the usual directions for the sale of the mortgaged premises. The property covered by the mortgage has been advertised to be sold at public sale by the special master appointed for that purpose, according to law, and the sale is to take place within a fortnight. At this juncture the petitioner, William T. Melick, who is the owner of one of the said bonds, of the value of \$500, but who claims in this proceeding to represent other bondholders owning bonds to the amount of \$22,900, presented to the court a petition asking that the decree of foreclosure and sale heretofore made may be opened, set aside, and vacated, and that he and his associates may be permitted to enter their appearance to the action, and file an answer to the bill of complaint of the complainant, and in that way interpose two defenses: First, that there has been no such default in the payment of interest by the mortgagor as was contemplated by the deed of mortgage; and, secondly, that some of the bonds presumably represented in this proceeding by the complainant were issued without consideration, and are void as outstanding obligations.

To permit a cause which has seemingly moved in such an orderly and customary way to be interrupted at so late a stage, and at so critical a point in its progress towards a final decree, can only be justified on the ground that otherwise there would be a practical denial of justice to the petitioner, caused by the deprivation of his right to have his day in court. And it is well settled that he who seeks to obtain such interference by a court of equity must thoroughly clear himself of any suspicion of laches in making his application. The petitioner strives to do this, in the present case, by declaring that his first knowledge of this foreclosure suit was acquired after the posting of the advertisements of the sale of the mortgaged premises to be made, as stated, by the special master, and that he took his present action immediately thereafter. If this statement were uncontradicted, it would go a very great way in relieving him from charges of delay. But it is flatly contradicted,—directly by one witness who long ago conversed with him about the foreclosure,—impliedly by another; and it is in evidence, without objection, that in the neighborhood where the petitioner lives the pending proceedings for foreclosure were a common topic of conversation, and had been so for months. In view of these contradictory statements, it is not possible to say that the effect of

the petitioner to excuse his apparent lack of diligence has been successful. The burden of disproving laches was upon him. The testimony is, at least, evenly balanced, and its failure to preponderate in favor of him who must assume the burden of proof is fatal.

This conclusion would probably justify a denial of the prayer of the petition. But there are other reasons for such denial, as strong, if not stronger, than the one given. As stated, the petitioner asks for the interference of the court in his behalf at this time that he may interpose alleged defenses in bar of the foreclosure sought. These defenses are two: First, that there had been no default in payment of interest due upon the bonds; and, second, that some of the bonds represented by the complainant were without consideration, and should be canceled. As to this last allegation, it is enough to say that it is wholly unsupported by any evidence now before the court. In fact, the allegation itself is extremely vague and indefinite, and seems to be based solely upon an assumption that the railroad of the mortgagor could have been, or perhaps was, built and constructed for less than the amount of the bonds which were issued to pay therefor. If such allegation were well proved, it would not invalidate the bond issue. The only matter for investigation would be whether the contract for building and constructing the railroad was fairly made, fairly carried out, and called for the amount of bonds in payment therefor which were in fact issued. Whether the contract was a beneficial one to the company or otherwise, or whether it agreed to pay too much to the contractors for the work done, cannot now be considered. There is no charge made of fraud in the inception or execution of the contract under which the bonds in question were issued. In the absence of such allegation, as the matter now stands before the court, the issue of bonds under it must be held valid. If, however, the petitioner should be advised hereafter that any part of the bond issue is fraudulent, he will have the right to raise such question before the master, to whom all bonds must be submitted before they can participate in the distribution of the funds realized from the sale of the mortgaged premises. It is not necessary to interrupt the progress of this suit at this time to secure him that right.

The other defense which the petitioner desires to interpose rests upon peculiar grounds. It is not denied that the semiannual interest which has grown due upon the bonds in question has been in default for many months,—for years, in fact. But the petitioner seeks to avoid these many defaults by the force and effect of a certain agreement made, executed, and entered into in the year 1890 by those who were holders of these bonds at that date, whereby it was expressly agreed by them that they would waive the collection of the interest upon their bonds for a period of 10 years. This agreement has been submitted to the court. It appears from it that the Rockaway Valley Railroad Company was anything but a financial success. In the transaction of its business it was losing money every day. In 1890 one J. N. Pidcock, himself a large bondholder and stockholder, offered to lease the road, and, by close, economical operation, to relieve it of its financial troubles. Such

a lease was accordingly made. And that it might be rendered less burdensome, if possible, to the lessee, the holders of these bonds, at that time, agreed with him that they would not seek to enforce the payment of interest upon their bonds as it fell due, for 10 year; while, on his part, the lessee agreed to pay certain floating indebtedness of the company, and keep and perform certain covenants. This agreement was between the bondholders and the lessee only. The railroad company, the mortgagor, and the Farmers' Loan & Trust Company, the mortgagee and trustee, were not parties thereto, and had no knowledge of it. The agreement was not made a matter of record. No public notice of it was ever given. Practically, it was a secret agreement, binding only upon those who executed it. Some of the bondholders who were parties to it afterwards parted with their bonds, but gave to those to whom they transferred their holdings no notice of the existence of this agreement. The agreement was violated by all the parties almost immediately. The lessee failed to pay the floating indebtedness; failed to keep and perform his covenants, while the bondholders utterly disregarded their obligation. Thus it appears that upon application made by the present petitioner, who was one of the bondholders who had executed the agreement in question, the railroad company was, by the court of chancery of the state of New Jersey, decreed to be insolvent, and a receiver therefor was duly appointed, who, ousting the lessee, took possession of its property and assets. This action of this petitioner was in direct violation of the agreement in question, which, in terms, bound the bondholders to refrain from making such application. The truth seems to be that the agreement was voluntarily repudiated by all the parties to it. Under such circumstances, a court could hardly permit it to be resuscitated and used seemingly for the purposes of delay. But, if it be admitted that the agreement has yet some virtue remaining, it does not appear that it can have any force by way of defense to the present action. It was undoubtedly made for the benefit of the proposed lessee and of the railroad company. Both are parties to these proceedings. Neither ask that the agreement should be enforced. Both treat it as void in all respects. Clearly, it cannot be binding upon the present holders of the bonds, who are holders for value, without notice. How can it possibly be enforced in equity against those who had no part in its execution, who were ignorant of its very existence, who are innocent holders of the bonds, and became such by the concealment of the agreement in question by those who originally executed it? The application of the petitioner is addressed to the discretion of the court. A very clear case should be made, to secure favorable consideration. No such case has been presented, and therefore the prayer of the petition is refused, and the petition is dismissed.

DUPONT et al. v. CITY of PITTSBURGH et al.
(Circuit Court, W. D. Pennsylvania. July 6, 1895.)

No. 6.

1. MUNICIPAL CORPORATIONS—LIMIT OF INDEBTEDNESS—PENNSYLVANIA CONSTITUTION.

Held, following the decision of the supreme court of Pennsylvania, that the language of article 9, § 8, of the constitution of that state, limiting the debt of cities to 7 per cent. of the assessed valuation of taxable property therein, means the valuation fixed by the city authorities for city taxation, not that made by county officers for county purposes.

2. SAME—SPECIAL ELECTIONS—PENNSYLVANIA ACTS OF JUNE 9, 1891, AND JUNE 10, 1893.

Held, also following the decision of the supreme court of Pennsylvania, that the act of the legislature of that state of June 9, 1891, regulating the manner of increasing the indebtedness of municipalities, is not repealed by the act of June 10, 1893, known as the "Baker Ballot Law."

3. EQUITY PLEADING—IMPEACHING SPECIAL ELECTION.

Allegations, in a bill seeking to impeach the result of a special election to authorize a municipal indebtedness, that, in many districts tickets in opposition were not furnished, or, if furnished, were secreted or destroyed, and discrimination made between different loans proposed, by not furnishing tickets against loans to which there was opposition, are too indefinite to be a foundation for any relief, though ordinances relating to the election required the mayor to furnish ballots.

4. MUNICIPAL CORPORATIONS—STREET IMPROVEMENTS—PENNSYLVANIA STATUTE.

It is within the lawful power of a city, under the Pennsylvania statute of May 16, 1891, relating to the opening and improvement of streets, to provide funds to meet an estimated liability for the costs, expenses, and damages of opening a street; and it is not to be presumed that more of the fund raised will be used in making such improvements than will be lawfully applicable thereto.

Wm. B. Rodgers and J. M. Shields, for plaintiffs.

Watson & McCleave and W. C. Moreland, for defendants.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.

ACHESON, Circuit Judge. The main object of this bill is to restrain the city of Pittsburgh and its mayor and controller from executing and issuing any bonds of the city under—First, certain ordinances, enacted on January 14, 1895, providing for the submission to the electors of the city of questions of increasing the indebtedness of the city for designated purposes; second, an election in pursuance of those ordinances, held on February 19, 1895; and, third, an ordinance enacted on April 23, 1895, authorizing an issue of bonds to the amount in all of \$4,750,000, agreeably to the vote of the electors. The bill contests the legality of the proposed increase of the debt of the city upon the grounds—First, that the election relative to that increase was not held in conformity with, but in violation of, the laws of the state of Pennsylvania; and, second, that such increase will contravene the constitutional provision limiting the indebtedness of cities. With respect to the election of February 19, 1895, the complainants maintain that it should have been held under and in accordance with the provisions of the act of June 10, 1893, popularly known as the "Baker Ballot Law"; and that, as confessedly it

was not so held, but was conducted under and in accordance with the provisions of the act of June 9, 1891, the election was illegal and void. The supposed unconstitutionality of the proposed increase of the debt of the city is based upon the assumption that the constitutional limit of the debt of the city of Pittsburgh is to be ascertained by the assessed value of the taxable property therein as fixed for county purposes by the ward assessors and the commissioners of the county of Allegheny.

The questions thus raised are important, and might be difficult of solution in the absence of authoritative decisions. But such decisions we have. In *Bruce v. Pittsburg*, and *Succop v. Pittsburg*, 166 Pa. St. 152, 30 Atl. 831, 835, the supreme court of Pennsylvania ruled that the language in article 9, § 8, of the constitution, "The debt of any city shall never exceed seven per centum upon the assessed value of the taxable property therein;" and that of section 2 of the act of April 20, 1874, "Any city may incur debt or increase its indebtedness to an amount in the aggregate not exceeding two per centum upon the assessed value of the taxable property therein, as fixed and determined by the last preceding assessed valuation thereof;" and similar language throughout this act,—means the valuation fixed by the city authorities as a basis of taxation for city purposes, and not the valuation made by county officers for county purposes. Furthermore, in one of those cases, the question of the constitutionality of the act of May 5, 1876, entitled "An act providing for the classification of real estate for the purpose of taxation, and for the appointment of assessors in cities of the second class," having been raised, the court sustained the act as a rightful exercise of legislative power. Then, again, in the still later case of *Evans v. Township of Williston* (pending when this bill was filed, but since decided),¹ the supreme court of Pennsylvania held that the act of June 10, 1893, did not repeal the act of June 9, 1891, regulating the manner of increasing the indebtedness of municipalities, and that so much of the act of 1893 as relates to elections other than those for public officers was unconstitutional; and the court sustained a township election held February 20, 1894, for the increase of the debt of the township, conducted according to the provisions of the act of 1891.

Now, upon the construction of the constitution and laws of a state, the courts of the United States, as a general rule, follow the decisions of the highest court of the state, unless they conflict with or impair the efficacy of some provision of the constitution or of a law of the United States, or a rule of general commercial law. *Gormley v. Clark*, 134 U. S. 338, 10 Sup. Ct. 554; *Stutsman Co. v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227. In the present instance no good reason appears for departing from the general rule. The questions here involved altogether arise under the constitution and laws of the state of Pennsylvania, and concern the powers conferred by the state upon one of her own municipalities; and, therefore, we think that the decisions of the supreme court of the state upon those questions are conclusive upon us.

As respects the main branch of this case, we are not able to see that the opinions delivered by the supreme court of Pennsylvania leave open any material question. Although, in discussing the act of May 5, 1876, the court made mention only of the supposed defect in the title of the act, the decision implied that, in the judgment of the court, the subject-matter of the act was proper for class legislation, and that the act was free from any valid objection upon constitutional grounds. In the Williston Township Case, particular notice was not taken of the provision in the act of 1891: "Such election shall be held * * * under the same regulations as provided by law for the holding of municipal elections." Clearly, however, these words are to be understood as meaning that such regulations are to govern in so far as they are not inconsistent with the specific regulations prescribed in the act of 1891; and this construction is implied in the decision of the supreme court sustaining the township election.

Little need be said with reference to the averment in the bill:

"In many election districts, tickets in opposition to the increase of debt were not furnished, or, if furnished, were secreted or destroyed, and discrimination made between different loans that were proposed by the city, by the nonfurnishing of tickets in relation to increase of debt, against which it was considered there would be great opposition. That by this violation of law and unfair and unjust action a full and free expression of the public will was prevented, and a majority returned for said increase of debt."

If an election for the increase of municipal indebtedness is impeachable by a bill in equity upon any such ground as is here suggested, still there are several sufficient answers to the above averment. In the first place, there was no statute requiring the public authorities to furnish tickets to the electors at such an election, and under the act of 1891 every elector had the right to use either a written or printed ticket. Then, again, although it is true that the several ordinances relating to this election directed the mayor of the city to provide the necessary ballots, yet the bill does not charge that he failed in his duty in that regard. The alternative averment "that, in many election districts, tickets in opposition to the increase of debt were not furnished, or, if furnished, were secreted or destroyed," is quite insufficient to impeach the action of the mayor or other city authorities. By whom tickets "were secreted or destroyed" is not disclosed. The allegations of this paragraph are entirely too indefinite to affect the validity of the election.

The tenth and eleventh paragraphs of the bill relate to part only of the proposed increase of the city's indebtedness, namely, the issue of bonds to the amount of \$500,000 for the purpose of acquiring the ground for and paying the damages and expenses of opening and improving Beechwood avenue and Grant Way, two boulevards or main highways. This branch of the case will be best understood by quoting those paragraphs:

"Tenth. Your orators further aver that said proposed increase of indebtedness, in so far as it relates to the payment for acquisition of land, and the damages and expenses of construction of highways, is illegal and unjust, in this: Under the laws governing said city now and for many years past in force, the costs and expenses of the opening and improvement of streets has been and is provided for by assessments upon the property benefited, but it

is now proposed to open and improve this and another avenue at the public expense, thus making a discrimination between these and other highways, and imposing unjust and illegal burdens on the taxpayers of said city.

"Eleventh. And your orators further aver and charge that the said ordinance for the opening of said Beechwood avenue is illegal and void, in that, by the said ordinance, it is proposed to proceed under the general acts relating to the opening of streets, and the said acts do not authorize the payment by the said city of the costs, expenses, and damages of said opening under the circumstances and in the manner proposed by the said city, as shown by the ordinance hereto attached."

The prayers under this head are that the city be enjoined from improving Beechwood avenue "out of the general funds of said city, or out of funds raised from the sale of said bonds," and "that the ordinance for the opening of Beechwood avenue be declared illegal and void."

The reference made in the bill to the law relative to the opening and improvement of streets in the city of Pittsburgh, and the provisions of the ordinances attached to the bill, make it proper and necessary for us, in passing upon the demurrer, to look into that law to determine whether the complainants are entitled to the relief sought. The law governing the opening and improvement of streets in the city of Pittsburgh, above referred to, is the general act of May 16, 1891 (P. L. 75), which provides that the damages sustained by the opening of streets shall be paid either in whole or in part by the municipal corporation, or in whole or in part by assessments upon the property benefited, as the viewers may determine and the court approve, and that the expenses of improving the streets shall be assessed upon the property benefited, according to the benefits, if sufficient can be found, but, if not, then that the deficiency, when finally ascertained, shall be paid by the municipal corporation. The ordinance for opening Beechwood avenue is in strict conformity with the terms of this act, and there is nothing on the face of the other ordinances to indicate an intention to depart from those terms. It seems to have been the judgment of city councils and a majority of the electors that the portion of the damages and expenses of opening and improving the two boulevards justly and legally chargeable against the city might reach the sum of \$500,000. It is, we think, within the lawful power of the city to provide funds to meet this estimated liability, and the proposed issue and sale of bonds to that amount for that purpose is in conformity with the ordinances of councils and the action of the electors. It is not to be presumed that more of the fund so to be raised will be used in making these improvements than shall lawfully be applicable thereto agreeably to the determination of the viewers and approval of the court. No threatened misapplication of the fund is charged. The bill proceeds upon an imperfect view of the general system established by law for opening and improving streets in the municipalities of the state, including the city of Pittsburgh. Certainly, the complainants are not entitled to the specific relief prayed for, and, under the averments of the bill, we do not perceive that they are entitled to any relief. The demurrer to the bill of complaint is sustained.

BUFFINGTON, District Judge, concurs.

SCOTT, Intervener, v. FARMERS' LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. June 4, 1895.)

No. 575.

1. RAILROAD FORECLOSURE—RECEIVERSHIP—PROPERTY NOT COVERED BY MORTGAGE.

A court of equity has no power, upon a bill for the foreclosure of a railroad mortgage, to take into its custody or control, through a receiver or otherwise, property not covered by the mortgage, nor to make any order that will hinder or delay creditors in subjecting property not covered by the mortgage to the payment of their debts.

2. EQUITY—RECEIVERSHIP—HINDERING OR DELAYING CREDITORS.

Certain stockholders, bondholders, and general creditors of the N. Ry. Co. filed a bill against that company, alleging that its earnings were insufficient to pay expenses and fixed charges; that it owed a large floating debt; that it was important to its creditors and the public that the unity of the line formed and controlled by the company should be preserved; that, unless the property of the company were taken into judicial custody, it would be broken up, and its value dissipated, by the enforcement of their remedies by individual creditors, and the forfeiture of leases by other companies; and thereupon prayed for the appointment of receivers to hold the property of the company in order that it might be managed and disposed of to the best advantage, and that all the obligations of the company might be discharged. Upon consent of the company, receivers were appointed, and an order made that they should pay current expenses, sums due to other connecting roads, and all sums due for wages within seven, and supplies and materials within six, months. A little more than six months before the appointment of the receivers, one S. recovered a judgment against the company for necessary supplies furnished to it, the indebtedness having accrued some years earlier. S. intervened in the suit in which the receivers were appointed, asking leave to levy an execution on certain lands on which his judgment was a lien. *Held*, that the court had no power to hinder and delay creditors of the company by withdrawing its property indefinitely from the operation of their remedies, or by excluding from the benefit of the trust it had assumed any class of creditors or debts accruing before any particular time, and that leave should be given to S., if not promptly paid by the receivers, to levy an execution on the property subject to the lien of his judgment.

Appeal from the Circuit Court of the United States for the District of North Dakota.

This was an intervening petition, filed by Charles Scott in the consolidated cause of the Farmers' Loan & Trust Company, P. B. Winston, and others against the Northern Pacific Railroad Company, praying for the payment of a judgment held by him as a preferential debt, or for leave to issue an execution against property of the railroad company in the hands of the receivers. The circuit court dismissed the petition. The intervener appealed. Reversed.

On the 15th day of August, 1893, there was filed in the circuit court of the United States for the Eastern district of Wisconsin a bill in equity in which P. B. Winston, the Farmers' Loan & Trust Company, and others were named as plaintiffs, and the Northern Pacific Railroad Company was named as defendant. 58 Fed. 257. A copy of this bill was thereafter, on the same day, filed in the United States circuit court for the district of North Dakota. The United States circuit court for the Eastern district of Wisconsin was the court of primary jurisdiction in the case, and the United States circuit court for the district of North Dakota, and other districts in which similar bills were filed,

are courts of ancillary jurisdiction, and in the foreclosure suit hereafter mentioned these courts sustained towards each other the same relation.

The bill alleged that some of the complainants were owners of some of the stock and bonds of the Northern Pacific Railroad Company; that others were general creditors of the company; that the Farmers' Loan & Trust Company was trustee in certain mortgages made by the company; gave a history of the road and its indebtedness; averred that its earnings were inadequate to pay its operating expenses and fixed charges; that it owed a large floating debt; "that the said railroads and property, as now held and controlled by the defendant, as aforesaid, form an important trunk line, which constitutes one of the most important ingredients of its value, and that its severance would result in a ruinous sacrifice to every interest in the property; and that unless this court, in view of the impending and inevitable defaults as aforesaid, will deal with the property as a single trust fund, and take it into judicial custody for the protection of every interest therein, individual creditors will assert their remedies in different courts in said several counties; that a race of diligence will result, and judgments and priorities will be attempted; that levies and attachments will be laid upon engines and cars of the defendant, which will greatly interfere with, and ultimately prevent, the defendant from the proper discharge of its duties as public carrier; that the United States mails will be stopped; that the defendant will be unable to fulfill its charter duties to the government of the United States and to connecting railroads; that commerce between the several states will be interfered with; that communication between many cities, towns, and places which are wholly dependent upon said railroads will be interrupted; that serious and irreparable injury to their trade and commerce and their general prosperity will result; that divers of the lessors of the railroads now operated by the defendant as aforesaid will enforce the re-entry covenants of their leases; that a continued default of the mortgage debts will, by the terms of the various mortgages, produce the immediate maturity of all the bonds secured by said mortgages; that a vast and unnecessary multiplicity of suits will result, and a most important and valuable property will be dismembered by the clashing decrees of many courts at the suits of separate creditors; that said property may be shielded and preserved as a valuable single trust property by adequate judicial protection, and the sums due and to become due to the defendant's bondholders and creditors secured and ultimately paid in full. But your orators aver that unless such a course is pursued, to wit, the taking of the property into judicial custody, said property will be dismantled, dissipated, and dismembered, and vast sums of money will be lost to the various creditors and stockholders of said company, and the public interests seriously affected. * * * To avert these disasters, and to prevent the general creditors of the company from collecting their debts in due course of law, the bill prayed for the appointment of receivers, and averred "that, if the defendant's said railway system and the lands so remaining to it can be taken into judicial custody, and preserved and managed as a unit, said remaining lands can be sold from time to time for prices equal to their constantly increasing value, and that the proceeds that will be received from such sales, together with the earnings of the defendant's railway system, will be more than sufficient to pay and discharge all the defendant's obligations to its creditors, and preserve for its stockholders said railway system, freed from debt."

As is customary in cases of this character, the railway company entered a voluntary appearance to the bill, and confessed all its allegations, and consented to the appointment of its president and two other persons as receivers. The order appointing the receivers provided they should pay: "(1) All current expenses incident to the creation or administration of this trust, and to the operating of said railroads and properties. (2) All sums due or to become due connecting or intersecting lines of railroads arising from the interchange of business, and for track service of other railroads used by said Northern Pacific Railroad Company in the operation of its lines, traffic, and car-mileage balances, and all amounts now due from said Northern Pacific Railroad Company for taxes and assessments upon the property or any part thereof. (3) The amounts due to all operatives and employes of said company for any services rendered to said company since the 15th day of January, A. D. 1893. (4) All

amounts due for supplies and material purchased and used in operating said railroads, or due by said company for supplies furnished to laborers, and credited against their labor, since the 15th day of February, A. D. 1893." ¹

On the 18th day of October, 1893, there was filed in the United States circuit court for the district of North Dakota, by the Farmers' Loan & Trust Company, a bill in equity against the Northern Pacific Railroad Company to foreclose certain mortgages on the road and property of the defendant company on which default had been made in the payment of interest. In this case the same receivers were appointed that were appointed in the first case, and upon motion the two suits were consolidated. The order relating to the payment of debts was the same in both suits. On the 26th of May, 1892, Charles Scott, the intervener, brought suit against the Northern Pacific Railroad Company in the district court of Cass county, N. D., and on the 14th day of February, 1893, recovered judgment against the company for \$3,115.50. An appeal was taken from this judgment by the defendant to the supreme court of the state, which was afterwards dismissed. The cause of action upon which the judgment was rendered was founded upon the same contract, and was of

¹NOTE. As a part of the history of the receivership under this bill it may be stated that a similar bill was filed in the United States circuit court for the district of Minnesota on the same day, and like orders made thereon. Afterwards, when the question of the sufficiency of the bill to justify the appointment of receivers came before the United States circuit court for the district of Minnesota, that court held the bill did not state a case of equitable cognizance, and discharged the receivers, and dismissed the bill. Thereupon the Farmers' Loan & Trust Company filed its bill against the Northern Pacific Railroad Company to foreclose certain mortgages in respect of which it was alleged the company had made default in the payment of interest, and prayed for the appointment of receivers, which prayer was granted, and the same persons appointed receivers who had previously been appointed by the court of primary jurisdiction in Wisconsin. The order of the circuit court in Minnesota appointing the receivers in the foreclosure suit contained the following, among other provisions: "And it appearing to the court that the defendant company owes debts and has incurred liabilities which the holders thereof could, without any interference with the legal or equitable rights of the complainant under the mortgage set out in the bill, collect by proceedings at law from said defendant, by seizing its rents, income, and earnings, and in other lawful modes, if not restrained from so doing by this court, and that it would be inequitable and unjust for the court to deny to said creditors their legal right to collect their several debts by appointing receivers to take and receive the earnings of said road during the pendency of this suit, as prayed by the complainant, without providing for the payment of such debts and liabilities: It is therefore declared that this order appointing receivers herein is made upon this express condition, namely: That all debts, demands, and liabilities due or owing by the defendant company which were contracted, accrued, or were incurred in this district, or are due or owing to any resident of this district, for ticket and freight balances, or for work, labor, materials, machinery, fixtures, and supplies of every kind and character, done, performed, or furnished in the repair, equipment, or operation of said road and its branches in the state of Minnesota, and all liabilities incurred by the said company in the transportation of freight and passengers, including damages for injuries to employes or other persons, and to property, which have accrued, or upon which suit has been brought or was pending, or judgment rendered in this state within twelve months last past, and all liability of said company to persons or corporations who may have heretofore become residents or citizens of this district who may have become sureties for said company on stay or supersedeas bonds, or cost bonds, or bonds in garnishment proceedings, without regard to the date of said bonds, or whether such bonds were furnished in actions or proceedings pending within this district or elsewhere, together with all debts and liabilities which the said receivers may incur in operating said road, including claims for injury to persons and property as aforesaid, shall constitute a lien on said railroad and all property appurtenant thereto, in this district, paramount to the lien of the mortgages of which foreclosure is sought in the bill in this case; that said railroad shall not be released or discharged from the liens hereby declared until such debts and liabilities are paid. The receivers are authorized and directed to pay all such debts and liabilities, as the same shall accrue, out of the earnings of the road, if practicable, or out of any funds in their hands applicable to that purpose; and, if not sooner discharged, then the same shall be paid out of the proceeds of the sale of said road." The order relating to the payment of debts in the district of Minnesota, being made by a court of ancillary jurisdiction, was restricted in its operation to debts due to citizens of that district, or debts contracted or payable in that district. The validity of the order was not contested, and the debts embraced therein were paid by the receivers from moneys derived from the earnings of the road and other sources.

the same character, as that upon which judgment was rendered in favor of Joseph Lamont, the defendant in error in case No. 594 (Northern Pac. R. Co. v. Lamont, 69 Fed. 23), the only difference being as to the date of the accrual of the indebtedness; the indebtedness in this case having accrued under the contract prior to the 1st day of January, 1889. On the 25th of November, 1893, the intervener filed his petition in the court below, setting up the foregoing facts, and alleging that his judgment was a lien on certain real estate of the Northern Pacific Railroad Company in Cass county, N. D., which was not included in any of the mortgages sought to be foreclosed; that he could have made the amount of his judgment by suing out execution thereon, and selling the land of the defendant, and would have done so but for the appointment of receivers in this case.

The record in this case and in that of Northern Pac. R. Co. v. Lamont (No. 594) 69 Fed. 23, are very much mingled. As they grow out of the same transaction, and are of the same general character, they were probably heard together in the court below. The intervener claimed in the court below that his judgment should be allowed and paid as a preferential debt, or that he should have leave to sue out execution on his judgment, and sell the lands of the defendant company not included in the mortgages in suit. There was a reference to a master, testimony was taken, and upon a final hearing the court below dismissed the intervener's petition, who thereupon appealed to this court.

Charles E. Joslin, for appellant.

C. W. Bunn (H. C. Truesdale and Turner, McClure & Rolston, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Although some technical objections are taken to intervener's petition, we think it sufficiently appears from an examination of the whole record that the intervener did set up that his judgment was a lien on certain real estate of the railroad company which was not embraced in any of the mortgages in suit, and that he desired the leave of the court to sue out execution on his judgment, and sell such lands, which were particularly described. As the intervener will be satisfied with this relief, we need not consider the question whether his judgment ought to be paid as a preferential debt. A special prayer for this relief was not necessary. The petition concluded with a general prayer "for all other further and proper relief," and that was sufficient. It sufficiently appears from the record before us that the intervener's judgment was and is a lien on the lands of the railroad company described in the petition, and that the lien of the mortgages which the complainant the Farmers' Loan & Trust Company seeks to foreclose does not extend to or embrace such lands. When a bill is filed to foreclose a mortgage, the court may, upon a proper showing, appoint a receiver to take into his possession and control the mortgaged property. But the jurisdiction possessed by a court of chancery to foreclose a mortgage and to appoint a receiver for the mortgaged property pending the foreclosure gives it no jurisdiction or power to seize or take into its custody or control, through a receiver or otherwise, property of the debtor which is not covered by the mortgage. Nor can the court in such a suit rightfully make any order that will prevent, hinder, or delay the other creditors of the mortgagor from subject-

ing the property not included in the mortgage to the payment of their debts. A mortgagee has the undoubted right to subject the mortgaged property to the payment of the mortgage debt, to the exclusion of all general creditors of the mortgagor and persons holding junior liens thereon; but as to all property of the debtor not included in the mortgage the mortgagee is in no better plight than if he had no mortgage. It is clear, therefore, that, so far as relates to the receivership in the foreclosure suit, the intervener was entitled to an order discharging the land mentioned from the custody of the receivers, and granting him leave to sell the same on execution to satisfy his judgment.

The next inquiry is, was the intervener deprived of his right to collect his judgment by due course of law by reason of the bill filed on the 15th day of August, 1893, and the orders made in that suit? That was not a bill to foreclose a mortgage or enforce any other lien on the property of the company. Though the railroad company was made a defendant to the bill, it is obvious that it was not an adversary proceeding, and that it is to be viewed precisely as if the company itself had filed the bill. The bill did not contemplate the sale of the road or the dissolution of the corporation. Briefly, it alleged the company owed more debts than it was then ready to pay, and that, unless the courts shielded and preserved its property by taking it into its judicial custody, large sums of money would be lost to its creditors and stockholders, and the public interests injuriously affected; but that, if the court would take the road and its property into its judicial custody, and preserve and manage "the same as a unit," the same would "be more than sufficient to pay and discharge all the debts and obligations to its creditors, and preserve to its stockholders said railway system freed from debt." The bill, it is evident, contemplated the continuance of the receivership until the court received money enough from the sales of the lands of the company, and from the earnings of the road, to pay all the debts of the company, and, when this had been accomplished, it was to hand the property over to the stockholders freed from debt. It placed the property of the company beyond the reach of its creditors, and put it under the management of the chancellor until the earnings and income therefrom should be sufficient to pay the debts of the company. The bill gave no intimation of the length of time that would be required to enable the chancellor to accomplish this task. The management of the road by its president and board of directors was not assailed; on the contrary, the company was eager to have its president appointed a receiver, and it was done.

It is obvious that if an individual or private business corporation had conveyed its property to another for the same purposes and upon the same trusts that the court was asked to take this property, and did take it, the law would have stamped the conveyance as one made to hinder and delay creditors, and fraudulent and void for that reason. In the case of *Glenn v. Liggett*, 47 Fed. 472, 474, Judge Thayer said:

"Ordinarily, and in the absence of a statute expressly authorizing such a proceeding, courts of equity have no greater control over the affairs of a private

corporation when it becomes insolvent than they have over the affairs of an individual. They are not courts of bankruptcy."

And see, to the same effect, *Silver Mines v. Brown*, 58 Fed. 644, 7 C. C. A. 412, 19 U. S. App. 203; *Walters v. Trust Co.*, 50 Fed. 316.

Assuming, but not deciding, that the bill presented a case of equitable cognizance because the defendant company was a quasi public corporation, nevertheless it was clearly one which looked to the payment of all the debts of the company. It did not suggest that any particular creditor or class of creditors was more deserving of protection than other creditors. Certainly, on such a bill, the court had no authority to bar or exclude from the benefits of the trust it had assumed any class of just and valid debts due and owing from the company. If it could, under such a bill as this, by a stroke of the pen, bar all debts the company owed which were contracted six months before the receivers were appointed, it could bar all the debts it owed down to the day the receivers were appointed. The order limiting the payment of debts to those which accrued within six months preceding the appointment of the receivers conflicted with the declared object of the bill, which averred that by placing the property in "judicial custody" it would, under such management, "be more than sufficient to pay and discharge all the defendant's obligations to its creditors. * * *" The theory of the bill was that all of the debts of the company were to be paid, and none repudiated. Nor could the court, on such a bill, annul or vacate any valid judgment or other lien on the company's property. A court of bankruptcy could not exercise such powers, and it will not be claimed that under such a bill as this the court possessed larger powers than a court of bankruptcy. Assuming that the bill was one that could be maintained, it was the duty of the court either to order the receivers to pay the intervenor's judgment, or grant the intervenor leave to sue out execution on his judgment, and sell the land upon which it was a lien. The court has no power to hinder and delay a creditor indefinitely in the collection of his debt, or to deny to him the right to enforce any lien he may have upon the property of his debtor for its payment. If such bills are to be maintained, it would seem the practice under them ought to conform as near as may be to the practice in bankruptcy. If an assignee in bankruptcy desires to preserve to the estate property upon which a creditor of the bankrupt has a valid lien, he must pay the debt, and, failing to do so, the creditor has a right to have his lien enforced. *Kimberling v. Hartly*, 1 Fed. 571, 1 McCrary, 136.

The decree of the circuit court is reversed, and the cause remanded, with instructions to enter an order that, unless the receivers shall pay the intervenor's judgment within 60 days after the mandate of this court is filed in the circuit court, the intervenor may sue out execution on his judgment, and sell thereon all the lands of the Northern Pacific Railroad Company in the county of Cass, in the state of North Dakota, upon which his judgment is a lien, and which are not included in the mortgages which are being foreclosed in this suit.

NORTHERN PAC. R. CO. v. LAMONT, Intervener.

FARMERS' LOAN & TRUST CO. v. SAME.

(Circuit Court of Appeals, Eighth Circuit. June 4, 1895.)

Nos. 594 and 595.

1. RAILROAD FORECLOSURE—PREFERENTIAL DEBTS.

Receivers of the N. Ry. Co. were appointed, and ordered to pay current expenses, sums due connecting roads, and sums due for wages within seven, and supplies and materials within six, months. One L. recovered a judgment upon a contract for furnishing a waiting room and ticket office at an important station, heating and lighting the same, and furnishing board and lodging at reduced rates to employes of the company; the indebtedness having accrued more than six months before the receivership. *Held*, that such judgment was a preferential debt, and should be ordered paid, without regard to the time when the debt accrued.

2. SAME—ASSIGNMENT.

Held, further, that the right of preference attached to the debt itself and consequently passed to an assignee of the debt.

Appeal from the Circuit Court of the United States for the District of North Dakota.

This was an intervening petition filed by Joseph Lamont in the consolidated cause of the Farmers' Loan & Trust Company, P. B. Winston, and others against the Northern Pacific Railroad Company, praying for the payment by the receivers of a judgment held by him as a preferential debt. The circuit court granted the petition. The Farmers' Loan & Trust Company and the railroad company appealed.

Receivers were appointed for the Northern Pacific Railroad Company by the United States circuit court for the district of North Dakota on the 15th day of August, 1893, and again on the 18th day of October, 1893, on bills which are particularly set out in the statement in case No. 575 (Scott v. Farmers' Loan & Trust Co., 69 Fed. 17), in which an opinion is herewith filed. The orders appointing the receivers provided they should pay: "(1) All current expenses incident to the creation or administration of this trust and to the operating of said railroads and properties. (2) All sums due or to become due connecting or intersecting lines or railroads arising from the interchange of business, and for track service of other railroads used by said Northern Pacific Railroad Company in the operation of its lines, traffic and car-mileage balances, and all amounts now due from said Northern Pacific Railroad Company for taxes and assessments upon the property, or any part thereof. (3) The amounts due to all operatives and employes of said company for any services rendered to said company since the 15th day of January, A. D. 1893. (4) All amounts due for supplies and material purchased and used in operating said railroads or due by said company for supplies furnished to laborers and credited against their labor since the 15th day of February, A. D. 1893." On the 1st day of September, 1881, Edward H. Bly and the Northern Pacific Railroad Company entered into a contract whereby the railroad company leased certain property to Bly, who agreed that he would, "at his own cost and expense, maintain, during the continuance of this lease, upon the said premises, a commodious and first-class hotel, complete in all its furniture and appointments, * * *" and that he would "suitably fit up, maintain, warm, and light, free of expense to the party of the first part, such waiting rooms as may be required in said building for the accommodation of passengers by the said railroad at Fargo, and also office room for the agents of the party of the first part for selling tickets. And the party of the second part further agrees that during the continuance of this lease the regular agents and employes of the party of the first part, boarding or rooming at such hotel, shall be charged not more than two-thirds of the regular transient rates for the time being. * * *" To compensate Bly for per-

forming these covenants of the contract on his part, the company agreed to transport his help and supplies for carrying on and keeping up the hotel and waiting rooms and offices for the company at one-half of the regular tariff rates for similar transportation at the time. The intervener succeeded to the rights of Bly under this contract, and performed all the covenants of the contract obligatory on Bly. The practice under the contract was for Bly or his successors in interest to pay the railroad company the full tariff rates at the time the service was rendered, and, when an accounting was had under the contract, the company accounted for and refunded the one-half of the charges, which were to go towards paying Bly or his assignees for furnishing the company the accommodations mentioned in the contract. The company did not pay the amount due under the contract to the intervener, Lamont, as assignee of Bly, for the period from January 1, 1889, to February 27, 1893, and the intervener brought suit therefor in the district court for the Third judicial district of North Dakota, and on the 15th day of November, 1893, recovered judgment against the company for the sum of \$2,035. On the 28th day of November, 1893, the intervener, by leave of court, filed his intervening petition in the suit in which the receivers were appointed, setting up a recovery of the judgment for \$2,035, and the facts out of which the indebtedness arose, and prayed that it might be allowed as a preferential debt, and the receivers directed to pay the same. There was a reference to a master, testimony was taken, and upon final hearing the court below decided the judgment was a preferential claim, and directed the receivers to pay it accordingly. From this decree the Northern Pacific Railroad Company and Farmers' Loan & Trust Company appealed to this court.

C. W. Bunn (H. C. Truesdale and Turner, McClure & Rolston, on the brief), for appellants.

Charles E. Joslin, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The money for which the intervener recovered judgment was in fact due to him for providing, furnishing, and maintaining for the railroad company at Fargo waiting rooms for its passengers, office room for its ticket agents, and a convenient place for its employés to board and lodge at reduced rates. To defeat the preferential character of this claim, the court would have to be satisfied that waiting rooms for passengers and an office for the ticket agents are not essential or necessary, at a town of several thousand population, on the Northern Pacific Railroad. We are asked, in effect, to hold that passengers on that road, while waiting to take passage on its trains, must endure the rigors of a North Dakota climate without shelter, and that its ticket agent must be content with an office on the public commons, and carry his tickets in his pocket or his hat. The road is in straits financially, but we are unwilling to believe that its business is so unremunerative, and its patronage so slender as to justify it in dispensing with waiting rooms and a ticket office at one of the most important towns on its line west of the Mississippi river. Decided by the strictest rules applicable to this class of cases, the intervener's claim was clearly a preferential debt. A preferential debt is not barred though contracted more than six months before the appointment of a receiver. As to such debts, there is no arbitrary "six-months rule," as has been often decided. *Hale v. Frost*, 99 U. S. 389; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675; *Central*

Trust Co. v. St. Louis, A. & T. Ry. Co., 41 Fed. 551; **Central Trust Co. v. Wabash, St. L. & P. Ry. Co.**, 30 Fed. 332; **Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.**, 53 Fed. 182, and note; **Clark v. Railroad Co.**,¹ 66 Fed. 803. In the case of **Trust Co. v. Morrison**, 125 U. S. 591, 8 Sup. Ct. 1004, a liability incurred by the intervener as surety for a railroad company on an injunction bond to stay execution on a judgment at law against the company, executed more than six years before the date of filing the petition of intervention, was held to be a preferential claim. In this case a portion of the intervener's claim accrued within six months preceding the appointment of the receivers, but the six-months limitation in the order appointing the receivers has no effect in barring meritorious preferential claims. This is conceded in the brief of the learned counsel for the appellants, where it is said:

"We do not mean to be understood as claiming or urging that claims might not and have not arisen already in the progress of this litigation which in equity and good conscience should be paid out of the earnings in the hands of the receivers, and which, if not already within the scope of the order, should be the subject of a special order to that effect; but clearly there must be a limit somewhere, beyond which courts of equity should not go in allowing such preferences. * * *"

The right of preference is one that attaches to the debt, and not to the person of the original creditor; consequently the right passes to an assignee of the debt. **Union Trust Co. v. Walker**, 107 U. S. 597, 2 Sup. Ct. 299.

The decree of the circuit court is affirmed, with interest and costs.

UNITED STATES v. STANFORD.

(Circuit Court, N. D. California. June 29, 1895.)

No. 12,053.

1. PUBLIC LANDS—GRANT TO CENTRAL PACIFIC RAILROAD.

By Act Cong. July 1, 1862 (12 Stat. 489), the Union Pacific Railroad Company was created and authorized to build a road from a point in Nebraska territory to the terminus of the Central Pacific Railroad Company of California. The act contained a grant of lands to the company, and a promise by the United States to issue subsidy bonds on the completion of each 40 miles of road. The act also authorized the Central Pacific to extend its lines to the eastern border of California, in order to connect with the Union Pacific, on the "same terms and conditions in all respects" as were contained in the act for the construction of the Union Pacific, and authorized it to further extend its lines to the Missouri river, "on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed." *Held*, that the grants made by the act to the Central Pacific were precisely the same in character and amount as those made to the Union Pacific.

2. RAILROAD COMPANIES—REPAYMENT OF BONDS—GRANTS ON CONDITION.

Act Cong. July 1, 1862 (12 Stat. 489), granting lands and subsidy bonds to the Union and Central Pacific Railroad Companies, expressly provided that neither the lands nor the bonds were to be delivered until the particu-

lar section of road to which they applied was completed, and that, to secure payment to the United States, the issuance and delivery of the bonds should, ipso facto, constitute a first mortgage on the whole line. Section 6 of the act provided that the grants were made "on condition that said company shall pay said bonds at maturity," and allowed compensation for services to the government to be applied in payment of the bonds, and allowed payment to be made wholly or in part in the same, or other bonds or treasury notes or other evidences of debt against the United States. *Held* that, though there was no express covenant by the railroad companies receiving the bonds to repay the United States the amount thereof, the law implies from the provisions of the act and their acceptance by the companies an absolute and unqualified promise on their part for such repayment.

3. SAME—ENFORCEMENT BY UNITED STATES.

Act Cong. July 1, 1862, creating the Union Pacific Railroad Company, and granting to it and the Central Pacific Company lands and subsidy bonds, in section 5 provides that the issuance and delivery of the bonds shall constitute a first mortgage on the road and its appurtenances, and for forfeiture to the United States on default in payment of the bonds, provided "this section shall not apply to that part of any road now constructed." *Held*, that though the proviso, considered alone, might be construed to confine the property out of which the government could enforce repayment of the bonds to the property constructed with government aid, when construed with section 6, providing that repayment may be made "wholly or in part in the same or in other bonds, treasury notes, or other evidences of debt against the United States," it does not limit the United States, in enforcing repayment, to the road and its appurtenances.

4. CORPORATIONS—LIABILITY OF STOCKHOLDERS.

The decision of the supreme court of California that Const. Cal. 1849, art. 4, §§ 32, 36, providing that corporate debts shall be secured by "such individual liability of the corporations, and other means, as may be prescribed by law," and that "each stockholder of a corporation or joint stock association shall be individually and personally liable for his proportion of all its debts and liability," were not self-executing, and did not furnish a rule by which the amount of a stockholder's individual liability could be fixed, is binding on the federal courts.

5. SAME.

Act Cal. May 20, 1861, providing that each corporate stockholder shall be "individually liable to the creditors of such company for his proportion, that is to say, in proportion to the amount of stock held by him," without stating whether the proportion is to the whole amount of capital stock or to the amount subscribed, or fixing any method of obtaining the proportion, is too indefinite to give effect to Const. Cal. 1849, art. 4, § 36, providing in general for the individual liability of corporate stockholders.

6. SAME.

Act Cal. April 27, 1863, and Civ. Code Cal. § 322, fixing a definite individual liability on stockholders for corporate debts, having been passed after the acceptance by the Central Pacific and Western Pacific Railroad Companies of the benefits of Act Cong. July 1, 1862, cannot affect the rights of the parties under that act.

7. RAILROAD COMPANIES—ACCEPTANCE OF BENEFITS FROM UNITED STATES.

Though the Central and Western Pacific Railroad Companies were organized under California laws, their subsequent acceptance of the benefit of Act Cong. July 1, 1862, granting lands and bonds to aid in extending their lines, created a contract which is the sole test of the liability of their stockholders for repayment of the bonds issued thereunder, unaffected by the laws of the state existing at the time of such acceptance.

In Equity. Bill by the United States of America against Jane L. Stanford, as executrix of the last will of Leland Stanford, deceased, to enforce against the estate decedent's liability as stockholder in the Western Pacific, Central Pacific, and Union Pacific

Railroad Companies, for default in payment of bonds issued by complainants to such companies. Heard on demurrer to the bill.

H. S. Foote, U. S. Atty., and L. D. McKisick, Special Asst. U. S. Atty., for the United States.

Russel J. Wilson, Mountford S. Wilson, John Garber, and F. E. Spencer, for respondent.

ROSS, Circuit Judge. The Central Pacific Railroad Company of California was incorporated June 28, 1861, under and by virtue of the laws of the state of California, with a capital stock of \$8,500,000, divided into shares of the par value of \$100 each, for the purpose of building a railroad estimated to be 115 miles in length, from the city of Sacramento, through Sacramento, Placer and Nevada counties, to the eastern boundary of the state of California.

July 1, 1862, congress passed an act (12 Stat. 489) by which it created the Union Pacific Railroad Company, and authorized and empowered that company to locate, construct, furnish, maintain, and enjoy a continuous railroad and telegraph, with the appurtenances, from a point on the 100th meridian of longitude west from Greenwich, between the south margin of the valley of the Republican river and the north margin of the valley of the Platte river, in the then territory of Nebraska, at a point to be fixed by the president of the United States after actual surveys; thence running westerly, upon the most direct, central, and practicable route, through the then territories of the United States to the western boundary of the then territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California.

By section 2 of the act of 1862, congress granted to the Union Pacific Railroad Company a right of way through the public lands for the construction of the railroad and telegraph line it was authorized to build, together with all necessary grounds for stations, buildings, workshops, depots, machine shops, switches, sidetracks, turntables, and water stations, and the right to take, from the public lands adjacent to the line of its road, earth, stone, timber, and other material for its construction. To further aid in its construction, congress, by section 3 of the act, granted to the corporation it then created five alternate sections of the public lands on each side of the road, with certain reservations and exceptions, not important to be mentioned, which lands, it was provided by section 4 of the act, should be patented to the company as fast as the company should complete 40 consecutive miles of any portion of the railroad and telegraph line, properly equipped and ready for the service contemplated by the act, to be shown by the certificate of commissioners authorized to be appointed by the president. And by section 5 it was enacted that, upon the certificate in writing of the commissioners so appointed of the completion and equipment of 40 consecutive miles of the railroad and telegraph line the Union Pacific Railroad Company was by the act authorized to construct, the secretary of the interior should issue to the company bonds of the United States of \$1,000 each, payable in 30 years after date, bearing 6 per

centum per annum interest, interest payable semiannually, to the amount of 16 of such bonds per mile for such section of 40 miles; "and," proceeds the statute, "to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall ipso facto constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures, and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when required so to do by the secretary of the treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the secretary of the treasury, for the use and benefit of the United States: provided, this section shall not apply to that part of any road now constructed.

The next section of the act of 1862 is as follows:

"Sec. 6. And be it further enacted, that the grants aforesaid are made upon condition that said company shall pay said bonds at maturity and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph line, and transport mails, troops and munitions of war, supplies and public stores upon said railroad for the government whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service); and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least 5 per centum of the net earnings of said road shall also be annually applied to the payment thereof."

By section 7 the Union Pacific Company was required to file its assent to the provisions of the act, and to complete its road, within a certain designated date.

By section 9, the Leavenworth, Pawnee & Western Railroad of Kansas was authorized to construct a railroad and telegraph line from the Missouri river, at the mouth of the Kansas river, on the south side thereof, so as to connect with the Pacific Railroad of Missouri, to the aforesaid point on the 100th meridian of longitude west from Greenwich, upon the same terms and conditions as were provided in the act for the construction of the Union Pacific railroad and telegraph line, and there to connect with the Union Pacific Company, and with certain provisions for connections with railroads from Missouri and Iowa, also provided for by the act. And section 9 of the act of 1862 contained this further provision:

"The Central Pacific Railroad Company of California, a corporation existing under the laws of the state of California, are hereby authorized to con-

struct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California, upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned (namely, the Union Pacific Railroad Company), and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California."

Both the Central Pacific Railroad Company of California and the Kansas Company mentioned were by the act required to file their assent to its provisions, and to complete their respective roads within certain specified dates. And the act of 1862, in section 10, proceeded to provide that those companies, or either of them, after completing their respective roads—

"May unite upon equal terms with the first named company (the Union Pacific Railroad Company) in constructing so much of said railroad and telegraph line, and branch railroads and telegraph lines, in this act hereinafter mentioned, through the territories from the state of California to the Missouri river, as shall then remain to be constructed, on the same terms and conditions as provided in this act in relation to the said Union Pacific Railroad Company. And the Hannibal and St. Joseph Railroad, the Pacific Railroad Company of Missouri, and the first-named company (the Union Pacific Railroad Company), or either of them, on filing their assent to this act, as aforesaid, may unite upon equal terms, under this act, with the said Kansas Company, in constructing said railroad and telegraph, to said meridian of longitude, with the consent of the said state of Kansas; and in case said first-named company (the Union Pacific Railroad Company) shall complete their line to the eastern boundary of California before it is completed across said state by the Central Pacific Railroad Company of California, said first-named company (the Union Pacific Railroad Company) is hereby authorized to continue in constructing the same through California, with the consent of said state, upon the terms mentioned in this act, until said roads shall meet and connect, and the whole line of said railroad and telegraph is completed; and the Central Pacific Railroad Company of California, after completing its road across said state, is authorized to continue the construction of said railroad and telegraph through the territories of the United States to the Missouri river, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed."

By section 11, additional aid was provided for those portions of the road most mountainous and difficult of construction; and by section 12 provision was made in respect to the grades and curves and for uniformity in the width of the track upon the entire line of railroad and branches. The section further provided that "the whole line of said railroad and branches and telegraph shall be operated and used for all purposes of communication, travel and transportation so far as the public and government are concerned, as one connected, continuous line."

By section 13 authority was given the Hannibal & Saint Joseph Railroad Company of Missouri to extend its roads from Saint Joseph, via Atchison, to connect and unite with the road through Kansas, upon filing its assent to the provisions of the act, upon the same terms and conditions, in all respects, for 100 miles in length next to the Missouri river, as are provided in the act for the construction of the railroad and telegraph of the Union Pacific Railroad Company.

By section 14 the Union Pacific Company was authorized and required to construct a single line of railroad and telegraph from a point on the western boundary of the state of Iowa, to be fixed by the president of the United States, upon the most direct and practicable route, to be subject to his approval, so as to form a connection with the main line of the Union Pacific Company at some point on the 100th meridian of longitude aforesaid, upon the same terms and conditions, in all respects, as are contained in the act for the construction of the main line of railroad and telegraph of the Union Pacific Railroad Company, with a provision for the completion of that branch line within a certain specified time after the filing by the company of its assent to the provisions of the act, and with the further provision "that a failure upon the part of said company to make said connection in the time aforesaid, and to perform the obligations imposed on said company by this section, and to operate said road in the same manner as the main line shall be operated, shall forfeit to the government of the United States all the rights, privileges, and franchises granted to and conferred upon said" Union Pacific Company by the act of 1862. By section 14 of the act of 1862 it was further provided that, whenever there should be completed a line of railroad through Minnesota or Iowa to Sioux City, the aforesaid Pacific Railroad Company was authorized and required to construct a line of railroad and telegraph from Sioux City upon the most direct and practicable route to a point on, and so as to connect with, either the branch or main line of the Union Pacific Company, such point or junction to be fixed by the president of the United States, not further west than the 100th meridian of longitude aforesaid, and on the same terms and conditions as provided in the act for the construction of the Union Pacific Railroad Company, and to complete the same at the rate of 100 miles a year, with the further provision that, should the Pacific Railroad Company fail to comply with the requirements of the act in relation to the Sioux City railroad and telegraph, it should suffer the same forfeitures prescribed in relation to the Iowa branch railroad and telegraph.

By section 15 it was provided that any other railroad company then incorporated, or that might thereafter be incorporated, should have the right to connect their road with the road and branches provided for by the act at such places and upon such just and equitable terms as the president of the United States should prescribe; and by section 16 it was provided that, at any time after the passage of the act, all of the railroad companies named therein and assenting to its provisions, or any two or more of them, were authorized to form themselves into a consolidated company, notice of such consolidation, in writing, to be filed in the department of the interior, and thereafter to proceed to construct the railroad and branches and telegraph line upon the terms and conditions provided in the act.

Sections 17 and 18 of the act of 1862 are as follows:

"Sec. 17. And be it further enacted, that in case said company or companies shall fail to comply with the terms and conditions of this act by not completing

said road and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but shall permit the same for an unreasonable time to remain unfinished or out of repair and unfit for use, congress may pass any act to insure the speedy completion of said road and branches, or put the same in repair and use, and may direct the income of said railroad and telegraph line to be thereafter devoted to the use of the United States, to repay all such expenditures caused by the default and neglect of such company or companies: provided, that if said roads are not completed so as to form a continuous line of railroad ready for use from the Missouri river to the navigable waters of the Sacramento river in California by the 1st day of July, eighteen hundred and seventy-six, the whole of all said railroads before mentioned and to be constructed under the provisions of this act, together with all their furniture, fixtures, rolling stock, machine shops, lands, tenements and hereditaments, and property of every kind and character, shall be forfeited to and taken possession of by the United States: provided, that of the bonds of the United States in this act provided to be delivered for any and all parts of the roads to be constructed east of the one-hundredth meridian of west longitude from Greenwich, and for any part of the road west of the west foot of the Sierra Nevada Mountains, there shall be reserved of each part and installment twenty-five per centum, to be and remain in the United States treasury, undelivered, until said road and all parts thereof provided for in this act are entirely completed; and of all the bonds provided to be delivered for the said road, between the two points aforesaid, there shall be reserved out of each installment fifteen per centum, to be and remain in the treasury until the whole of the road provided for in this act is fully completed; and if the said road or any part thereof shall fail of completion at the time limited therefor in this act, then and in that case the said part of said bonds so reserved shall be forfeited to the United States.

"Sec. 18. And be it further enacted, that whenever it appears that the net earnings of the entire road and telegraph, including the amount allowed for services rendered for the United States, after deducting all expenditures, including repairs, and the furnishing, running and managing of said road, shall exceed ten per centum upon its cost, exclusive of the five per centum to be paid to the United States, congress may reduce the rates of fare thereon, if unreasonable in amount, and may fix and establish the same by law. And the better to accomplish the object of this act, namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes, congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act."

On April 4, 1864, the legislature of California passed an act entitled "An act to aid in carrying out the provisions of the Pacific railroad and telegraph act of congress, and other matters relating thereto," declaring that:

"To enable the said company [the Central Pacific Railroad Company of California] more fully and completely to comply with and perform the provisions and conditions of said act of congress, the said company, their successors and assigns, are hereby authorized and empowered, and the right, power, and privilege is hereby granted to, conferred upon, and vested in them, to construct, maintain and operate the said railroad and telegraph line, not only in the state of California, but also in the said territories lying east of and between said state and the Missouri river," etc., and "confirming to and vesting in said company all the rights, privileges, franchises, power and authority conferred upon, granted to, or vested in said company by said act of congress; hereby repealing all laws and parts of laws inconsistent or in conflict with the provisions of this act or the rights and privileges herein granted." St. Cal. 1863-64, p. 471.

Shortly after the passage of the act of congress of July 1, 1862, that is to say on the 11th of December, 1862, the Western Pacific

Railroad Company was incorporated under and by virtue of the same laws of the state of California that the Central Pacific Railroad Company of California was organized under, and with a capital stock of \$5,400,000, divided into shares of the par value of \$100 each, for the purpose of constructing and maintaining a railroad from a point on the San Francisco & San José Railroad, at or near San José to Sacramento, there to connect with the Central Pacific Railroad Company of California.

July 2, 1864, congress passed an act (13 Stat. 356), amending that of July 1, 1862, in certain important particulars, thereby, among other things, largely increasing the quantity of land granted by the act of 1862 to the respective railroad companies therein named, and so amending section 5 of that act as to authorize the Union Pacific Railroad Company, the Central Pacific Railroad Company, and any other company authorized to participate in the construction of the road therein provided for, on the completion of each section of the road, as provided in the act and in that to which it was an amendment, to issue their first mortgage bonds on their respective railroad and telegraph lines in an amount not exceeding the amount of the bonds of the United States, and of even tenor and date, time of maturity, rate and character of interest, with the bonds authorized to be issued to the railroad companies respectively, and making the lien of the United States bonds subordinate to that of the bonds so authorized to be issued by the respective railroad companies.

By section 16 of the amendatory act it was provided, among other things:

"That any two or more of the companies authorized to participate in the benefits of this act, are hereby authorized at any time to unite and consolidate their organizations, as the same may, or shall be, upon such terms and conditions, and in such manner as they may agree upon, and as shall not be incompatible with this act, or the laws of the state or states in which the roads of such companies may be, and to assume and adopt such corporate name and style as they may agree upon, with a capital stock not to exceed the actual cost of the roads so to be consolidated, and shall file a copy of such consolidation in the department of the interior; and thereupon such organization, so formed and consolidated, shall succeed to, possess, and be entitled to receive from the government of the United States, all and singular the grants, benefits, immunities, guarantees, acts, and things to be done and performed, and be subject to the same terms, conditions, restrictions, and requirements which said companies respectively, at the time of such consolidation, are or may be entitled or subject to under this act, in place and substitution of said companies so consolidated respectively. And all other provisions of this act, so far as applicable, relating or in any manner appertaining to the companies so consolidated, or either thereof, shall apply and be of force as to such consolidated organization. And in case upon the completion by such consolidated organization of the roads, or either of them, of the companies so consolidated, any other of the road or roads of either of the other companies authorized as aforesaid, (and forming, or intended or necessary to form, a portion of a continuous line from each of the several points on the Missouri river, hereinbefore designated, to the Pacific coast,) shall not have constructed the number of miles of its said road within the time herein required, such consolidated organization is hereby authorized to continue the construction of its road and telegraph in the general direction and route upon which such incomplete or unconstructed road is hereinbefore authorized to be built, until such continuation of the road of such consolidated organization shall reach the constructed road and tele-

graph of said other company, and at such point to connect and unite therewith; and for and in aid thereof the said consolidated organization may do and perform, in reference to such portion of road and telegraph as shall so be in continuation of its constructed road and telegraph, and to the construction and equipment thereof, all and singular, the several acts and things hereinbefore provided, authorized, or granted to be done by the company hereinbefore authorized to construct and equip the same, and shall be entitled to similar and like grants, benefits, immunities, guarantees, acts, and things to be done and performed by the government of the United States, by the president of the United States, by the secretaries of the treasury and interior, and by commissioners in reference to such company, and to such portion of the road hereinbefore authorized to be constructed by it, and upon the like and similar terms and conditions, so far as the same are applicable thereto."

To the provisions of both of the acts of Congress mentioned, the Central Pacific Railroad Company of California, in due time, filed its acceptance; and on October 8, 1864, under and by virtue of an act of the legislature of California, entitled "An act to authorize the relocation of the route of the railroad of the Central Pacific Railroad Company of California," approved April 17, 1863 (St. Cal. 1863, p. 320), it filed amended articles of incorporation in the office of the secretary of state of California, by which articles its capital stock was increased to \$20,000,000, divided into 200,000 shares of the par value of \$100 each, and defining the route of its road from Sacramento to the eastern boundary of California, as relocated; and on July 23, 1868, it increased its capital stock from \$20,000,000, to \$100,000,000.

By agreement between the Central Pacific Railroad Company of California and the Western Pacific Railroad Company, the latter, with the consent of congress, expressed in an act approved March 3, 1865 (13 Stat. 504), became entitled to the same privileges and benefits conferred by the acts of July 1, 1862, and July 2, 1864, on the Central Pacific Railroad Company of California, subject to all of the conditions thereof; and on July 22, 1870, those two companies were, under and by virtue of the laws of the state of California, amalgamated and consolidated into one company by the name of Central Pacific Railroad Company, the declared objects of which were, in part, to purchase, construct, own, maintain, and operate the railroad and telegraph lines of the constituent companies, so as to form a continuous line of railway and telegraph from Ogden, in the territory of Utah, at its connecting point with the Union Pacific Railroad Company, to the several points mentioned in the several articles of association of the constituent companies. The capital stock of the consolidated company was fixed at \$100,000,000, divided into 1,000,000 shares, of the par value of \$100 each; and it succeeded to all of the property and rights of the constituent companies, and assumed all of their liabilities and obligations.

In all of the California corporations mentioned, the deceased, Leland Stanford, was a stockholder. The bill alleges that from January 16, 1865, to December 31, 1869, complainants, in pursuance of the provisions of the aforesaid acts of congress, issued and delivered to the Central Pacific Railroad Company of California, to aid it in the construction of the railroad and telegraph line, their bonds to the amount of \$25,885,120, which was in full performance of their obligation under the statute in respect to the bonds, and was so

accepted by the company; that, when said bonds were so issued and delivered, the deceased, Stanford, was the owner of 130,887 shares of the stock of the company, its total subscribed stock being 520,000 shares or thereabouts; that complainants have paid all the interest on the bonds so issued to the Central Pacific Railroad Company of California as it became payable semiannually, and that they will continue to do so until the maturity of each bond; that the first four installments of said bonds, amounting to \$2,362,000 of principal, matured and became due and payable on the 16th day of January, 1895, and the same were on that day paid by complainants; that, in like manner and for the like purpose, complainants issued and delivered to the Western Pacific Railroad Company their bonds to the amount of \$1,970,560, which were in like manner accepted by that company, at which time the deceased, Stanford, was the owner of 13,500 shares of its stock, and on which bonds complainants have paid the interest semiannually as it matured. The bill alleges that no part of the money so paid by complainants has been repaid; that the whole amount of principal and interest of the bonds so loaned to the Central Pacific Railroad Company of California and Western Pacific Railroad Company will, at the maturity of the whole, be about \$78,000,000; that the Central Pacific Railroad Company, the successor of the two aided companies, is insolvent, and that all of its property is mortgaged or hypothecated to secure the payment of debts and liabilities greatly in excess of its whole value; that the whole amount of money now in or that may hereafter come into the sinking funds created by law to which complainants are or may be entitled will not be sufficient to pay more than one-tenth of the amount that will become due the complainants; that complainants have no security therefor except a second statutory mortgage on the bond-aided lines of the Central Pacific Railroad Company, which second statutory mortgage is of no value, or, if of any value, is insufficient, together with the sinking funds moneys, to reduce the amounts that will become due complainants below \$60,000,000, the whole of which the Central Pacific Company is, and will continue to be, wholly without means to pay. And complainants, having presented their claim to the executrix of the estate of the deceased, Stanford, for \$15,000,000, which they claim he in his lifetime promised to pay them at certain times in the years 1895 to 1899, including those years, in consideration of aid furnished the railroad companies of which he was then a stockholder, and the said claim having been rejected by the executrix, the complainants brought this suit to establish their claim. A demurrer to the bill raises the question of its sufficiency.

The important questions involved in this case have been very ably argued by counsel, and have been very carefully considered by the court. I proceed to state, as briefly as the nature of the case admits of, my views and conclusions in respect to such of them as I consider necessary to a decision of the case, observing, in limine, that it will not do for the court to be controlled or in any way influenced, in the interpretation of the contract which forms the basis of the suit, by any event subsequently occurring. On the contrary, the

contract between the government, on the one side, and the railroad companies, on the other, is to be sought in the provisions of the statute, and there only, interpreted by the light of the circumstances and conditions existing at the time it was made. Neither the vast sums of money realized by the defendant's testator and his associates out of the construction and operation of the railroads in question, nor the purposes to which the deceased, Stanford, devoted a large part of his share of such profits, are proper subjects for consideration in this inquiry. The questions here, and the only questions, are, what were the liabilities assumed by Stanford, and, if he shall be found to have assumed an individual liability for the repayment of the bonds loaned by the United States to the railroad companies in which he was the holder of stock, whether the suit of the government is barred by the lapse of time.

The Central Pacific Railroad Company of California, which, as has been stated, was incorporated June 28, 1861, was organized and put into operation prior to the passage by congress of any of the Pacific Railroad acts. Leland Stanford, C. P. Huntington, Mark Hopkins, and Charles Crocker were among its incorporators, and each of them subscribed for 150 of the 85,000 shares into which the stock of that corporation was divided by its articles of incorporation. There were also other subscribers for its stock, two for similar amounts as the four already named, and still others in smaller amounts. The then existing laws of the state of California, under and pursuant to which the Central Pacific Railroad Company of California was incorporated, were sections 31, 32, and 36 of article 4 of the constitution of 1849, and the provisions of an act of the legislature of the state of California, entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matters relating thereto," approved May 20, 1861. St. Cal. 1861, p. 607.

The sections of the state constitution referred to read as follows:

"Sec. 31. Corporations may be formed under general laws, but shall not be created by special act, except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.

"Sec. 32. Dues from corporations shall be secured by such individual liability of the corporations, and other means, as may be prescribed by law."

"Sec. 36. Each stockholder of a corporation, or joint-stock association, shall be individually and personally liable for his proportion of all its debts and liabilities."

The act of the legislature of California approved May 20, 1861, providing for the incorporation of railroad companies, contained in its twelfth section the following provision in respect to the liabilities of stockholders in such corporations, which is the only provision therein pertinent to this case:

"Any stockholder transferring his shares of stock in manner aforesaid (that is to say, in the manner previously provided in the act), and in compliance with the by-laws of the company, and the same being approved by the board of directors as aforesaid, shall, from and after the date of such approval, cease to be a stockholder in such company, and shall not be liable to any future calls from the directors, nor for any debts that may be contracted by said company thereafter. But this shall not release him from his proportion of

debts and liabilities contracted by the company prior to his ceasing to be a stockholder; but each stockholder of such company shall be individually liable to the creditors of such company for his proportion; that is to say, in proportion to the amount of stock by him held, for all the debts and liabilities of such company, except as above provided."

Although Stanford, Huntington, Hopkins, and Crocker were only subscribers for 600 shares, in the aggregate, of the stock of the Central Pacific Railroad Company of California, they were undoubtedly the moving and controlling spirits in the undertaking, and, beyond question, had in view congressional aid for the railroad that company was organized to build. Indeed, for many years the state of California, through its legislature, had been endeavoring to induce congress to take such steps as would insure the building of a transcontinental railroad. As early as May 1, 1852, an act of the state was passed reciting "that the interests of this state, as well as those of the whole Union, require the immediate action of the government of the United States for the construction of a national thoroughfare connecting the navigable waters of the Atlantic and Pacific Oceans, for the purposes of national safety, in the event of war, and to promote the highest commercial interests of the republic," and granting the right of way through the state to the United States for the purpose of constructing such a road. St. Cal. 1852, p. 150. Congress not having acted, in 1859 a resolution was passed by the legislature of the state calling a convention "to consider the refusal of congress to take efficient measures for the construction of a railroad from the Atlantic states to the Pacific, and to adopt measures whereby the building of said railroad can be accomplished" (St. Cal. 1859, p. 391); and at the same session of the legislature a memorial was adopted asking congress to pass a law authorizing a construction of such a road, and asking also a grant of lands to aid in the construction of railroads in the state (Id. p. 395).

Notwithstanding the urgent needs for such a road, it was not until July 1, 1862, that congress passed the first of what are known as the "Pacific Railroads Acts." The reasons which finally moved it to action in the premises are matters of common knowledge. They are very clearly and tersely stated by the supreme court in the case entitled *U. S. v. Union Pac. R. Co.*, 91 U. S. 72. As said by the court in that case: "Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed." The legislation in question is, indeed, *sui generis*. It was enacted at a time when the very life of the nation was in peril, and in large measure in the interest of national safety. Many lesser considerations conduced to the enactment; such as the promotion of commerce between the states, the opening up and settlement of the vast unpeopled territory that lay between the then settled portions of the country, as also the hope of cheaper transportation of the mails and supplies for the Indians. All of these considerations, and others that might be mentioned, gave to the needed road a national character. The main line was to be about 2,000 miles in length, and was to cross deserts,

rugged mountains, and a country inhabited by Indians jealous of intrusion upon their rights. The difficulties then in the way of its construction were very great; great even for the government,—far too great to have been then secured by private means without government aid. Congress, therefore, undertook to secure the building of the road. It found then in existence a California corporation called the Central Pacific Railroad Company of California, organized for the purpose of building a railroad from Sacramento, Cal., to the eastern boundary of that state; and it adopted that corporation in and by the act it passed July 1, 1862, as one of its instruments in the undertaking. By the same act it created a corporation, and called it the Union Pacific Railroad Company, to build a line of railroad and telegraph from a point in the then territory of Nebraska, to be fixed by the president of the United States, within certain specified limits, on the 100th meridian of longitude west from Greenwich, and running thence by the most direct, central, and practicable route through the then territories of the United States, to the western boundary of the then territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California; and it also made provision for various eastern connections with the main line. All of this was done in and by the same act of congress,—that of July 1, 1862. Whatever aid it thereby granted to the various railroad companies mentioned in it, whether in land, bonds, or other privileges, was granted upon the same terms and subject to the same conditions as was the grant it thereby made to the Union Pacific Railroad Company, for the statute in express terms so declares, and, after the most attentive reading of the entire act, I am unable to discover a single sentence or word indicating a contrary intention.

In respect to the Central Pacific Railroad Company of California it is provided in section 9 of the act of July 1, 1862, that that company is—

"Hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento river, to the eastern boundary of California upon the same terms and conditions, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned [namely, the Union Pacific Railroad], and to meet and connect with the first mentioned railroad and telegraph line [namely, the Union Pacific Railroad] on the eastern boundary of California."

And in section 10 of the act of July 1, 1862, it is provided that:

"The Central Pacific Railroad Company of California, after completing its road across said state (the state of California), is authorized to continue the construction of said railroad and telegraph through the territories of the United States to the Missouri river, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, on the terms and conditions provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect, and the whole line of said railroad and branches and telegraph is completed."

In view of this language of the statute, it is beyond question that the grants made by the act of July 1, 1862, to the Central Pacific Railroad Company of California were precisely the same in character

and amount as those made to the Union Pacific Company; and it was so expressly adjudged by the supreme court in the Sinking Fund Cases, reported in 99 U. S. 700-728. The terms and conditions of those grants are to be ascertained by a resort to the statute. Having been duly accepted by the railroad companies in question, they constitute the contract between the respective parties, from which the companies cannot depart, and which the government cannot change or alter except in the mode reserved to it by law. If, upon so elementary a proposition, authority is needed, it may be found in the decision in the Sinking Fund Cases, 99 U. S. 718, 719, and in *Union Pac. R. Co. v. U. S.*, 104 U. S. 662.

Now, looking at the statute of July 1, 1862, it is seen that section 2 grants the right of way through the public lands for the contemplated railroad and telegraph line, together with the incidental ground for stations, shops, etc. Section 3 grants, in aid of its construction, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of the road, with certain limitations and exceptions not important to mention. Section 4 provides that whenever the company shall have completed 40 consecutive miles of any portion of the road, properly supplied and equipped, and ready for the service contemplated by the act, the president of the United States shall appoint three commissioners to examine and report to him in relation thereto; and, if it shall appear to him that 40 consecutive miles of the railroad and telegraph line have been completed and equipped in all respects as required by the act, patents for the land granted, on each side of the road as far as the same is completed, shall be issued. Section 5 provides that the secretary of the treasury, upon a like certificate in writing of the commissioners so appointed by the president of the completion and equipment of 40 consecutive miles of the railroad and telegraph, in accordance with the provisions of the act, shall—

"Issue to said company bonds of the United States of \$1,000 each, payable in 30 years after date, bearing 6 per centum per annum interest (said interest payable semiannually), which interest may be paid in United States treasury notes or any other money or currency which the United States have or shall declare lawful money and a legal tender to the amount of sixteen of said bonds per mile for such section of forty miles; and to secure the repayment to the United States, as hereinafter provided, of the amount of said bonds so issued and delivered to said company, together with all interest thereon which shall have been paid by the United States, the issue of said bonds and delivery to the company shall ipso facto constitute a first mortgage on the whole line of the railroad and telegraph, together with the rolling stock, fixtures and property of every kind and description, and in consideration of which said bonds may be issued; and on the refusal or failure of said company to redeem said bonds, or any part of them, when so required to do by the secretary of the treasury, in accordance with the provisions of this act, the said road, with all the rights, functions, immunities and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company, may be taken possession of by the secretary of the treasury, for the use and benefit of the United States: provided, this section shall not apply to that part of any road now constructed."

Section 6 enacts:

"That the grants aforesaid [that is to say, the grants of right of way, ground for stations, shops, etc., lands and bonds] are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit dispatches over said telegraph lines, and transport mails, troops and munitions of war, supplies and public stores upon said railroad for the government, whenever required to do so by any department thereof, and that the government shall at all times have the preference in the use of the same for all the purposes aforesaid (at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service) and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest until the whole amount is fully paid. Said company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes or other evidences of debt against the United States, to be allowed at par; and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

Undoubtedly, the contract between the United States and the respective railroad companies thus embodied in the statute of July 1, 1862, contemplated the repayment by the companies to the United States of the amount of the principal and interest of the bonds so loaned to them. But how? Did the companies receiving the benefit of the bonds thus issued and delivered to them by the government thereupon become indebted to the United States therefor in the ordinary sense of that term in the amount of the principal of the bonds and such interest as the government might thereafter pay thereon, to pay which all of their property, of every character, is liable, or was the obligation assumed by the companies for the repayment of the principal and interest of the bonds so issued and delivered to them to be performed in certain defined and specified ways? This question was not involved, and therefore not decided, in any of the cases cited by counsel in which the Pacific Railroad acts have been under consideration by the supreme court. It is directly involved in the present case, for it is obvious that unless there was an absolute, unqualified promise to repay the bonds on the part of the corporations in which the deceased, Stanford, was a holder of stock, there was no personal obligation on his part to repay them.

The statute embodying the contract to be construed was drawn with great care, as has been seen from the statement of its provisions, and with much attention to details; yet it is not as explicit as it should have been. In express terms, it contains no unqualified, nor, indeed, any express, covenant on the part of the corporation receiving the bonds to repay them. If any such unqualified promise exists, it is by implication. But a covenant, as held by the supreme court in *Hudson Canal Co. v. Pennsylvania Coal Co.*, 8 Wall. 276, cannot be implied in the absence of language showing that it was intended. It was also there held that the fact that the nonimplication of it makes the contract, in consequence of events happening subsequently to its being made quite unilateral in its advantages, is not a sufficient ground to imply a covenant which would tend to balance advantages thus preponderating. In the later case of *Hale v. Finch*, 104 U. S. 261-269, the same court said that according to the authorities, many of which will be

found cited in the opinion in that case, "and from the reason and sense of the thing, a covenant will not arise unless it can be collected from the whole instrument that there was an agreement or promise or engagement upon the part of the person sought to be charged for the performance or nonperformance of some act."

Recurring now to the act of July 1, 1862, embodying the contract between the United States and the railroad companies, let us see whether its terms and provisions, taken as a whole, import an absolute, unqualified agreement by the railroad companies to repay the amount of the bonds, for which repayment all of their property, of every character, is liable, or does its true interpretation require only such repayment in certain specified and defined ways, with prescribed consequences for a failure of such repayment. It is to be observed, in the first place, that, by the express terms of the act, neither the granted lands nor the subsidy bonds were to be delivered to the railroad companies until the particular section of road to which they applied was fully completed, equipped, and ready for the service contemplated by the act. As each section of the road was thus completed, equipped, and ready for service, the bonds pertaining to that section were to be issued and delivered to the particular company, and thereupon, by the express terms of the contract, such issue and delivery should ipso facto constitute a first mortgage on the whole line of the railroad and telegraph, in consideration of which bonds were authorized to be issued, together with its rolling stock, fixtures, and property of every kind and description. Now, here was an express provision that, before any part of the granted aid should become effectual at all, the particular section of road to which it applied should be fully completed, equipped, and ready for the contemplated service, at which time the bonds applicable to that section should be issued and delivered to the company. Such issue and delivery, constituting, as it does, a loan to the railroad company, imported a promise on the part of the company to repay it; but was the promise so imported an absolute, unqualified promise of the company to pay the amount that should become due the United States by reason of the loan, like an ordinary loan, for which all of the property of the borrower of every character would be liable?

The provision of the contract in respect to the repayment of the bonds was that they should be repaid "as hereinafter provided,"—that is to say, as afterwards provided in the statute; and, to secure such repayment, the issue and delivery of the bonds was by the contract made to constitute ipso facto a first mortgage on the whole line of railroad and telegraph, together with the rolling stock, fixtures, and property, of every kind and description, in consideration of which bonds were authorized to be issued. The contract further declared that all of the grants—namely, the grants of right of way, ground for stations, etc., lands and bonds—were made upon condition, not only that the company would pay the bonds at maturity, but also should keep the railroad and telegraph line in repair and use, and at all times transmit dispatches over the telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores, upon the railroad for the government, whenever required

to do so by any department thereof, and that the government should at all times have the preference, in the use of the same for all of those purposes at fair and reasonable rates of compensation, not to exceed the amounts paid by private parties for the same kind of service. And it was further provided that in case any company or companies accepting the provisions of the act should fail to comply with the terms and conditions thereof, by not completing said line of railroad and telegraph and branches within a reasonable time, or by not keeping the same in repair and use, but should permit the same for an unreasonable time to remain unfinished, or out of repair and unfit for use, congress should have the right to pass an act to insure the speedy completion of the road and branches, or put the same in repair and use, and direct the income of the railroad and telegraph line to be thereafter devoted to the use of the United States to repay all such expenditures caused by the default and neglect of such company or companies. And, further, that if the roads should not be completed, so as to form a continuous line of railroad, ready for use, from the Missouri river to the navigable waters of the Sacramento river by July 1, 1876, the whole of all of the railroads authorized to be constructed under the provisions of the act, together with all of their furniture, fixtures, rolling stock, machine shops, lands, tenements, and hereditaments, and property of every kind and character, should be forfeited to and taken possession of by the United States. Act 1862, §§ 5, 6, 17. Provision was thus made by the contract for the completion of the line of railroad and telegraph and branches within a certain designated time, and for their 'continued use and operation. In respect to the repayment to the United States of the amount of their bonds issued and loaned to the respective companies, to aid in the construction of their roads, together with the interest thereon, the contract provided, in section 6 of the act of 1862, first, that all compensation for services rendered for the government by the respective companies should be applied to the payment of the bonds and interest until the whole amount should be fully paid; that the company may also pay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par; and that after the completion of the road, until the bonds and interest are paid, at least 5 per centum of the net earnings of the road should also be annually applied to the payment thereof. These provisions of the contract, so far from limiting the promise which the law imports that the company receiving the loan would repay it, unmistakably and affirmatively point to an absolute, unqualified promise by the railroad company receiving the bonds to repay to the United States the amount of them, together with the interest thereon. They may, according to the express terms of the contract, not only be paid by the company out of the earnings of the road, but also, wholly or in part in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par. And to further secure the repayment to the United States of the amount of bonds so loaned, together with the interest thereon, it is provided by the contract, in section 5 of the act, that on the refusal or failure of the

company to redeem the bonds, or any part of them, when required so to do by the secretary of the treasury, in accordance with the provisions of the act, the road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the company by the United States which, at the time of such default, shall remain in the ownership of the company, may be taken possession of by the secretary of the treasury, for the use and benefit of the United States, with a proviso that section 5 shall not apply to that part of any road then constructed.

It is earnestly insisted on the part of the defendant that this proviso indicates that it was not the intention of the act to put upon the company receiving the bonds of the government an absolute, unqualified agreement to repay to the United States the amount of them, together with the interest thereon; that such an unqualified agreement would necessarily subject any and every road the company might have to such repayment. In answer to this, it is said for the complainants that as the Central Pacific Railroad Company of California did not commence to build its road until January 13, 1863, it did not at the time of the passage of the act of July 1, 1862, have any constructed road. But that fact is manifestly wholly immaterial in arriving at the true meaning of the contract between the parties as embodied in the statute, the provisions of which, as has been seen, applied equally to all of the railroad companies mentioned in the act to which the grants were made. Whatever they meant with respect to one of them they meant with respect to all.

It is argued for the defendant, and correctly, that, if the implied promise of the company receiving the bonds was absolute and unqualified, then all of its property, including any and all roads in existence at the time of the passage of the act of 1862, would be liable to make good the promise, just as all of the property of A. who borrows from B. is liable for the repayment of the money so borrowed. Giving to the proviso to section 5, therefore, the broadest construction to which it (considered alone) is susceptible, it would undoubtedly furnish strong evidence of an intention to confine the property out of which the United States should be repaid to the granted lands and to property constructed and created in part by the aid extended by the government and its proceeds. But such a construction of the proviso to section 5 of the act of 1862 would make it clearly repugnant to, and inconsistent with, the last clause of the next section of the act, in which it is distinctly declared that the repayment to the United States of the amount of the bonds and the interest thereon may be made, wholly or in part, in the same or other bonds, treasury notes, or other evidence of debt against the United States, to be allowed at par. The legal intendment is that each clause was inserted for some useful purpose, and, relating, as they do, to the same subject, each must be read with direct reference to the other, and so read, if possible, as to avoid repugnancy. It is to be observed that section 5, to which the proviso is appended, provides for the loan of the bonds, the creating of a first mortgage on the road, in consideration of which bonds were authorized to be issued, together with its rolling stock, fixtures, etc., and for the forfeiture thereof in the

event of the failure of the company to redeem the bonds or any part of them. The proviso was probably inserted to make clearer the fact that none of those provisions should apply to that part of any road then constructed. At all events, in view of the other provisions of the act to which reference has been made, and especially in view of the provision that the company might repay the United States, wholly or in part, in the same or other bonds, treasury notes, or other evidences of debt against the United States, to be allowed at par, it is impossible that the agreement of the company to repay the loan can be limited to the road and its appurtenances.

But because the Central Pacific Railroad Company of California and the Western Pacific Railroad Company, like all of the other railroad companies accepting the terms and provisions of the act of July 1, 1862, and receiving bonds of the United States thereunder, thereby assumed an absolute and unqualified promise to repay the amount of them to the United States, together with the interest thereon, does it follow that the stockholders of the California corporations named became personally liable for the debt of those companies? Beyond question there is no common-law liability for such a debt. The individual liability of stockholders in a corporation for the payment of its debts is always a creature of statute. *Pollard v. Bailey*, 20 Wall. 520. On the part of the government it is strenuously urged that the laws of California under which the Central Pacific Railroad Company of California and the Western Pacific Railroad Company were incorporated fixed upon the stockholders thereof an individual liability for the debts of those corporations, and that the rights of the parties to the present suit are to be tested by those laws of the state of California. Both of the California corporations named were incorporated, as has been seen, under and by virtue of the provisions of the act of the legislature of California, approved May 20, 1861 (*St. Cal.* 1861, p. 607). At that time the provisions of the constitution of California in relation to the subject in hand were sections 32 and 36 of article 4 of the constitution of 1849, already given in full. It is plain, therefore, that whatever individual liability the stockholders of the Central Pacific Railroad Company of California and the Western Pacific Railroad Company incurred is to be found in those provisions of the constitution of 1849, and in the provisions of the act of the legislature of California of May 20, 1861.

In 1864, the supreme court of California, in the case of *French v. Teschemacher*, 24 Cal. 518, fully considered and construed sections 32 and 36 of article 4 of the constitution of 1849. It there held that section 32 was a positive injunction requiring the legislature to provide security for corporate dues by laws imposing, in connection with other means, some degree of individual liability upon the members of the corporation, but leaving the extent of that liability to the wisdom and sound discretion of the legislature, and that, while section 36, considered by itself, would seem, upon first impression, to fix the precise degree of liability, leaving no room for the exercise of legislative judgment, yet the apparently conflicting provisions of the constitution should be so construed as to give force and effect to each; that section 36 was not self-executing, in that it did not

determine the proportion of the debts and liabilities of the corporation for which the stockholder should be liable, nor prescribe any rule by which that proportion could be ascertained; and, as a necessary result, that legislation was necessary to give the constitutional provisions on the subject a reasonable and practicable operation. That this construction of the constitution of 1849 by the highest court in existence under it is binding on this court is thoroughly settled. Resort must therefore be had to the state statute to see what, if any, individual liability was thereby fastened on the stockholders of the Central Pacific Railroad Company of California and the Western Pacific Railroad Company for their corporate debts and liabilities.

The two California corporations named, which received the bonds from the United States at times when the defendant's testator was a large holder of stock therein were, as has been seen, incorporated under the state act of May 20, 1861, in which it was declared that each stockholder should be "individually liable to the creditors of such company for his proportion, that is to say, in proportion to the amount of stock by him held, for all the debts and liabilities of such company, except" those incurred after he should cease to be a stockholder. The stockholder's liability for the corporate debts and liabilities as here defined by the statute is "for his proportion—that is to say, in proportion to the amount of stock by him held." This statutory provision is but little more definite than section 36 of article 4 of the constitution of 1849 and no more definite than the provision contained in section 32 of the act concerning corporations, passed in 1850 (Wood's Dig. 115), which was held by the court in *French v. Teschemacher*, *supra*, to be insufficient to give a reasonable and practicable operation to section 36 of article 4 of the constitution of 1849.

It is manifest that the declaration that the stockholder is liable for all the debts and liabilities of the corporation "in proportion to the amount of stock by him held" does not establish any rule by which any definite liability can be fixed. Proportion to what? Whether to the whole amount of the capital stock, or to the amount of the subscribed capital stock or any other ascertainable proportion, is not stated. As to that essential element of the problem, the statute of 1861, like the constitution of 1849, is entirely silent. It is true that by subsequent statutes, as well as by the subsequent constitution of 1879, the liability of stockholders in the state corporations is definitely fixed. Thus, by a statute passed April 27, 1863, to amend the act of May 20, 1861, it is declared that each stockholder "shall only be individually liable to the creditors of such company for his proportion, that is to say, the proportion that the amount of stock by him held bears to the whole amount of the capital stock of such company, of all the debts and liabilities of the company contracted or incurred during the time he was a stockholder." *St. Cal.* 1863, p. 610. By section 322 of the Civil Code of California it is provided that "each stockholder of a corporation is individually and personally liable for such proportion of its debts and liabilities as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation, and for a like

proportion only of each debt or claim against the corporation." And by section 3 of article 12 of the state constitution of 1879 it is declared that "each stockholder of a corporation, or joint stock association, shall be individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder, as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation or association." But it is manifest that the state laws fixing the liability of stockholders, passed subsequent to the making of the contract, which is the basis of the present suit, have no application to the questions here involved.

At the time, therefore, that the Central Pacific Railroad Company of California and the Western Pacific Railroad Company accepted the provisions of the act of congress of July 1, 1862, upon which acceptance the contract between them and the United States arose, the laws of the state under which those companies were incorporated had not fixed upon the stockholders of such corporations any definite individual liability for the corporate debts, or prescribed any rule by which any such definite individual liability could be ascertained. With respect to contracts then made, the corporations in question, therefore, stood as if there had been no constitutional or statutory provisions in relation to the individual liability of stockholders for corporate debts and liabilities; for it is plain that a constitutional provision requiring legislation to give it effect is, until such legislation is had, ineffectual, and that a statute which is too indefinite to give a reasonable and practicable operation to the constitutional provision is as if it had not been enacted. That a contract made in the absence of such a liability is unaffected by a subsequent statute fixing it is elementary. Any other rule would be to sanction a most material change in the contract itself, to the manifest injury of one of the contracting parties. But even if, by the laws of California in existence at the time of the making of the contract in question, the individual liability of the stockholders of the Central Pacific Railroad Company of California and the Western Pacific Railroad Company had been clearly defined and fixed, the result, I think, must be the same; for it seems clear to me that this suit is dependent, not upon what the laws of California may or may not have provided in respect to the liabilities of stockholders of corporations organized under those laws, but upon the contract made between the United States and the railroad companies in which defendant's testator was a stockholder. The grants contained in the Pacific Railroads acts, and constituting the contract which is the basis of the suit, are, as has already been said, *sui generis*. They have been so characterized by the supreme court. *Union Pac. R. Co. v. U. S.*, 104 U. S. 665.

The whole scope and tenor of the legislation constituting the contract under which the line of railroad and telegraph was constructed, in consideration of which the bonds in question were issued and loaned to the Central Pacific Railroad Company of California and the Western Pacific Railroad Company, respectively, unmistakably show that no personal liability of the individual stockholders was contem-

plated, either by the United States, on the one side, or the railroad companies and their stockholders, on the other side. Wherever, in its undertaking to secure the building of the road and its connections, congress granted aid, whether in rights of way, station grounds, lands, or bonds, to any railroad company, it granted it upon precisely the same terms and conditions that it granted similar aid to the other companies mentioned in the act. Each and every company to which aid was extended was put, in respect to such aid, upon exactly the same footing. If there is anything clear in the provisions of the statute upon the subject, it is this fact. True, the Central Pacific Railroad Company and the Western Pacific Railroad Company were incorporated under and by virtue of the laws of California; but congress, in and by its legislation, adopted them as instruments in the execution of its purpose to secure the construction of the road the country needed, and conferred upon them certain powers, rights, privileges, and immunities independent of and wholly apart from those derived from their state charters. Whether or not the state of California could have objected to that action of congress, it is not important to inquire. So far from objecting, the state assented thereto, and, as far as it could, ratified and confirmed the action of congress in the premises. St. Cal. 1863-64, p. 471; Sinking Fund Cases, 99 U. S. 728. In the case last cited, the supreme court, in speaking of the California charter of the Central Pacific Railroad Company of California, said that no power was thereby "granted to build any road outside the state, or in the state except between the termini named," but that, "by the act of 1862, congress granted this corporation the right to build a road from San Francisco or the navigable waters of the Sacramento river to the eastern boundary of the state, and from there, through the territories of the United States, until it met the road of the Union Pacific Company. For this purpose, all the rights, privileges, and franchises were given this company that were granted the Union Pacific Company, except the franchise of being a corporation, and such others as were merely incident to the organization of the company. The land grants and subsidy bonds to this company were the same in character and quantity as those to the Union Pacific, and the same right of amendment was reserved. Each of the companies was required to file in the department of the interior its acceptance of the conditions imposed, before it could become entitled to the benefits conferred by the act. This was promptly done by the Central Pacific Company, and in this way that corporation voluntarily submitted itself to such legislative control by congress as was reserved under the power of amendment." 99 U. S. 727, 728.

The Western Pacific Railroad Company, as has already been shown, and, indeed, as is alleged in the bill, occupied precisely the same position as that of the Central Pacific Railroad Company of California. The theory upon which the decision of the supreme court, in the Sinking Fund Cases proceeds, in so far as concerns the two California corporations, is that, to the extent of the powers, rights, privileges, and immunities granted them by congress, they are to be regarded as the creatures of congress, and in precisely the

same light as the Union Pacific Company. The logic of this is that the contract in respect to the subsidy bonds was precisely the same with the California corporations that it was with the Union Pacific Company, and to be measured by the same standard. The act of congress embodying the contract in respect to each of the corporations not having provided for any individual liability on the part of their stockholders, none can be held to exist. *Pollard v. Bailey*, supra; *Carroll v. Green*, 92 U. S. 512.

Had the provisions of the act of July 1, 1862, remained unchanged, and the road been built solely thereunder, the government, with the retention of all compensation for services rendered for it by the companies, and 5 per centum of their net earnings, and a first mortgage on the entire aided road, with its appurtenances, would undoubtedly have been sure of the repayment of the bonds as provided in and by the act. But to speed the enterprise, and to further aid in the construction of the roads, congress passed the act of July 2, 1864, by which, as has been seen, the grant of lands was doubled, a provision inserted that only one-half of the compensation rendered by the railroad companies for the government should be required to be applied to the payment of the bonds issued by the government, and by which the United States waived their first lien for the repayment of the amount of its bonds, with interest, and consented that the railroad companies to which the grants applied should issue their own bonds in like amounts, which should be secured by a lien on their respective roads paramount to the lien of the United States. While this generosity on the part of the government clearly entitled it to the utmost good faith on the part of the railroad companies in all their dealings with the United States, it cannot justify the court in departing from the true interpretation of the contract as the parties themselves made it.

The views that have been expressed render it unnecessary to consider other questions argued by counsel; and if they are sound, of which I have no doubt, it is apparent that no amendment of the bill can make good the complainants' claim in this case. Nevertheless, leave will be given the complainants to amend, if they shall be so advised.

Demurrer sustained, with leave to complainants to amend within the usual time.

SOUTHERN PAC. R. CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. June 24, 1895.)

No. 193.

1. PUBLIC LANDS—GRANTS TO RAILROADS—ADOPTION OF ROUTE.

By Act July 27, 1866, congress granted lands to the A. & P. R. Co. in aid of the construction of a road from Springfield, Mo., to the Pacific Ocean, and by the same act authorized the S. P. R. Co. to build a road from a point of connection with the A. & P. Road, near the boundary of California, to San Francisco, and made to it a grant similar to that to the A. & P. Co. On March 3, 1871, for the purpose of connecting the T. & P. R. R. with San Francisco, congress authorized the S. P. Co. to build a line of road from Tehachapi Pass, via Los

Angeles, to the T. & P. Road, at or near the Colorado river, "with the same rights, grants, and privileges," etc., as were granted to the S. P. Co. by the act of July 27, 1866. In October, 1869, the A. & P. Co. filed its plat purporting to designate the line of its road from the place where it crosses the Colorado river, near the thirty-fifth parallel, extending westerly over the Tehachapi Pass, and in a northwesterly direction to San Francisco. Upon the objection of the S. P. Co. this route was disapproved by the secretary of the interior, on the ground that the act gave the S. P. Co. the right to build the road into San Francisco, and no lands were reserved on this route. March 9, 1872, the A. & P. Co. filed two maps showing parts of a route from the Colorado river to the Pacific coast and thence to San Francisco, which route was completed by two maps filed in August, 1872. This route was approved by the officers of the government, and lands along it were withdrawn from settlement. *Held* that, although parts of the correspondence between the officers of the A. & P. Co. and the government, subsequently passing in the course of a controversy as to the right of the A. & P. Co. to build its road to San Francisco, and parts of certain official documents, relating to such controversy, appeared to refer to the route filed in 1869, and to insist on that route as the one claimed by the A. & P. Co., the A. & P. Co. had abandoned the route of 1869, and its right to that of 1872 had been recognized, so as to withdraw the lands along that route from the operation of a subsequent grant to the S. P. Co. in aid of another line crossing such lands.

2. SAME—HOW FIXED.

The line of a railroad to which a grant of lands has been made is definitely fixed, for the purpose of determining the lands to which the grant applies, by the filing of the map of the route, although no actual survey has been made or the line surveyed has been wrongly located on the map, in consequence of errors in projecting township and section lines over unsurveyed parts of the public domain.

3. SAME—EFFECT OF FRAUDULENT LOCATION.

A fraudulent deception of the government in regard to the location of the line of a railroad to which a grant of public lands had been made, would be ground for reconsideration of the approval of the maps filed, or for forfeiture of the land, but, without such action by the government, would give no right in such lands to any other company under a subsequent grant.

Appeal from the Circuit Court of the United States for the Southern District of California.

This was a suit by the United States against the Southern Pacific Railroad Company and others to determine the title to certain lands. The circuit court rendered a decree for the complainant. 62 Fed. 531. Defendants appeal. Affirmed.

Joseph D. Redding, William F. Herrin, and William Singer, Jr., for appellants.

Joseph H. Call, for the United States.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

BELLINGER, District Judge. This is a suit by the United States against the Southern Pacific Railroad Company and its grantees to determine the title to about 700,000 acres of land in Los Angeles and Ventura counties, Cal. These lands are within the limits of a grant by congress to the Atlantic & Pacific Railroad Company, of July 27, 1866, as determined by what the government contends was the line of definite location of route by the company. By the same act the Southern Pacific Railroad Company was authorized to build

a road from a point of connection with the road of the Atlantic & Pacific Company, at or near the boundary line of California, to San Francisco, and, to aid in such construction, was given a similar grant of land to that granted the Atlantic & Pacific Company. On March 3, 1871, for the purpose of connecting the Texas & Pacific Railroad with San Francisco, congress authorized the Southern Pacific Company to construct a line of road from a point at or near Tehachapi Pass, via Los Angeles, to the Texas & Pacific Railroad, at or near the Colorado river, "with the same rights, grants, and privileges," etc., as were granted to said Southern Pacific Company by the act of July 27, 1866. On July 6, 1886, the lands granted to the Atlantic & Pacific Company in California were, by act of congress, forfeited and restored to the public domain. The lands in controversy are within the limits of both grants at the place where the line of the Southern Pacific crosses what is claimed by the government, as above stated, to be that of the Atlantic & Pacific Company; and the question to be decided is as to whether the earlier grant attached to such lands, and thus operated to exclude them from the grant to the Southern Pacific Company. This same question was considered in the supreme court of the United States in two cases by the United States against the Southern Pacific Railroad Company, heard together, and decided in 146 U. S. 570, 13 Sup. Ct. 152. It was contended in these cases that no map of definite location of line between the Colorado river and the Pacific Ocean was ever filed by the Atlantic & Pacific Company. The facts relied upon to maintain this contention were these: The Atlantic & Pacific Company had claimed the right to build its road from the Colorado river to the Pacific Ocean, and thence north to San Francisco. It filed maps in the office of the secretary of the interior of this route, in four sections, at different times in 1872, as will more fully appear hereafter. Taken together, these maps formed a continuous line of route from the Colorado river to San Francisco. This line reached the Pacific Ocean at San Buenaventura, which, however, was not the terminus of any line of definite location, whether shown by one or more of the maps, but was only an intermediate point. It was contended that this was not a valid location (1) because the maps were of segments of route, and were filed at different times; (2) because the maps were filed in the office of the secretary of the interior instead of the general land office; and (3) because the line thus formed extended through San Buenaventura to San Francisco. The court held the location thus made to be good as a definite location from the Colorado river to San Buenaventura; and upon this conclusion as to definite location of line it held that the lands within the limits of the grant to the Atlantic & Pacific Company, as identified by such location, were reserved from the grant to the Southern Pacific Company. In the present case, the validity of this location of line by the Atlantic & Pacific Company is attacked upon the ground that the company, by an earlier and different location of line of route, was precluded from making the location relied upon, and upon the further ground

that the second location was not bona fide, but was a mere fraudulent device intended to impose upon the government, and having that effect. These new objections, and the effect of the former adjudication, are the grounds of controversy in this suit.

On October 25, 1869, the Atlantic & Pacific Company filed with the interior department its plat, purporting to designate the line of its road as located from a point selected by the company for crossing the Colorado river, by the route deemed by the company the most practicable and eligible to the Pacific Ocean. The line of road designated on this plat is from a point on the Colorado river near the thirty-fifth parallel, extending westerly over the Tehachapi Pass, and in a northwesterly direction to San Francisco. This map or plat is in evidence for the first time in this case. It was introduced by the defendants, who claim not to have known of its existence when the former case was heard. The defendants contend that this is a map of definite location of route by the Atlantic & Pacific Company, and that the action of the interior department subsequent to the filing of the maps of 1872, in approving a line of definite location by the company, did not refer to the line of these maps, but to the line designated on this map or plat of 1869. If this is so, the grant of the company is identified by this line, and the lands in dispute are not within it, and are therefore subject to the grant to the Southern Pacific Company. The commissioner of the general land office, in conformity with the decision of the secretary of the interior, to whom the matter had been referred, refused to recognize the claim of the Atlantic & Pacific Company to a reservation of lands upon the route designated on this map of 1869, upon the ground that the company could not take a grant of lands from the Colorado river to San Francisco. From the consideration given to this question subsequently by the interior department, it seems that this refusal was based upon the conclusion that, inasmuch as the act of 1866 authorized the Southern Pacific Railroad Company to build a road from a point of connection with the Atlantic & Pacific near the state boundary line, to San Francisco, the right to build such connection was exclusive in the former company. No other map or plat of definite location was filed by the Atlantic & Pacific Company until the 9th day of March, 1872, when it filed four maps in the office of the secretary of the interior, two of which refer to territory outside of California, and therefore cut no figure in the case. The other two purport to be maps of definite location from San Francisco to San Miguel Mission, and from a point on the west boundary of Los Angeles county to a point in township 7 N., range 7 E. of San Bernardino base and meridian. The lines thus designated do not connect with each other, nor with any other part of the located line. On the 11th of April, 1872, the acting secretary of the interior, in answer to a letter by the president of the Atlantic and Pacific Company, stated that the maps theretofore filed at different dates by the company had been approved. On August 15, 1872, two other maps, purporting to be maps of definite location, were filed by the company. These maps were approved April 16, 1874. By these maps lines are designated from San

Miguel Mission to a point of connection with the line of the second map of March 9, 1872, at the west boundary of Los Angeles county, and from the east end of the same line in township 7 N., range 7 E. of San Bernardino base and meridian, to the Colorado river. The four maps thus filed, taken together, make one continuous line of location from the Colorado river to San Francisco.

It is now contended in behalf of the defendants that the Atlantic & Pacific Company did not abandon its location of 1869 via Tehachapi Pass to San Francisco, but continued to insist upon it, and that it was to this location that the subsequent approvals by the interior department referred. If this is true, the only definitely located line of the Atlantic & Pacific was that via Tehachapi Pass to San Francisco, and to that line the land-grant rights of the company were limited. The facts in support of this contention are these: On April 6, 1872, Francis B. Hayes, president of the Atlantic & Pacific Company, addressed a letter to the secretary of the interior, stating that the company had filed its maps, delineating its route through the Indian Territory, Northern Texas, New Mexico, Arizona, and portions of California, to San Francisco, and requesting the approval of such line and the withdrawal of lands appurtenant to it. The secretary is "especially" requested by this letter to decide "whether the Atlantic & Pacific Company has not the right to construct its road on the line as filed to San Francisco." The acting secretary answered this letter on April 11th, saying that the maps referred to had been examined and approved, and stating as follows: "The route to San Francisco, as delineated on the map filed, appears to me to be sanctioned by the terms of the charter of the company, and there is no doubt of their right to construct the road on that line." On April 15, 1874, the secretary of the interior addressed a letter to the commissioner of the general land office, referring to the above letter of April 11, 1872, and to the decision of the department in favor of the right of the Atlantic & Pacific Company to build its line to San Francisco, and stating that on June 21, 1872, James H. Storrs, counsel for the Southern Pacific, had submitted an appeal from such action by the department, supported by able and elaborate argument, denying the right of the Atlantic & Pacific Company to build their road to San Francisco, and that, in consideration of the arguments so made, he had concluded to take the opinion of the assistant attorney general, and, such opinion being favorable to the right claimed, he had concluded to decline disturbing the action taken pursuant to the letter of April 11, 1872. The opinion of the assistant attorney general referred to in this letter of the secretary of the interior is dated March 16, 1874, and states that he has "considered the question of the right of the Atlantic & Pacific Railroad Company to definitely locate the line of its road from the point where it crosses the Colorado river, near the thirty-fifth parallel of latitude, to San Francisco, by way of Tehachapi Pass, and west of the Coast Range of mountains"; that "the map of definite location was filed in the general land office on the 12th day of March, 1872, and the lands along the route ordered to be withdrawn on the 22d of April, 1872," etc. It is argued that the inquiry in the letter of the president of the At-

lantic & Pacific Company of April 6, 1872, as to the right of his company to construct its road on the line as filed to San Francisco, can only refer to the line of 1869, since there was no other line to San Francisco "filed" at that time, and that, for the same reason, the reference in the letter of the secretary of the interior of April 11, 1872, to "the route to San Francisco, as delineated on the map filed," necessarily means the map of 1869, and that the description in the opinion of the assistant attorney general of the line as definitely located "by way of Tehachapi Pass" makes it certain that the only line under consideration was the line of 1869. It is further shown that, on March 10, 1873, J. B. Henderson, the attorney of the Atlantic & Pacific Company, wrote a letter to the secretary of the interior, protesting against the location of the Southern Pacific Company, stating that "the Atlantic & Pacific Railroad Company has filed its map of general location of its road, from the crossing of the Colorado river, near the thirty-fifth parallel, by way of Tehachapi Pass, and west to the Coast Range of mountains, to San Francisco, in California." Nearly two years later, on January 5, 1885, J. A. Williamson, as attorney for the Atlantic & Pacific Company, wrote a letter to the secretary of the interior, protesting against the appointment of commissioners to approve sections of the Southern Pacific road, in which he maintained that the map of 1869 was a definite location of the road of the Atlantic & Pacific Company through California; that such company adhered to that map, and that its right to particular tracts of land was identified by such location.

From the filing of the map of 1869, the interior department was vexed with controversy over the question of the right of the Atlantic & Pacific Company to build its road to San Francisco. The Southern Pacific was authorized, by the same act under which the Atlantic & Pacific had its grant, to build from a point of connection with the latter company's road on the Colorado river to San Francisco; but, if that company itself built this extension, the Southern Pacific would be practically crowded out of this field. It therefore resisted, before the land department, the pretensions of the Atlantic & Pacific to make San Francisco its coast terminus. It made no difference whether the proposed extension was by the way of Tehachapi Pass or San Buenaventura to San Francisco. It was not a question of routes, but of destination, that caused contention between the rival interests. The letter of the president of the Atlantic & Pacific Company to the secretary of the interior of April 6, 1872, and its answer, had reference to this question. It is true that at the date of this correspondence there was technically no continuous line platted from the Colorado river to San Francisco, other than that by way of Tehachapi Pass. There were maps showing portions of a line that could only be connected by a line of route substantially as now contended for by the government. These maps had been filed a few days before the correspondence took place as maps of definite location, and were approved as such, and are evidence of the intention of the company to build over the lines platted on them. The letter of Francis B. Hayes, president of the Atlantic & Pacific Company, of April 6, 1872, to the

secretary of the interior, requesting to know whether "the line as filed" is approved and orders issued to withdraw the appurtenant land, was referred to the commissioner of the general land office, who answered, on the 11th of April, acknowledging its receipt. In this answer the commissioner says: "The lines of road as filed by the company, with your letter of the 9th ult., indicate the general direction of the line, and show San Francisco as the objective point on the Pacific coast," etc. The letter of the secretary of the 9th ult. here referred to is the letter transmitting the four maps of location, two of which are portions of the line by way of San Buenaventura. The reference to them by the commissioner, in answering the secretary's letter transmitting the Hayes letter of April 6th, identifies them as the maps referred to by Hayes in that letter, and shows that the president of the Atlantic & Pacific Company, in speaking of the line as filed, referred to the line of these maps, and not to the line of 1869. It is immaterial to the particular question of identity of maps that separate portions of a line described on independent maps may not technically answer the description of "the line as filed" contained in the Hayes letter of April 6th. The fact remains that the commissioner to whom this letter was referred understood it to refer to the line described on the separate maps, and proceeded to prepare maps of withdrawal of lands appurtenant to such line. While the opinion of the assistant attorney general mentions Tehachapi Pass, yet it otherwise unmistakably designates the other route. The line by way of Tehachapi Pass does not go west of the Coast Range, as the opinion states. The opinion refers to the maps along which the withdrawal of lands of April 22, 1872, was made. This withdrawal was along the line of what is known as "the second map," being the map of definite location from the western boundary of Los Angeles county to a point in township 7 N., range 7 E. of San Bernardino, the map relied upon by the government in this case. It is evident that the assistant attorney general thought that the San Buenaventura route included Tehachapi Pass. Whether he made this mistake, or the other most improbable one of supposing that the line from the western boundary of Los Angeles county to a point in township 7 N., range 7 E. of San Bernardino, was not where the second map and the diagrams of withdrawal filed nearly two years previously located it, is not material. The identity of this route is established by the maps of location on file, by the record approval of the line thus laid down, and the withdrawal of lands, as shown by the diagrams of such withdrawal, filed in the records of the general and local land offices. And the location thus established and identified is not affected by the fact that an attorney of the Atlantic & Pacific Company, two or three years later, in a proceeding adversary to the Southern Pacific in the interior department, wrote a letter stating that the former company adhered to the map of 1869. If the matter was open to controversy, this letter would be material, and the case might turn upon it, if it was otherwise doubtful; but this is not such a case. The board of directors of the Atlantic & Pacific Company, by formal resolution passed at a meeting held in February, 1872, adopted the route of the second map. Subsequently that map

and the map of route from San Francisco to San Miguel were filed and approved, and the lands in controversy withdrawn from settlement. In August of the same year, other maps of definite location, supplying the absent links of route, were filed. Nearly two years later, urged to action by the insistence of the officers of the company, these maps were approved and additional withdrawals of land made. These facts show conclusively that the Atlantic & Pacific Company did not adhere to the map of 1869. What it did not abandon, but always insisted upon, was the destination of that map; and whatever confusion existed in the department with reference to the two routes is probably due to the fact that the company adhered to the claim of right made by the map of 1869 to make San Francisco its coast terminus. The doubt that was raised as to its right to do this, after the decision by Secretary of the Interior Cox against the company, was sufficient reason for the adoption of the second route. By this route the company was sure of its grant, at least to the coast. Otherwise it was liable to lose all of the grant west of the Colorado river.

The map of 1869, having been finally abandoned by the Atlantic & Pacific Company after the adverse decision by the secretary of the interior, was there a definite location of line of route to the Pacific Ocean at San Buenaventura by which the grant to that company attached to the land in controversy? It is charged against the maps of this route that they are fraudulent pretenses, in this: That the lines represented by them were not surveyed and marked on the ground, and that the affidavits of the chief engineer of the Atlantic & Pacific Company to that effect are false. It is argued that by the words "definitely fix" or "definitely locate," with reference to a railroad route, is necessarily implied that a survey has been made on the ground, and that stakes and stones have been set, which fix on the earth's surface the exact route over which the road will pass. None of the earlier railroad land grants provided for the filing of maps or plats of location of line, either general or definite. Such grants were of lands on either side of the proposed road "not sold, reserved, or otherwise disposed of by the United States," etc., "at the time the line of said road is definitely fixed." The method by which it was to be ascertained that a line had been "definitely fixed" was left to the determination of the land department, which held that a survey and marking upon the ground as a fact notorious and easily observed was necessary to "definitely fix" a line of railroad route; and accordingly the supreme court held, in *Railroad Co. v. Fremont Co.*, 9 Wall. 94, that, until the line of the railroad was definitely fixed on the ground, no title could vest to any particular section on the line of road. The act of 1862, in aid of the Union Pacific Railroad Company, provided for the filing by the company of a map of general route, whereupon the secretary of the interior was required to cause the lands within 15 miles of the designated route to be withdrawn from pre-emption, private entry, and sale. The act of 1864, in aid of the Northern Pacific road, provided for the designation of a general route, and for definitely fixing the line of road, and requiring a map of such

definite location to be filed. The act of July 27, 1866, under consideration, is substantially like that in aid of the Northern Pacific Company. All railroad land-grant acts since 1862 have provided for maps of location of route, since which time it has been uniformly held that the line of railroad route is fixed by the map filed. The thing to be guarded against in these cases is a line which is subject to change at the will of the company. The object of a survey and marking on the ground was to "definitely fix" the line. But it was soon apparent that a survey on the ground did not accomplish this. The attorney general, on February 16, 1857, in a quotation contained in appellant's argument, says:

"A mere survey fixes nothing, either contingently or conclusively, in this respect. It is means of information; it is not location. I go further, and say that 'definitely fix' implies fixed without capacity of change."

In *Van Wyck v. Knevals*, 106 U. S. 366, 1 Sup. Ct. 336, the court said:

"Until the map is filed with the secretary of the interior the company is at liberty to adopt such a route as it may deem best, after an examination of the ground has disclosed the feasibility and advantages of different lines. But, when a route is adopted by the company, and a map designating it is filed with the secretary of the interior, and accepted by that officer, the route is established. It is in the language of the act definitely fixed, and cannot be the subject of future change, so as to affect the grant, except upon legislative consent."

And in *Railroad Co. v. Dunmeyer*, 113 U. S. 635, 5 Sup. Ct. 566, the court held that:

"The filing of the map in the office of the commissioner is the act by which the line of road is 'definitely fixed,' under the statute."

Inasmuch as the object of the rule in force prior to 1862 was to secure permanence in the line adopted, there is nothing, so far as the government is concerned, that makes a marking on the ground indispensable, where the more effective means of securing that result is provided for by filing maps of definite route. If a map presupposes a survey, and there is in fact no survey, the map is not on that account invalid. It is for the company to adopt a line satisfactory to itself, by means of its own choice. If it adopts an impracticable route, its own interests are prejudiced, not those of the government, which does not, in any event, part with its title to the granted lands until the company has earned them. Moreover, if the legality of what has been done depends upon a survey, and the fact of such survey, as shown by the maps filed and approved in the land department, can be impeached by the testimony of a witness under any circumstances,—much less where his testimony is given more than 20 years after the events described,—all titles depending upon land grants will be insecure and practically valueless. If the authentic character of these records may be destroyed by the testimony of a witness in any case, the testimony should be of the most conclusive character, to have that effect. This is not such a case. The testimony relied upon to impeach the record showing a survey shows that there was in fact a survey. E. N. Robinson, the engineer referred to in the certificate of the chief engineer of the Atlantic & Pacific Company attached to the maps

of this line, as having made this survey, testifies, in effect, that he made surveys for the company between the Colorado river and coast at San Buenaventura, including one through Soledad Pass, and that he staked the line as he proceeded; that "every hundred feet there was a stake, and sometimes oftener," except in places across the desert, where this was not necessary; and that he made reports to the chief engineer of the company from time to time all along the line. He says, as to these reports, "They contained a general statement of the survey and the progress of the party, and the notes, platting, etc., so that they would understand exactly what kind of a route we were getting through that country." He also testifies, in effect, that a profile always accompanied these reports, showing the grades of the line, and that he sent other maps showing topography, as well; that the crossings of streams and any defined object were shown on such maps, and that they found the grade very easy all the way, practically, from Ventura, following up the Santa Clara river east through the Soledad Canon, up to what is called the "Summit," and that then they had the whole country before them. From the summit, the route of this survey to the Colorado river is particularly described by the witness. Nevertheless, this witness testifies that the survey made by him was a preliminary one; that the map of route in controversy does not designate any survey made by him; that he had nothing to do with this map, and that the work represented by it was not done under his supervision. The repudiation of the map by this witness, and the fact that the line of the map, when located on the ground, is found to be a wholly impracticable railroad route, is the basis for the defendant's contention that no survey was ever made of the line of definite location contended for by the government. But this difficulty is not a real one. It is evident that the line of the map is out of its proper location in consequence of the fact that the route there designated is identified by lines of survey protracted upon the map, in conformity with a practice that obtains where lines are located in advance of the government survey, and that these protracted lines do not coincide with the actual surveys since made. The result is that the line of route which followed the Santa Clara river appears to cross the congressional townships some distance from where the river actually crosses such townships. The line of the map therefore appears, when located on the ground, to be some distance from the river where the line of actual survey was made. There was neither secrecy nor deception in the representation by the map and certificate of the protracted survey as an actual one. The officers of the land department were not ignorant of the unsurveyed condition of this part of the public domain; and, if they were, the government was not prejudiced. There was, then, in fact, an actual survey of a line of route staked upon the ground. It was the work of two large parties in the field, carried on for some months, and was followed by an expenditure of between twelve and thirteen thousand dollars in grading, excavating, sinking shafts, and exploring in Soledad Pass. All of this tends to show good faith on the part of the company.

Assuming, however, that a survey of the line on the ground is required, and that a fraudulent deception was practiced upon the government by the representation that a survey had been made, this is ground upon which the department might properly reconsider its acceptance and approval of the maps filed; but, until such reconsideration, the status of the lands is fixed by what was done. The approved maps operated to identify these lands as within the grant to the Atlantic & Pacific Company, without reference to the good faith of the company in preparing them. The fact of definite location is settled by the maps; and it is the fact, not the means by which it was procured, that decides the question. So of a patent fraudulently obtained. Such a patent operates to transfer title, notwithstanding the fraud by which it was obtained, and for which an injured party may have a remedy in an appropriate proceeding. Moreover, if there was a fraud practiced, as claimed, it could only be taken advantage of by the government. In *Lee v. Johnson*, 116 U. S. 48, 6 Sup. Ct. 249, the court says:

"The issue of a patent by the officers of the land department cannot be attacked collaterally, but only by a direct proceeding, instituted by the government, or by parties acting in its name and by its authority. * * * It is only when fraud and imposition have prevented the unsuccessful party in a contest from fully presenting his case, or the officers from fully considering it, that a court will look into the evidence. It is not enough that fraud and imposition have been practiced upon the department, or that false testimony or fraudulent documents have been presented. It must appear that they affected its determination, which, otherwise, would have been in favor of the plaintiff. He must in all cases show that, but for the error or fraud or imposition of which he complains, he would be entitled to the patent. It is not enough to show that it should not have been issued to the patentee. It is for the party whose rights are alleged to have been disregarded that relief is sought, not for the government, which can file its own bill when it desires cancellation of a patent unadvisedly or wrongfully issued."

"A third party cannot take upon himself to enforce conditions attached to the grant, when the government does not complain of their breach. The holder of an invalid title does not strengthen his position by showing how badly the government has been treated with respect to the property." *Van Wyck v. Knevals*, 106 U. S. 369, 1 Sup. Ct. 336.

The Southern Pacific Company was not injured in any right by the alleged failure of the Atlantic & Pacific Company in its duty, or by that company's want of good faith. If fraud was practiced, it was upon the government. If there was an injury, it was the government that was injured. How, then, can the Southern Pacific Company, to whom there was no obligation or duty, and in whom there was no right in respect to the matters complained of, take advantage of the fraud alleged to have been practiced upon the government? And upon what principle of justice or morals can it expect to make use of a fraud practiced upon the government to make a case for itself against the government? At most, then, the alleged frauds in the maps of definite location constituted a cause of forfeiture, and this gave no right of succession to the Southern Pacific Company to the lands liable to forfeiture. This was decided by the supreme court in *U. S. v. Southern Pac. R. Co.*, 146 U. S. 604, 13 Sup. Ct. 152. In that case it was contended by the company that congress intended by the acts of July 27, 1866, and March

3, 1871, that these lands should pass to some company to aid in the building of a railroad, either the Atlantic & Pacific or the Southern Pacific; that if they were not applied to aid the former company, then the latter company was to be entitled to them; but the court held the contention erroneous. It held, in effect, that the exception out of the grant to the latter company of the lands included in the grant to the Atlantic & Pacific Company was not conditional, but absolute; that, if there was any breach of the conditions of the grant to the Atlantic & Pacific Company, congress might itself take all needful measures to accomplish the building of the road, and to that end use the lands of the grant; and that, if the act of forfeiture had not been passed, the Atlantic & Pacific Company could yet construct its road, and, constructing it, its title to the lands in question would become perfect.

"No one but the grantor can raise the question of a breach of a condition subsequent. Congress, by the act of forfeiture of July 6, 1886, determined what should become of the lands forfeited. It elected that they should be restored to the public domain. The forfeiture was not for the benefit of the Southern Pacific. It was not to enlarge its grant as it stood prior to the act of forfeiture. It had given to the Southern Pacific all that it had agreed to in its original grant; and now, finding that the Atlantic & Pacific was guilty of a breach of a condition subsequent, it elected to enforce a forfeiture for that breach and a forfeiture for its own benefit." *U. S. v. Southern Pac. R. Co.*, *supra*.

These considerations apply to the contention that if the maps of 1872 are maps of definite location, then there was no preliminary location or designation of general route. Moreover, the provision of the law as to this is intended for the protection of the company. It is stated in *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100, to be "to preserve the land for the company to which, in aid of the construction of the road, it is granted," by enabling the government to exclude from sale, entry, or pre-emption, the adjoining odd sections within the limits of the grant, in advance of a definite location of route. But there is no reason why the company may not, without this preliminary designation, make a definite location of its line, if it sees fit to do so. In view of the conclusions reached upon the points decided, the effect of the adjudication had in the case last cited as an estoppel in this case has not been considered. The decree appealed from is affirmed.

MAYOR, ETC., OF CITY OF COLUMBUS v. DENNISON et al.

(Circuit Court of Appeals, Fifth Circuit. April 23, 1895.)

No. 342.

1. MUNICIPAL BONDS IN AID OF RAILWAYS—SUBSCRIPTION AND DONATION—
RATIFICATION BY LEGISLATURE.

A town was authorized by act of legislature to subscribe to aid the construction of a railroad, and to issue bonds for the amount, but there was no provision for the exchange of bonds for stock, and stock was not mentioned in the act. The bonds were in fact voted as a donation, and the vote was by the constitutional two-thirds required in cases of donation, which fact was recited in the bonds themselves. Subsequently, by an act amending the railroad charter, so as to authorize a consolidation with an-

other company, it was provided that "the donation" of bonds thus agreed to be made should be paid over to the consolidated company; and by another act, amending the city charter, the city was authorized to levy and collect a special tax for interest and sinking fund to pay the bonds, and interest was accordingly paid for 11 years. *Held*, that this was a ratification of the bonds, both by the legislature and the city.

2. SAME—AUTHORITY TO CHANGE ROUTE—CONSOLIDATION OF RAILROAD.

After a city had voted a donation of bonds, an act was passed authorizing the railroad company to consolidate with another company, and directing the bonds to be delivered to the new company. In an action on the bonds thus delivered it was contended that the consolidation act authorized a change of route, which would leave the city off the line of the road; but it appeared that the road was actually built through the city, according to the condition of the subscription. *Held*, that the giving of an option to change the route did not affect the validity of the bonds, and that they were properly delivered to the consolidated company.

3. SAME—COMPLIANCE WITH CONDITIONS—RECITALS—BONA FIDE PURCHASERS.

Where municipal bonds are issued, with proper recitals, showing compliance with the conditions upon which the subscription was made, the city is estopped, as against bona fide purchasers, from alleging that its authorities acted wrongfully in issuing the bonds.

Toulmin, District Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Mississippi.

This was a suit by John M. Dennison, J. G. Wilson, and Frank T. Redwood against the mayor and city council of Columbus, Miss., to recover upon interest coupons of certain bonds issued by defendant city to the Columbus, Fayette & Decatur Railroad Company. A demurrer to the declaration was overruled by the circuit court, and upon a trial a verdict was returned in favor of plaintiffs, and judgment was entered accordingly. From this judgment the defendant brings error. In overruling the demurrer to the declaration, the following opinion was delivered in the circuit court by Niles, District Judge:

This is a suit on overdue coupons for interest on bonds issued by the defendant to the Columbus, Fayette & Decatur Railroad Company, and delivered to the Georgia Pacific Railway Company, into which the first company and several others were consolidated. The main points relied on as defenses are that the bonds were voted as a donation, when the act under which they were voted only authorized a subscription to the capital stock; and that the consolidated company was authorized to build a different railroad from that originally chartered. The act approved February 1, 1872 (see Acts 1872, p. 297) gave the city authorities power to subscribe to aid in the construction of the Columbus, Fayette & Decatur Railroad Company, and to issue its bonds to the amount of said subscription. No provision is anywhere made for an exchange of bonds for stock, and stock is nowhere mentioned in the act. The act ratifying the consolidation (Acts 1882, p. 836, § 2) provides that "the donation of \$100,000.00 in its bonds heretofore agreed to be made by the town of Columbus, to the Columbus, Fayette & Decatur Railroad Company, but which have not yet been paid over, be and are hereby declared to be payable to the said Georgia Pacific Railway Company." This is a legislative construction, at least, that a donation was authorized, which in such cases is entitled to great respect, and will frequently amount to a legislative ratification. *Pompton Tp. v. Cooper Union, etc.*, 101 U. S. 196. In 1884 an act was passed amending the charter of the city of Columbus, in which it was authorized to levy and collect a special tax to pay the interest on these bonds, and to provide a sinking fund for the ultimate redemption of the principal. The declaration shows that the interest has been paid for eleven years,—since 1882. Here is a ratification by the legislature in authorizing the bonds to be issued as a donation, and taxation

to pay them; a ratification by the city authorities, in issuing them as a donation, and levying the taxes; and a ratification by the people in the continued payment of the taxes. It is difficult to conceive a stronger case of ratification, if that were necessary. The bonds were voted as a donation by the constitutional majority of two-thirds of the qualified voters, as recited in the face of the bonds themselves, and, this only barrier against legislative power being removed, the legislature clearly had the right to ratify. *Supervisors v. Brogden*, 112 U. S. 261, 5 Sup. Ct. 125; *Katzenberger v. Aberdeen*, 121 U. S. 178, 7 Sup. Ct. 947.

It is next objected that by the consolidation a different road was authorized to be built, and that the consolidated company had authority to leave Columbus off its line entirely, and to build by way of Aberdeen. It is not alleged that the consolidated company was deprived of the right to build the road for which the bonds were voted, or that it actually did build by way of Aberdeen. The rule is that, if bonds are voted to a railroad company, which at that time is authorized to consolidate with other railroads, then the bonds may properly be delivered to the consolidated company. This principle is announced, and the authorities reviewed, in *Livingston Co. v. First Nat. Bank of Portsmouth*, 128 U. S. 102, 9 Sup. Ct. 18. There was a general act for the creation of railroads passed by the legislature of Alabama on December 29, 1868. See Acts Ala. 1868, p. 462. By the twenty-first section of this act railroad companies were authorized to consolidate on certain conditions. By the twenty-third section all the property and choses in action of each constituent company were transferred to the consolidated company. By the Mississippi act this Columbus, Fayette & Decatur Railroad Company, which was incorporated under this general act for Alabama, was granted "all the privileges, rights, and immunities" conferred by the Alabama act. See Acts Miss. 1871, pp. 187, 188. Hence the companies were authorized to consolidate, and the bonds, or right to the bonds, which is a chose in action, was transferred to the consolidated company, unless this right was cut off by the allegation that the consolidated company had an option to build a different road by way of Aberdeen. The answer to this is that the city authorities were only required to issue the bonds "when the terms of subscription are complied with." See Acts Miss. 1872, p. 298. On their faces the bonds are payable to the Columbus, Fayette & Decatur Railroad Company. They were authorized to be delivered to the Georgia Pacific Railway Company, the consolidated company, under the same limitations and restrictions that they were or would have become payable to the Columbus, Fayette & Decatur Railroad Company. See Acts Miss. 1882, p. 836. The city authorities of Columbus, Miss., were the tribunal to determine when these conditions were complied with, and issue and deliver the bonds. They did issue and deliver the bonds with proper recitals, and they are now estopped, as against innocent purchasers, from alleging that they acted wrongfully. *Block v. Commissioners*, 99 U. S. 686; *Commissioners v. January*, 94 U. S. 202; *Commissioners v. Clark*, Id. 278; *Brooklyn v. Insurance Co.*, 99 U. S. 362; *Moran v. Commissioners*, 2 Black, 722. For these reasons I think the demurrer to the declaration should be overruled, and the demurrers to the special pleas (from the third to the fifteenth, inclusive) should be sustained, and judgments can be entered accordingly.

James M. Arnold, George A. Evans, and Wm. Baldwin, for plaintiff in error.

F. A. Critz and R. C. Beckett, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and TOULMIN, District Judge.

PER CURIAM. The majority being satisfied with the reasons for judgment given in the opinion of the trial judge, and the court finding no reversible error in the proceedings, the judgment of the circuit court is affirmed.

TOULMIN, District Judge, dissents.

CROW et al. v. KIMBALL LUMBER CO.

(Circuit Court of Appeals, Fifth Circuit. May 28, 1895.)

No. 343.

ACCORD AND SATISFACTION—FAILURE TO PERFORM—ACCORD AGREEMENT—EFFECT ON ORIGINAL CONTRACT.

Where, in the course of performance of a contract, disputes and mutual recriminations arose, and afterwards a new and modified contract was made by way of accord, but nothing was ever done under it, *held*, that there was no satisfaction, and that the original contract remained in force, and an action for damages could be maintained for breach thereof.

In Error to the Circuit Court of the United States for the Southern District of Florida.

This was an action by the Kimball Lumber Company, a corporation engaged in manufacturing lumber and timber at Appalachicola, Fla., against Crow, Rudolph & Co., lumber merchants of Liverpool, England, to recover damages for an alleged breach of a contract for the sale and shipment of timber and lumber by complainant to defendants. In the circuit court there was a verdict for plaintiff in the sum of \$14,723.24, upon which judgment was entered by the court. Defendants bring error.

The contract sued on was executed May 20, 1889, and was signed on behalf of defendants by W. S. Keyser, their resident agent, at Pensacola. It provided for the sale and delivery by plaintiffs of eight cargoes of sawn timber, a cargo of from 300,000 to 400,000 feet of prime deals, a million to a million and a quarter of prime boards and choice dimension deals, and a million to a million and a quarter feet of hewn timber. The performance of the contract was to cover a period from November 1, 1889, to November 1, 1890, and the shipments were to be made on vessels from 400 to 800 tons, to be provided by defendants from time to time as business required, say about one vessel per month. For the details of this contract, reference was made to a previous contract entered into on the 3d of November, 1888, and which was still in course of execution. Three cargoes only were shipped under the contract of 1889; but, mutual recriminations having taken place,—defendants complaining of the grade and quality of the lumber furnished, and plaintiff of the delays and irregularity in sending vessels,—a new contract was, on December 30, 1889, executed, which contained various modifications of the terms of the original contract; but no ships were ever sent by defendants to take cargoes under this contract, and no part of it was ever performed. Defendants set up this contract as a defense to the action, claiming that it entirely superseded the original contract, and hence that no action could be maintained upon the latter. Plaintiff claimed, and gave evidence in support thereof, that the new contract was intended as an accord between the parties, and was such in fact, but that, as there was no performance of it, there was no satisfaction, for which reason the original agreement remained in force. Upon this question the court charged the jury as follows: "The suit here in this case is upon the contract of May 20, 1889, and not upon the contract of December 30th. The defendants have contended that the contract of December 30th was valid and binding upon these plaintiffs, and therefore nothing could be recovered upon this contract sued on. That is properly a question of law, because, if the contract of December is binding, then the plaintiff cannot recover in this case, but must bring another suit on that contract. The large part of the legal contention, as made over this clause, is about that question, and I propose to draw the line clearly and definitely in a legal way on that subject. I think it will be better for the jury, and I am sure, if the case goes to another court, it will be better for the counsel in the case, and for the respective parties. The contract of December 30, 1889, is not binding. It was on accord, and, if carried out, would have been in complete satisfaction, of the contract of May 20th. It never was carried out in any particular. No ship was ever chartered or sent under that contract, and it fails for that reason, and the suit in this case stands because of that fact in law. Your determination, as has been ar-

gued by the plaintiff, is all under the contract of May 20, 1889, as it stood and as it was made, embodying, as I say, some of the features of the contract of 1888. That being the case, and there being no evidence, in my judgment, other than that the contract of May 20, 1889, was broken by the defendants without any just cause, as has been shown in this case, the question, and the only question, for the jury to determine, is the amount of damages which the plaintiff shall recover in this case, and it is the law that you shall assess such damages as they have suffered by the breach of that contract." Various questions were raised by exceptions to the judge's charge in relation to the measure of damages, but the one mainly argued in this court was the question as to the effect of the contract of December 30, 1889.

W. A. Blount, for plaintiffs in error.

H. Bisbee, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. As there was evidence tending to show that the agreement of December 30, 1889, was intended by the parties as an accord, which, when performed, was to be in satisfaction of the contract of May 20, 1889, and as it was conceded that under the said agreement of December 30, 1889, there was no performance, we are of opinion that the ruling of the circuit court, on the invitation of the defendants, plaintiffs in error here, on the effect of said agreement, was not erroneous; and as, on the other errors assigned and pressed in this court, we find for the defendant in error, the judgment of the circuit court is affirmed.

PONS v. BLOCK.

(Circuit Court of Appeals, Fifth Circuit. May 7, 1895.)

No. 353.

ADVANCES ON SECURITY OF GROWING CROPS—CONTRACT FOR LIEN—LANDLORD'S LIEN FOR RENT.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This was a bill by Simon Block, an alien, against Pierre B. Dragon, Athenaise Dragon, Madeline Pons, and several others, citizens of Louisiana, for an accounting. All the defendants excepting Madeline Pons compromised with complainant and were dismissed from the cause, June 18, 1892. On December 31, 1894, a decree was entered against her and in favor of complainant for the sum of \$853.01, with interest and costs, and from this decree she has appealed. The facts from which the controversy arose were briefly as follows: In January, 1883, Pierre B. Dragon and Athenaise Dragon, being lessees of "Monsecour's" plantation in the parish of Plaquemines, La., contracted with Simon Block for advances for the purpose of enabling them to work the plantation and produce a crop for the year 1883, and for security gave him a lien on all the products of the plantation, and agreed to consign the same to him at New Orleans for sale, allowing him commissions therefor. The clause of the contract in relation to the lien was as follows: "A special lien and mortgage, or privilege, is hereby granted and recognized for the full sum of fifteen thousand dollars on any and all crop or crops of rice, sugar, molasses, and other products that may be planted, grown, raised, and gathered, or made and manufactured during the year eighteen hundred and eighty-three on the hereinbefore mentioned and described plantation, tracts, and parcels of land, and

this instrument is hereby directed to be recorded in order to preserve and make the same public so as to operate and bear upon the crops of the year eighteen hundred and —— grown and produced on the aforesaid plantation." Prior to the making of this contract, one B. Saloy purchased the plantation from the lessor, and he became a party to the contract, expressly agreeing that his claim as lessor for rent should be "subordinate and inferior in rank to the claims and privileges of said Block as the furnisher of supplies or for advances furnished under the contract," and that said Block should be first reimbursed out of the crops of 1883 "in the full amount of his advances hereunder, without regard and in preference to demands of said Saloy for the rental of said plantation." Under this contract, Block made advances exceeding in their total amount the sum of \$15,000. When the account was closed, in April, 1884, it was found that a considerable sum was still due to Block from the lessees. Prior to that time, and on November 26, 1883, the said Saloy brought a suit in a state court for rent of the plantation, amounting to \$4,800, and obtained the issuance of the writ of provisional seizure, under which he caused a part of the crops to be seized. He afterwards gave a release bond and took full possession of the property.

The prayer of the bill was that complainant might be declared to have a lien and privilege upon the property thus seized and held by Saloy, it being alleged that this seizure was in violation of his contract to permit the complainant to have a first lien on the crop for his advances. Saloy, however, died before the suit was brought, leaving his estate by will to his wife as universal legatee, who, as alleged by the bill, accepted the same purely and simply, and was duly recognized, and was given possession by the proper state court. Shortly afterwards, she also died intestate, and the property descended to the persons named as defendants in the bill, who were alleged to have accepted this succession purely and simply and to have been put in possession of the property by the proper court, by reason whereof they became liable for all the debts due by the said Saloy, including complainant's demand. The cause was heard before a master, and, after numerous exceptions to his report were disposed of, a decree was rendered against Madeline Pons for her proportion of the amount found due on the accounting. The main point made against the decree was that complainant had made advances in excess of the \$15,000 specified in the contract, and that the lessees had consigned to him, and he had sold, products of the plantation exceeding that sum; and it was contended that as soon as his net sales amounted to \$15,000 Saloy's rights as landlord became thenceforth superior to the lien for advances, and that he then had a lawful right to enforce his lien for rent by seizing the products of the plantation.

P. L. Fourchy and O. B. Sansum, for appellant.

John D. Rouse and Wm. Grant, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. An examination of the record in connection with the briefs and argument shows no error in the record prejudicial to the appellant, and the decree appealed from is affirmed.

MILLER v. HOUSTON CITY ST. RY. CO.

(Circuit Court of Appeals, Fifth Circuit. June 17, 1895.)

No. 382.

CORPORATIONS—TITLE TO STOCK.

In 1873, 180 shares of stock of the H. Co. were issued to one H., on account of B., for cash advanced by B. in the organization of the company. In 1874, on an adjustment of accounts between B. and the company, 1,468 shares of stock were issued to B. in full settlement, the original shares being thereafter treated as canceled, though not surrendered. In 1875, B.

delivered the original certificates to the plaintiff, as margin on a purchase of cotton for future delivery, no money or valuable consideration appearing, however, to have been given for them. The plaintiff held the shares until 1884, when he showed them to the general manager of the H. Co., and was notified by him that the stock would not be recognized, and belonged to the canceled files of the company. In 1888 plaintiff made a formal demand for transfer of the stock, and in 1889 brought suit for damages for the company's refusal to transfer it. *Held*, that the plaintiff was in no better position than B. to assert title to the stock, and could not recover.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This was an action by Walter T. Miller against the Houston City Street-Railway Company to recover damages for a refusal to transfer certain stock. Upon the first trial, before the court without a jury, judgment was rendered for the defendant, and, on error, a new trial was awarded. 5 C. C. A. 134, 55 Fed. 366. The case was again tried by the court without a jury and judgment given for the defendant. Plaintiff brings error. Affirmed.

R. V. Davidson and F. D. Minor, for plaintiff in error.

M. W. Garnett, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. The undisputed evidence in the case shows that in October, 1873, William Brady, then president of the Houston City Street-Railway Company, caused to be issued to T. W. House, for his (Brady's) account, 180 shares of stock for and on account of cash advanced by him (Brady) in the organization of the company; that thereafter, in 1874, other matters of account having arisen between Brady and the company, a settlement was had of all the matters involved, and 1,468 shares of stock were issued to William Brady in place of all stock originally issued, and in full settlement of all amounts found to be due. After such settlement, although the original stock certificates issued in October, 1873, were not surrendered, they were treated as canceled, and thereafter neither William Brady, nor any one else for him, ever attempted to vote, or assert any right or claim under the said certificates, until the plaintiff in error asserted his pretensions resulting in the present suit. In the summer or fall of 1875, William Brady delivered the original stock certificates, issued as aforesaid in 1873, to the firm of Miller & Co., of New York, who received the same as marginal security in cotton purchases for future delivery, but who are not shown to have paid or advanced any money or other valuable consideration for or on account of the same. The said firm of Miller & Co. asserted no claim under the said certificates until 1884, when the plaintiff in error showed the certificates to the president of the Houston City Street-Railway Company, at the time in New York. The president then told him that said stock would not be recognized, exhibiting an official list of the stock of the company, which did not embrace any of the stock in controversy. August 25, 1884, the vice president and general manager of the railway company by letter notified

Miller & Co. that the stock in question belonged to the canceled files of the company. After this no effort was made to assert any rights under the stock sued on until July, 1888, when a formal demand was made on the company to transfer the stock on the books of the company to the plaintiff in error, which was refused. The demand was renewed in October, 1888, and was again refused. This suit, which is for damages, was instituted on September 16, 1889. Under this showing it is quite clear that the plaintiff in error, representing the firm of Miller & Co., is in no better position to assert title to the stock in controversy than would be Brady himself; and, as to Brady, it cannot be contended that he had any claim whatever on the Houston City Street-Railway Company for and on account of the said stock. As we view the case, it would not have been error in the court below to have instructed the jury to find a verdict for the defendant, for no other verdict was permissible under the issues and evidence. It follows that none of the errors assigned in this court, if otherwise well taken, were prejudicial to the defendant in error, and the judgment of the circuit court is affirmed.

LOUISIANA ELECTRIC LIGHT & POWER CO. v. BASS FOUNDRY & MACHINE WORKS.

(Circuit Court of Appeals, Fifth Circuit. June 20, 1895.)

No. 376.

CONTRACTS—INTERPRETATION.

The B. Co. and the L. Electric Light Co. entered into a written agreement by which certain differences were adjusted, and a sum was fixed as the amount due the former by the latter for machinery sold. It was also provided that, within 40 days, a test of such machinery should be made, and, according to the amount of saving shown over the machinery formerly used by the L. Co., the time of payment of the balance due should be fixed. The test was made more than 40 days later, in consequence of delays by the L. Co., and in a different way from that provided by the agreement, but it was satisfactory to both parties, and the L. Co. took possession of the machinery, and used it, without complaint, and without suggesting any other test, for a longer time than it would have been entitled to delay payment by any result of the test. *Held*, that the B. Co. was entitled to a decree for the balance due.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

This was a suit by the Bass Foundry & Machine Works against the Louisiana Electric Light & Power Company upon a contract. The circuit court rendered a decree for the plaintiff. Defendant appeals.

E. H. Farrar, B. F. Jonas, E. B. Kruttschnitt, and Hewes T. Gurley, for appellant.

R. H. Browne, B. F. Choate, and R. C. Bell, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. The decision in this case depends upon the proper construction of the following contract:

"The differences existing between the Bass Foundry & Machine Works and the Louisiana Electric Light & Power Company are hereby settled and adjusted as follows: It is agreed that there is due the Bass Foundry and Machine Works, upon final adjustment of accounts, as a balance for machinery, boilers, etc., sold, the sum of thirty-nine thousand seven hundred dollars (\$39,700), upon which there is to be credited the following, to put the same in proper condition: Two hundred dollars for steam pipe; five hundred dollars for independent condensers; and Bass F. & M. Works is to furnish a new bed plate for same, to be put in by other party at its own expense, leaving a net balance due Bass F. & M. Works of thirty-nine thousand dollars. For the last-named sum, the Louisiana E. L. & P. Co. is to give this day the sum of fifteen thousand dollars (\$15,000). The Louisiana E. L. & P. Co. is to put an additional supply pipe to the river for one of the condensers, and to cover in proper manner the steam pipes, and do such other work as shall put the plant in proper and economical working condition. When so placed, a test of four days is to be made of the working capacity of the plant under the supervision of experts, to be furnished by Bass F. & M. Works or E. P. Allis & Co., or their representatives, to ascertain the amount of consumption of coal and oil, and the quantity of labor required to operate said machinery, and to ascertain the net saving, if any, per day or month, in the running of said plant over the contract price, for the operation of the same with high-speed engines, as heretofore contracted for. When, if any, the amount is thus ascertained, for the balance of said sum of thirty-nine thousand dollars, after deducting the sum of fifteen thousand dollars, viz. twenty-four thousand dollars, said Louisiana E. L. & P. Co. is to execute its notes, payable monthly, from the date of said test, in equal amounts, for the amounts so saved, as shown by said test; up to said balance of twenty-four thousand dollars, the basis of said test to be the expense of running with 1,000 lights; said last-named notes to be in such amounts and such number as to aggregate said sum of twenty-four thousand dollars. Said Louisiana E. L. & P. Co. is to furnish all coal and labor necessary to make above test, which is to be made not later than forty days from this date or earlier, if possible. It is also understood and agreed that existing vendor's lien shall be retained and reserved in favor of Bass F. & M. Works upon boilers and machinery, until said purchase price thereof shall be paid, and until such time the ownership of said property shall remain in Bass Foundry and Machine Works, and not vest in Louisiana E. L. & P. Co. It is further agreed and understood that the execution of the said notes for the said sum of twenty-four thousand dollars shall be conditional upon said Louisiana Electric Light and Power Company obtaining the contract for the lighting of the streets of New Orleans within the next nine months. If it shall not, then this contract shall be binding only as to said fifteen thousand dollars, and the settlement and adjustment of the differences existing, and the amount due on the purchase price of said property, but otherwise the parties shall stand as though this contract had not been made.

"Executed in duplicate, the second day of April, 1887.

"[Signed]

La. Electric Light & Power Co.

"Jos. Simon, Prest.

"Bass Foundry & Machine Works,

"By J. H. Bass, Pt."

This contract settled and determined the amount due to the Bass Foundry & Machine Works to be paid by the Louisiana Electric Light & Power Company, as follows: \$15,000 in hand, and \$24,000 according to the delays, to be determined by the test provided for, which was to be made in not less than 40 days, but was to be preceded by certain preparations specified to be made by the Louisiana Electric Light & Power Company. The test was not made in 40 days, because the Louisiana Electric Light & Power Company failed and neglected to make the necessary preparations. A test was made at the end of about three months, but only for eight hours, and to ascertain the saving in fuel only, which test, showing decided sav-

ing in the matter of fuel, was satisfactory to the Bass Foundry & Machine Works, and was apparently satisfactory to the Louisiana Electric Light & Power Company. Immediately upon the success of this test, and apparently with the consent of all concerned, the Louisiana Electric Light & Power Company took full possession of the engines and machinery appertaining which before had been in the possession of the makers, Allis & Co., and thereafter said Louisiana Electric Light & Power Company and its assigns have run and operated the same without complaint of any kind, and without suggesting, much less demanding, any further test. The evidence in the case shows that, under the circumstances, a continuous test of four days was impracticable, because the Louisiana Electric Light & Power Company was supplying light mainly about eight hours in the nighttime, during which time only the expense of running with 1,000 lights, as specified in the contract, could be ascertained. The evidence further shows that one test of eight hours was just as good, and bound to be as satisfactory as if the same had been repeated any number of nights; and that, in the matter of oil and labor, there was, of necessity, a decided saving in operating the two Corliss engines over the fifteen or sixteen high-pressure engines with which the comparison was to be made. As the test was to be made for the sole purpose of ascertaining the delays to be accorded the electric light and power company for the payment of the \$24,000, and as the evidence shows that the said company has already had more delay than it would have been entitled to by the results of any test, and yet has paid nothing on account, and still owes for the engines and machinery which it has been using with satisfaction for over eight years, it seems clear to us that the decree of the lower court, which is for the amount of \$24,000, with 5 per cent. interest from the 24th day of January, 1891, is in all respects equitable and just.

The decree appealed from is affirmed, with costs.

PORTER et al. v. MAYFIELD.

(Circuit Court of Appeals, Fifth Circuit. June 25, 1895.)

No. 359.

In Error to the Circuit Court of the United States for the Western District of Texas.

This was an action of trespass to try title under the Texas statute of July 12, 1891, and was brought by Theophilus Porter, Nancy A. Porter, and Cornelia Porter, citizens of Michigan, against Charles H. Mayfield, Henry Hoecke, W. P. Finley, George C. Shoaf, and Mrs. F. R. Noble. Additional parties were brought in as defendants by amendment. At the trial the circuit court directed a verdict for defendants, and judgment was entered accordingly. The plaintiffs bring error.

J. A. Buckler, for plaintiffs in error.

Wm. Aubrey, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. The majority of the judges being of opinion that the record shows no reversible error, the judgment of the circuit court is affirmed.

LEAK GLOVE MANUF'G CO. v. NEEDLES et al.

(Circuit Court of Appeals, Eighth Circuit. June 4, 1895.)

No. 573.

INDIAN TERRITORY—LAWS IN FORCE—PENALTY FOR NOT EXECUTING PROCESS.

Under the act of congress of May 2, 1890, c. 182, § 31 (26 Stat. 81, 93), adopting for the Indian Territory certain statutes of Arkansas, including chapter 60 of the statutes of that state, relating to executions, section 3061, part of said chapter 60, and providing a penalty for the failure of an officer to whom an execution is delivered to execute or to return the writ, is an act of congress within the territory, of the same force and effect as if adopted by congress, without any reference to the Arkansas statutes, and is to be enforced by the United States court, as such.

In Error to the United States Court in the Indian Territory.

This was an action by the Leak Glove Manufacturing Company, for the use of J. P. Baden, and J. P. Baden, against Thomas B. Needles, United States marshal for the Indian Territory, and others, for a failure to execute process. Judgment was rendered for the defendants in the United States court in the Indian Territory. Plaintiffs bring error. Reversed.

Jo Johnson filed brief for plaintiffs in error.

William T. Hutchings, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge. The Indian Territory was without a government, except such as obtained among the several Indian tribes and nations occupying the country. The jurisdiction of the Indian courts was restricted to Indians. There was no court which could exercise civil jurisdiction over white men or their property. Out of deference to treaty obligations, probably, congress forebore to give that territory the customary territorial government. It is still without an executive or legislative department. The act of congress of March 1, 1889, c. 333 (25 Stat. 783), provided for the appointment of a judge, attorney, marshal, and clerk for the territory. The marshal was required to give bond "in the sum of ten thousand dollars conditioned as by law required in regard to the bonds of other United States marshals." It was further provided:

"That the practice, pleadings and forms and modes of proceeding in civil causes shall conform, as near as may be, to the practice, pleadings and forms of proceeding existing at the time in like causes in the courts of record in the state of Arkansas, any rule of the court to the contrary notwithstanding."

It will be observed that this act created a court and adopted a code of procedure, but did not adopt any substantive laws for the court to enforce, or by which the rights and obligations of the citizens in the territory, subject to the jurisdiction of the court, should be regulated and determined. In the exercise of its exclusive powers of legislation for the territory, congress, by the act of May 2, 1890, c. 182, § 29 et seq. (26 Stat. 81, 93), for the purpose of remedying the defects in the first act, enacted a complete code of substantive laws for the

territory, to be administered by the court it had previously created. This code of laws was taken from the Revised Statutes of the state of Arkansas, and it embraced the body of the statute law of that state. These statutes were adopted and put in force in the territory by reference to the title and number of the chapter as the same appear in the Revised Statutes of Arkansas.

Omitting the title and number of the chapters which have no reference to this case, the thirty-first section of the act reads as follows:

"Sec. 31. That certain general laws of the state of Arkansas in force at the close of the session of the general assembly of that state of 1883, as published in 1884 in the volume known as Mansfield's Digest of the Statutes of Arkansas, which are not locally inapplicable or in conflict with this act or with any law of congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory until congress shall otherwise provide, that is to say, the provisions of the said general statutes relating to * * * executions, chapter sixty, * * * and wherever in said laws of Arkansas the courts of record of said state are mentioned, the said court in the Indian Territory shall be substituted therefor; and wherever the clerks of said courts are mentioned in said laws the clerk of said court in the Indian Territory and his deputies, respectively, shall be substituted therefor; and wherever the sheriff of the county is mentioned in said laws the United States marshal of the Indian Territory shall be substituted therefor, for the purpose, in each of the cases mentioned, of making said laws of Arkansas applicable to the Indian Territory."

It will be observed that the act expressly adopts as a law for the Indian Territory the provisions of "the General Statutes of Arkansas relating to * * * executions, chapter sixty." Section 3061 of Mansfield's Digest is a part of chapter 60, entitled "Executions," and reads as follows:

"If any officer to whom execution shall be delivered, shall neglect or refuse to execute or levy the same according to law, or shall take in execution any property, or if any property be delivered to him by any person against whom an execution may have been issued, and such officer shall neglect or refuse to make sale of the property so taken or delivered according to law, or if any such officer shall not return any execution on or before the return day therein specified, or shall make a false return thereof, then, and in any of the cases aforesaid, each officer shall be liable and bound to pay the whole amount of money in such execution specified or thereon endorsed and directed to be levied, and it shall be the duty of the clerk of the court from which any execution may be issued to endorse thereon the time when such execution was returned."

The only question in this case is whether it is the duty of the United States court in the Indian Territory to give effect to this statute. There would seem to be no room for two opinions on this question. Section 3061 of Mansfield's Digest is the law of the Indian Territory, just as much as if it had been enacted by congress in *haec verba*. It is a mistake to suppose that chapter 60, containing the section in question, is to be treated in the Indian Territory as an Arkansas statute, as would be the case if a question should arise under it in the circuit court of the United States for the district of Arkansas. In the Indian Territory it is an act of congress, and has the same force and effect as if it had been originally adopted by congress without any reference to its prior existence in the state of Arkansas. The act of congress adopting an entire code of laws for the Indian Territory is not to receive the limited and restricted construc-

tion placed upon the process acts (section 914, Rev. St.), which merely required the circuit courts to conform the practice and pleadings in those courts to the practice and pleadings in the state courts "as near as may be." The act adopts in terms chapter 119, entitled "Pleading and Practice," which embraces the entire Civil Code of Procedure of Arkansas. It does not, however, stop with the adoption of the Code of Procedure, as does section 914 of the Revised Statutes, regulating the procedure of the courts of the United States in the states, but it adopts the body of the substantive laws of the state, among which is the chapter on executions we are considering. The power of congress to put this law in force in the territory is not questioned. It is the only legislative body in existence that can pass laws for that territory. The law is not locally inapplicable or in conflict with the act of congress adopting it, nor is it in conflict with "any law of congress relating to the subjects specially mentioned in" section 31. It is cumulative, and not in conflict with the remedy given by law on the bond of the marshal. The two remedies may coexist. They are different, but not conflicting, remedies. In the state from which the statute was taken, the sheriff and his sureties may be sued at law on the sheriff's bond for any official delinquency, or he and his sureties may be proceeded against summarily, as provided by chapter 60, § 3061, Mansf. Dig. *Norris v. State*, 22 Ark. 525; *Herr v. Atkinson*, 40 Ark. 377; *Atkinson v. Heer*, 44 Ark. 174; *Jett v. Shinn*, 47 Ark. 376, 1 S. W. 693; *Hawkins v. Taylor*, 56 Ark. 45, 19 S. W. 105; *Jones v. Goodbar* (Ark.) 29 S. W. 462.

In the case of *Gwin v. Breedlove*, 2 How. 29, 35, the court said:

"It has therefore never been true that a suit on his bond, governed by the acts of congress, furnished the exclusive remedy as against the marshal himself; and we think that congress intended by the new process act of 1828 to add the cumulative remedies, then existing by statute, in the new states, where they could be made to apply, because they were more familiar to the courts and country, and better adapted to the certain and speedy administration of justice. In our opinion, the act of Mississippi authorizing a judgment, by motion, against a sheriff for failing to pay over moneys collected on execution to the party on demand, or into court at the return day, was adopted by the act of 1828, and does apply in a case like the present, as a mode of proceeding in the courts of the United States held in the district of Mississippi, and could be enforced against the marshal in like manner it could be against a sheriff in a state court."

That the penalty of the law is severe does not affect its validity or prevent congress from putting it in force in the Indian Territory. The rule that the courts of one government will not enforce penalties prescribed by the laws of another has no application to this case, because here the courts were created and the law enacted by the same government.

In the case of *Gwin v. Barton*, 6 How. 7, 10, Chief Justice Taney, speaking for the court, said:

"In the case referred to [*Gwin v. Breedlove*, 2 How. 29], the court held that, so far as the statute of Mississippi authorized a summary process against the marshal himself to enforce the payment of the debt, interest, and costs for which he was liable by reason of his default, it was adopted by the act of congress of 1828; but that the courts of the United States could not enforce the

payment of a penalty imposed by the state law, in addition to the money due on the execution. And in the same case the court further held that such summary proceedings against the sureties of a marshal would be repugnant to the act of congress of April 10, 1806; and that, if the plaintiff in the execution sought to charge the sureties for the default of the marshal, he must proceed regularly by action, and obtain his judgment in the manner and form pointed out by that law."

This case and the case of *Gwin v. Breedlove*, supra, decided no more than that the act of 1828 (section 914, Rev. St.), requiring that the practice and pleadings and forms and modes of proceeding in the courts of the United States shall conform to the state law "as near as may be," does not adopt a state law inflicting penalties on a sheriff, or authorizing summary proceedings against a sheriff and his sureties, though it does authorize a summary proceeding, and judgment against the marshal himself. The compulsory adoption of the state practice in the courts of the United States by section 914 of the Revised Statutes has not always been looked upon with favor by those courts. The clause "as near as may be" in that section has received a liberal interpretation, and, as a consequence of such an interpretation, the practice of the circuit courts has diverged from the practice of the state courts in a good many respects. *Walker v. Collins*, 8 C. C. A. 1, 59 Fed. 70, and cases there cited. But, for the reasons heretofore stated, the decisions in the cases of *Gwin v. Breedlove* and *Gwin v. Barton*, and the other cases limiting the operation of the process act, can have no effect when the law imposing the penalty and prescribing the mode of proceeding has in terms been adopted by congress for a territory. Congress can impose a penalty on the marshal of a territory for official delinquency, and provide for the enforcement of the same against him and his sureties in a summary mode. These are matters resting in the discretion of congress. The mode of proceeding adopted in this case was that which has long been pursued in the state from which the statute was taken, and the presumption is that it was adopted with the construction placed upon it by the state court prior to its adoption by congress. *Sanger v. Flow*, 4 U. S. App. 32, 1 C. C. A. 56, and 48 Fed. 152.

The judgment of the United States court in the Indian Territory is reversed, and the cause remanded, with instructions to grant a new trial.

FIREMAN'S FUND INS. CO. et al. v. NORWOOD et al.

(Circuit Court of Appeals, Eighth Circuit. June 17, 1895.)

No. 501.

INSURANCE—WAIVER OF CONDITIONS—ESTOPPEL.

One S., the general agent of certain insurance companies, called upon plaintiff and asked to be allowed to place some of the insurance on plaintiff's stock. He inquired how much insurance plaintiff intended to carry, and plaintiff told him \$40,000, and subsequently authorized him to place \$10,000 of such insurance. S. afterwards delivered to plaintiff policies, including two of \$2,500 each, to which were attached riders allowing other

insurance to the amount of \$27,500, and which both contained the condition that if the assured should have or afterwards effect other insurance, without the written consent of the company, the policy should be void, and which also provided that only certain specified officials should have authority to waive or modify the conditions of the policy. When plaintiff received the policies, he examined them to see that the amounts were correct, but, relying on his conversation with the agent, did not examine them further, and placed them in his safe. *Held*, that by delivering the policies with knowledge, through their agent, of the amount of insurance intended to be taken, the companies waived the condition as to other insurance, and were estopped to set the same up, after a loss; plaintiff having a right to rely on such knowledge of the agent. *Per* Caldwell and Thayer, Circuit Judges. Sanborn, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Kansas.

Separate suits were brought by O. F. Norwood and E. R. Norwood, the defendants in error, against the Fireman's Fund Insurance Company and the Norwich Union Fire Insurance Society, the plaintiffs in error, to recover alleged losses on policies of fire insurance on a stock of merchandise issued by these companies, respectively, to the defendants in error. By agreement of the parties, the suits were consolidated and tried as one cause. The policy issued by the Fireman's Fund Insurance Company bore date November 5, 1891, and contained the following conditions: "If the assured shall have or shall hereafter make any other insurance, whether valid or not, on the property hereby insured, or any part thereof, without the consent of the company written hereon, this policy shall be void. * * * All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claims under this policy. * * * And it is hereby understood and agreed by and between this company and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specially provided for in writing. It is further understood and made a part of this contract that only the manager of this company at Chicago has authority to waive, modify, or strike from this policy any of its printed conditions, nor is the consent of an agent to an increase of risk binding upon the company until the same is indorsed in writing upon the policy and the increased payment paid; and, in case this policy shall become void by reason of the violation of any of the conditions thereof, it is understood that only the said manager has power to revive the same, and that a new policy intended to replace any policy so made void shall be of no effect until the actual issue and delivery thereof to the assured, any contract by parol or understanding with the agent to the contrary notwithstanding." The policy issued by the Norwich Union Fire Insurance Society bore date November 5, 1891, and contained the following conditions: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void, if the insured new has, or shall hereafter make or procure, any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy. * * * This entire policy shall be void in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after loss. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto, and no officer or agent or other representative of this company shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provision and conditions, no officer, agent, or representative shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached." To each policy was attached a slip or rider allowing \$27,500 ad-

ditional insurance. The total insurance on the stock at the time of the fire was \$38,300. W. B. Smith was the general agent of the defendants at Larned, Kan., where the plaintiffs were carrying on a mercantile business. A witness testifies that: "Mr. W. B. Smith came to me and wanted me to see Mr. Norwood and see if he would not let him have a part of the insurance. He said he was placing a large amount of insurance, and came to me and insisted that I should go and see Mr. Norwood and have him give him some of the insurance. He said to me that these people were carrying a large amount of insurance, and that he presumed that they would carry about the same amount as last year. I says, 'You are well acquainted with him, and you can go and have a talk with him'; and I says, 'I presume likely that if he is not bound up he will let you have some of it.'" One of the plaintiffs testifies as follows: "Mr. Smith came into the store and asked me if he could take out some insurance on the stock. I told him I had made arrangements with Mr. Ormandy to look after the insurance for me, and then he says he wanted to know how much insurance we were going to carry, and I told him forty thousand dollars. After a little while longer, I says: 'I will tell you what I will do, Mr. Smith. I will go and see Mr. Ormandy, and if it is satisfactory to him I will let you have a portion of the insurance.' I went right from Mr. Ormandy's office to Mr. Smith's office, and saw him there, and told him that I had seen Mr. Ormandy, and that it was satisfactory to him, and I would let him carry ten thousand dollars on my stock." Policies in four different companies for \$2,500 each, amounting to the \$10,000, were soon thereafter delivered by Smith, the agent, to the insured, who, after looking at their face to see that the amount was correct, put them in their safe, and did not know until after the fire that the policies limited concurrent insurance to \$27,500, instead of \$40,000, as the insured had stated to the agent, Smith. No exception was taken to the charge of the court. Exception was duly saved to the refusal of the court to give the following instructions asked by the defendants: "If you find that, after said policy was issued, plaintiffs procured other insurance, which made the aggregate amount of insurance on said policy exceed thirty thousand dollars, and that provision therefor was not indorsed on the policy, then plaintiffs are not entitled to recover, although they may have informed the agent, before the policy was issued, that they desired or expected to carry forty thousand dollars of insurance on said stock, and the agent orally assented thereto, and your verdict must be for the defendant company." "You are instructed that it is admitted by the pleadings that at the time of the fire plaintiffs had insurance on said stock amounting to thirty-eight thousand three hundred dollars. Now you are instructed that mere parol notice to defendants' agent, Smith, before said policy was issued, that plaintiffs desired or expected to carry on said stock of goods more than thirty thousand dollars, and the statement from Smith that the same would be all right, was not of itself sufficient to comply with the requirement of said policy, but it was necessary, in case plaintiffs procured more than thirty thousand dollars insurance on said property, that the same should not only be notified to defendants, but should be mentioned in or indorsed upon the policy, otherwise the policy was void and of no effect." Among other defenses, the answer set up these two: (1) Other insurance for which written consent had not been indorsed on the policy; and (2) a fraudulent overvaluation of the goods in the proofs of loss. In the circuit court the first defense seems to have been the one chiefly relied on. The jury found the property was worth all the plaintiffs claimed it was, and the evidence abundantly supports the finding; and the second defense need not be further noticed.

M. A. Fyke (Ed. E. Yates and C. V. Fyke, on the brief), for plaintiffs in error.

C. N. Sterry (W. H. Vernon, on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Upon the evidence and the authorities, it cannot be controverted that Smith was the general agent of the defendants, and that whatever he said and did in soliciting, issuing, and delivering the policies in suit, and collecting the premiums, has the same legal effect as if done by the company itself. The material question in the case is whether the instructions asked by the defendants, and which we have set out in the statement, should have been given. The contention of the plaintiff in error is that the condition in the policy that "if without written consent hereon there is any prior or subsequent insurance, valid or invalid, on said property, this policy shall be void," cannot be waived by parol, and that nothing that the defendants' agent may have said or known or verbally agreed to in relation to prior or subsequent insurance can operate to effect or avoid this condition, either by way of waiver or estoppel or as a new contract; but that there must be a written consent indorsed on the policy, as provided in the condition, or other insurance avoids the policy. In the early case of *Carpenter v. Insurance Co.*, 16 Pet. 495, which is the first case cited in the brief of the plaintiffs in error, it is held by the supreme court of the United States that the requirement of written consent cannot be waived by parol, but must be indorsed in writing on the policy; and in some early cases in the state courts the same doctrine was maintained, and is probably still maintained in Massachusetts and Rhode Island, although the supreme court of the latter state in a recent case concedes that it is against the weight of authority. In *Reed v. Insurance Co. (R. I.)* 24 Atl. 833, the court said:

"The first question is whether the defendant company is estopped from setting up the clause in question by notice to itself of the prior insurance at the time the policy was issued. * * * The same question was decided in *Greene v. Insurance Co.*, 11 R. I. 434, where it was held that a mistake in a policy, limiting the amount of insurance, after due notice to the company of a larger amount, might be shown in evidence by way of estoppel. The ground of the decision was that it would be a kind of fraud for the insurers to insist upon a forfeiture for which they were more blamable than the insured. It would be taking advantage of one's own wrong. We see no reason to question that decision, and, following it, we must hold the first replication to be good. * * * The fourth replication raises the question, of greater difficulty, whether the fact that the plaintiff informed the agent of the defendant company, who procured the insurance, of the existence of other insurance, is a sufficient answer to the plea setting up the clause of the policy as to other insurance, and alleging the breach of it. Upon this point we think the tendency and weight of modern decisions are in favor of the plaintiff. * * * There is much room for doubt, therefore, whether public policy requires the adoption of a rule which treats a contract of insurance differently from any other contract in writing. But, however this may be, we recognize the tendency of decision in favor of the insured, and, if this were a new question in this state, we might feel compelled to yield to the weight of authority."

The early doctrine on this subject has been so generally denied and repudiated by the courts of the country, state and federal, that it has come to be regarded as overruled and obsolete. Among the decisions of the supreme court of the United States which effectually dissipate the doctrine of *Carpenter v. Insurance Co.*, supra, attention may be called to the cases of *Insurance Co. v. Wilkinson*, 13

Wall. 222; *Insurance Co. v. Norton*, 96 U. S. 234; *Eames v. Insurance Co.*, 94 U. S. 621. In the case last cited the supreme court say:

"According to the views expressed by this court in *Insurance Co. v. Wilkinson*, 13 Wall. 222, and other more recent cases, the defendant was concluded by the act of its agent. The reference to collateral insurance in other companies is subject to the same consideration. The insurance was being applied for through this very agent who wrote the answers, and who knew the whole facts, and between whom and the general agent they had been referred to in their correspondence. The defense on this ground is utterly destitute of equitable consideration."

The cases in this court to the same effect are *Insurance Co. v. Snowden*, 7 C. C. A. 267, 58 Fed. 342; *Insurance Co. v. Robison*, 7 C. C. A. 444, 58 Fed. 723; *Assurance Soc. v. Winning*, 58 Fed. 541, 7 C. C. A. 359, 19 U. S. App. 173.

The rule deducible from the great weight of modern authority is that if, before or after the policy is issued, the agent has notice of the amount of insurance which the insured is carrying or intends to carry on the property insured, and makes no objection thereto, the company will be estopped from claiming a forfeiture, after there is a loss, upon the ground that such prior or subsequent insurance, of which its agent had notice in fact, was not indorsed in writing on the policy. When notified that other insurance has been or will be obtained, it is open to the agent, if the policy has not been issued, to decline the risk, or, if it has been issued, to cancel the policy. The company cannot after such notice accept and retain the premium, and when a loss occurs avoid the policy because its agent had not indorsed thereon the company's consent to the prior or subsequent insurance of which he had notice. It is contended that consent to other insurance cannot be proved by oral evidence—First, because the policy provides that it shall be in writing indorsed on the policy; and, second, because it would violate the rule against the reception of oral evidence to contradict or vary a written instrument. But it has been authoritatively decided that a contract of insurance is not within the statute of frauds, and may be by parol. *Commercial Ins. Co. v. Union Mutual Ins. Co.*, 19 How. 318; *Insurance Co. v. Shaw*, 94 U. S. 574; *Henning v. Insurance Co.*, 2 Dill. 26, Fed. Cas. No. 6,366. And if it can be made by parol, it may be varied by parol. Parties to contracts cannot disable themselves from making any contract allowed by law in any mode the law allows contracts to be made. A written contract may be changed by parol, and a parol one changed by a writing, despite any provision in the contract to the contrary.

"A written bargain is of no higher legal degree than a parol one. Either may vary or discharge the other, and there can be no more force in an agreement in writing not to agree by parol than in a parol agreement not to agree in writing. Every such agreement is ended by the new one which contradicts it. *Insurance Co. v. Earle*, 33 Mich. 153. See, to the same effect, *Insurance Co. v. McCrea*, 8 Lea, 513; *Insurance Co. v. Norton*, 96 U. S. 234; *Pechner v. Insurance Co.*, 65 N. Y. 195; *Insurance Co. v. Wilkinson*, 13 Wall. 222."

In *Insurance Co. v. Norton*, supra, the policy contained a condition that, unless otherwise expressly agreed in writing, it should be

null and void if the premiums were not paid on the days mentioned in the policy, and also the further condition that "agents of the company are not authorized to make, alter, or abrogate contracts, or waive forfeitures." The insured in that case made an application to the company's agent for an extension of time to pay the premium note, and the agent answered "All right." Parol evidence was offered to prove this fact, and the further fact that it was the practice of the defendant's agent to extend the time of payment of premium notes, and that the company had knowledge of this practice. The defendant moved to strike out this testimony because it was "in conflict with the terms of the policy, and as showing no authority in Frary [the agent] to give the alleged consent." Answering this objection, the supreme court said:

"But a party always has the option to waive a condition or stipulation in his own favor. * * * And whether it did exercise such option or not was a fact provable by parol evidence as well as by writing, for the obvious reason that it could be done without writing."

Nor can parties by their contracts debar themselves of the right to prove their cause of action or defense by any species of evidence which the law declares to be competent and legal. The application of this doctrine is not always invoked in the interest of the insured. It is applied for the protection of the insurer as well. In *Emerigon on Insurance* (Meredith's translation, pp. 607, 608) it is said:

"The agreement that the insurer shall abide by the affirmation of the assured on the subject of the disaster is unlawful, for no one may be a witness, and still less the sole witness, in his own case. But agreement to abide by the attestation of the captain is valid, saving the right to produce proof to the contrary."

Parol evidence that the company had knowledge of and consented to other insurance is not introduced to contradict or vary the written conditions.

It is every day practice to receive parol evidence to establish or overthrow written instruments, or to show that some claim based thereon has been waived by the party claiming under it, or that he has so acted towards the other party that he is estopped from setting up the claim. In all such cases the existence of the contract is neither denied nor its terms sought to be varied by parol. The condition in this policy is admitted, but the insured says the insurance company, by delivering the policy and receiving the premium thereon with notice of the other insurance then existing or thereafter to be obtained, thereby gave its consent to such other insurance, and asserted the validity of the policy, and it cannot be heard after the loss to say that the policy is void. "This act," says the New York court of appeals, "may be called a waiver, or may be treated as an estoppel." *Pitney v. Insurance Co.*, 65 N. Y. 6.

The company cannot play fast and loose. It cannot issue a policy which is valid for the purpose of receiving the premiums, but invalid when it comes to pay a loss. In *May on Insurance* (section 497) the rule is stated thus:

"To deliver a policy with full knowledge of facts upon which its validity may be disputed, and then to insist upon these facts as ground of avoidance, is to attempt a fraud. This the courts will neither aid nor presume; and, when the alternative is to find this, or to find that, in accordance with honesty and fair dealing, there was an intent to waive the known ground of avoidance, they will choose the latter."

In the case of *Carrugi v. Insurance Co.*, 40 Ga. 135, a policy contained a condition similar to those in the policies in suit. The lower court charged the jury:

"That, if Carrugi had the agent's verbal consent to insure his property in other companies, that subsequent insurance did not work a forfeiture, although no notice of this additional insurance was given to the agent after it was made."

The supreme court affirmed the soundness of this instruction, saying:

"Consent to prior or subsequent insurance is within that scope [of the agent's authority], as the every-day practice of the country proves; and if an agent does in fact so consent, and the insured in good faith acts upon it, we think it is fraud upon the insured for the company to set up that they had stipulated the consent to be in writing."

The injunction of the law is upon every man not to perpetrate fraud. If, notwithstanding this injunction of the law, he seeks to use any stipulation in a contract in a manner that will absolve him from an honest obligation, and enable him to perpetrate a fraud upon an innocent party whom he has misled by his fraudulent conduct, a court of justice will not lend its assistance to effectuate the fraud, but will hold him estopped to make such an unconscionable use of the contract. It is not in the power of an insurance company to abolish the law of estoppel or of waiver, or exempt itself from its operation, by any provision or condition that it can insert in its policies. The chief office of estoppel or of waiver is to prevent the consummation of fraud, and, when the facts bring the case within the well-settled rules on this subject, no stipulation of the contract can be used to stay its operation. Public policy and sound morality forbid that any stipulation in a contract shall, either in terms or by construction, have the effect to preclude a party who has been deceived and defrauded by the other party to the contract from setting up such fraud by way of estoppel or waiver, or as a defense, as may be indicated by the rules of law applicable to the case. *Bridger v. Goldsmith* (N. Y. App.) 38 N. E. 458; *Fashion Co. v. Skinner*, 64 Hun, 293, 19 N. Y. Supp. 62; *Hofflin v. Moss* (at the present term), 14 C. C. A. 459, 67 Fed. 440.

It is next said that it was the duty of the insured to examine the policies at the time the agent delivered them, and see that he had made the required indorsement in relation to other insurance, and that, not having done so, they are conclusively bound by the condition. The law imposed no absolute duty on the insured to see what indorsement the agent had put on the policy in relation to other insurance. The insured had done their duty in the premises. They had imparted to the agent the requisite information to enable him to make the proper indorsement. It was his duty to make it in conformity to the information given him, and the insured had a right

to rely upon his performing that duty, and his failure to do so, whether the result of a mistake or of a deliberate fraud, cannot operate to the prejudice of the insured. The contract of insurance is pre-eminently one that should be characterized by the utmost good faith on both sides. There is no rule of law requiring the business world to deal with insurance agents upon the assumption that they are cheats and frauds. The presumption is that they are reasonably intelligent and honest men, who know and perform their duty both to the insurer and to the insured, and the company cannot escape payment of the loss merely because the insured acted upon this presumption. In answer to a similar contention, the supreme court of Pennsylvania said:

"We cannot say that the law, in anticipation of a fraud upon the part of a company, imposed any absolute duty upon Kister to read his policy when he received it, although it would certainly have been an act of prudence on his part to do so. *Insurance Co. v. Bruner*, 23 Pa. St. 50; *Insurance Co. v. Wilkinson*, 13 Wall. 222. One thing is certain, however, the company cannot repudiate the fraud of its agent, and thus escape the obligations of a contract consummated thereby, merely because Kister accepted in good faith the act of the agent without examination."

In the case of *Insurance Co. v. Steiger*, 26 Ill. App. 228, the same question arose, and the court said:

"Plaintiff's testimony that defendants' agent called on him, and solicited a renewal, and asked how much insurance he already had; that he said he did not know, but referred the agent to two other agencies in the city for information; that a few days later he found on his desk the policy in suit, and that, supposing it to be properly drawn, he placed it in his safe without examination,—supports a finding for the plaintiff on the defense of other insurance not allowed by the policy."

It would serve no useful purpose, and protract this opinion to an unjustifiable length, to cite all the cases pro and con on the question of waiver of such conditions. The cases are collected in *May, Ins.* §§ 369, 370; *Brown, Par. Ev.* § 48; *Carpenter v. Insurance Co.*, 2 *Am. Lead. Cas.* p. 911. Of the very many cases supporting the conclusions reached we content ourselves with referring to the following: *Insurance Co. v. Mathews*, 8 *Lea*, 499; *Pechner v. Insurance Co.*, 65 *N. Y.* 195; *Short v. Insurance Co.*, 90 *N. Y.* 16; *Havens v. Insurance Co.*, 111 *Ind.* 90, 12 *N. E.* 137; *Insurance Co. v. Lyons*, 38 *Tex.* 253; *Morrison v. Insurance Co.*, 69 *Tex.* 353, 6 *S. W.* 605; *Bennett v. Insurance Co.*, 70 *Iowa*, 600, 31 *N. W.* 948; *Fishbeck v. Insurance Co.*, 54 *Cal.* 422; *West Coast Lumber Co. v. State Inv. & Ins. Co.* (*Cal.*) 33 *Pac.* 260; *Insurance Co. v. Earle*, 33 *Mich.* 143; *Insurance Co. v. Luttrell*, 89 *Ill.* 314; *Viele v. Insurance Co.*, 26 *Iowa*, 9, and note.

A statement and examination of the exceptions to the ruling of the court in admitting and rejecting evidence is not necessary, as none of them is of any general importance. They have all been carefully considered, and we are satisfied they are without merit. The judgment of the circuit court is affirmed.

SANBORN, Circuit Judge (dissenting). Does the statement of the insured that he intends to increase his insurance to a fixed amount,

made in the parol negotiations that eventuate in a subsequent written policy, which contains a written consent to all the concurrent insurance in existence at its date, but which also contains the usual provision that the company shall consent to any subsequent increase of the insurance above the amount stipulated, or the policy shall be void, estop the company from enforcing the latter provision, or waive, in advance of the execution of the policy, the contract right the policy purports to secure by this provision? The majority of the court answer this question in the affirmative. With great respect for their opinion, I find myself unable to concur in that view. I think the proposition they maintain is unsound for two reasons: First, because it deprives parties of the right to make a contract that is neither immoral, illegal, nor in contravention of public policy; and, second, because it contravenes the settled rule that written contracts shall prevail over the previous oral negotiations from which they result. Such a statement of intention to obtain, even an agreement, made in the previous parol negotiations, to allow, concurrent insurance, is merged in the subsequent written contract evidenced by the policy, and is not available to the insured in an action on the policy, either as a representation, an agreement, an estoppel, or a waiver. *Havens v. Insurance Co.*, 111 Ind. 90, 12 N. E. 137; *Laclede Fire-Brick Manuf'g Co. v. Hartford Steam-Boiler Inspection & Ins. Co.*, 9 C. C. A. 1, 60 Fed. 352, 358; *Insurance Co. v. Mowry*, 96 U. S. 544, 547, 549; *Insurance Co. v. Lyman*, 15 Wall. 664, 669; *Thompson v. Insurance Co.*, 104 U. S. 252, 259; *Lewis v. Insurance Co.*, 39 Conn. 100; *Pearson v. Carson*, 69 Mo. 550; *Tracy v. Iron-Works Co.*, 104 Mo. 193, 16 S. W. 203; *Insurance Co. v. Neiberger*, 74 Mo. 167; *White v. Ashton*, 51 N. Y. 280; *White v. Walker*, 31 Ill. 422; *Faxton v. Faxon*, 28 Mich. 159.

The policies in suit expressly allowed the existence of \$27,500 of insurance concurrent with each of them. The amount of concurrent insurance which the insured had when these policies were issued, including the four policies issued at that time, did not exceed \$27,500, and the policies were valid in their inception. The insured subsequently increased their insurance concurrent with each of these policies to \$34,800, so that their total insurance was \$38,300; but they never notified the companies or their agent of this increase until after the fire. There is no charge in the pleading, and no proof in the record, that the insured were induced not to read these policies or to enter into the contracts they evidence by any misrepresentation, deceit, or fraud of the companies or their agent. The entire plea on this subject that the insured make is:

"These plaintiffs allege and show to the court that they contracted with the agent of the defendant, authorized by defendants so to contract, for said insurance, under a statement and agreement made at the time, and concurrent with said contract and a part thereof, that the total insurance, including the policy issued by defendant, upon the property insured of the plaintiffs, should amount in the aggregate to the sum of forty thousand dollars, and that the policy of the defendant to be issued to the plaintiffs should contain an agreement for such additional and concurrent insurance as that the policy to be issued by the defendant would amount in the aggregate to forty thousand dollars, and that thereafter, and upon receipt of said policy, the plaintiffs, rely-

ing upon said contract and agreement so made as aforesaid, received and accepted said policy from the defendant upon the belief that said agreement had been fully carried out, and that said policy permitted concurrent and additional insurance so as aforesaid agreed upon, and, so relying upon such contract and agreement, the plaintiffs wholly failed and neglected to read said policy until after the occurrence of the fire which destroyed the property covered thereby. That, by reason thereof and of the facts aforesaid, the defendant ought not now to be permitted to assert as a defense in this action the facts set forth in the fourth defense contained in said answer, for it is estopped to deny its liabilities on the grounds and for the reasons therein stated."

If this plea is good, any party to a written contract may rely upon the oral statements made in the preliminary negotiations to it, fail to read his contract, and the previous oral negotiations will always prevail over the written agreement.

The proof is weaker than the plea. It is that the agent of the companies applied to the insured for the privilege of writing insurance upon their stock; that, in answer to a question by the agent, one of the insured said that they were going to carry \$40,000 insurance; and that, after the latter had indulged in a conversation with another agent at another place, he went to the office of the agent of these companies, and told him that he would let him carry \$10,000 on their stock. The provision which contained the consent of the companies to the \$27,500 other insurance was written upon slips attached to the policies. Some days after the preliminary conversation just referred to, the policies were delivered to one of the insured. He testified:

"I looked at the face of the policies, and saw the amount, and put them in the safe. Q. What do you mean by the face of the policies? A. The written portion. Q. On the inside or outside? A. On the outside. Q. When did you for the first time ever learn that these policies limited the concurrent insurance to twenty-seven thousand five hundred? A. I think it was a day or so after the fire."

There is no doubt that there are cases where one party to a written contract has been so imposed upon by the fraudulent representations of its contents, or by some artifice or deceit of the other party, which prevents him from reading it, that he may be excused for ignorance of its contents. But I cannot subscribe to the proposition that a mere statement or agreement as to the terms of the proposed contract, made in the preliminary oral negotiations which result in the subsequent written contract, will excuse either party from reading the contract when it is delivered, or will reverse the settled rule that the written contract must prevail over the preliminary negotiations. It is the duty of every party to a contract to read it and to know its contents when he has an opportunity to examine it before he accepts it, and in the absence of fraud, concealment, or misrepresentation as to its contents he must be conclusively presumed to have knowledge of them. Contracts for insurance furnish no exception to this rule. *Morrison v. Insurance Co.*, 69 Tex. 353, 359, 6 S. W. 605; *Quinlan v. Insurance Co.*, 133 N. Y. 356, 365, 31 N. E. 31; *Wilcox v. Insurance Co. (Wis.)* 55 N. W. 188; *Fuller v. Insurance Co.*, 36 Wis. 599, 604; *Herbst v. Lowe*, 65 Wis. 321, 26 N. W. 751, 754; *Hankins v. Insurance Co.*, 70 Wis. 1, 2, 35 N. W. 34; *Herndon v. Triple Alliance*, 45 Mo. App. 426, 432; *Palmer v. Insurance Co.*, 31

Mo. App. 467, 472; Insurance Co. v. Yates, 28 Grat. 585, 593, 594; Ryan v. Insurance Co., 41 Conn. 168, 172; Barrett v. Insurance Co., 7 Cush. 175, 181, 182; Holmes v. Insurance Co., 10 Metc. (Mass.) 211, 216; Insurance Co. v. Swank, 12 Ins. Law J. 625, 627; Insurance Co. v. Hodgkins, 66 Me. 109, 112, 113; Insurance Co. v. Neiberger, 74 Mo. 167, 173; Beach, Ins. § 414 and cases cited. The entire plea and all the evidence in the record that it is claimed tends to show the fraudulent misrepresentation that excused the insured from reading their policies is set forth above. This evidence does not show that the agent of the companies promised or represented that the policies would contain a provision that would allow the insured to carry \$40,000 insurance, and, even if he had made such a promise, it would not have constituted a fraudulent representation that would avoid the provision on that subject actually inserted in the policy, or that would excuse the insured from reading it. Fraud cannot be predicated of such a promise or prophecy. Railway Co. v. Barnes, 12 C. C. A. 48, 50, 64 Fed. 80; Kerr, Fraud & M. p. 85, note 3; Sawyer v. Prickett, 19 Wall. 146, 163. It is not the misrepresentation of an existing fact. It is not calculated to impose upon the insured, or to prevent them from reading their policy and learning whether or not the promise is performed. If, when the policy is delivered, they do not read it, it is their own negligence, and not the previous promise of the agent, that is the proximate cause of their ignorance of its contents, and they cannot be relieved from the effect of their carelessness on the ground of alleged fraud, because none exists. Thus it appears that there was neither allegation nor proof that the insured were induced to fail to read these policies by any deceit or fraudulent misrepresentations of the companies or their agent as to their contents, and this case presents the naked question whether or not a statement of an intention to increase insurance, made by the insured in the preliminary negotiations which result in a written policy, will estop the insurance company from making or enforcing the usual provision that it shall have notice of and consent to any increase after the policy is issued, or the policy shall be void.

It is conceded that there is much reason and authority for the rule that where, at the time of the issue of a policy, concurrent insurance exists, to an amount in excess of the amount allowed by the policy, and that fact is known to the agent when he issues it, and also where, after the issue of the policy, the concurrent insurance is increased above the amount permitted, and notice of that fact is given to the agent, and, by his verbal agreement to indorse the permission, or by like action, he leads the insured to believe that the company consents to the increase, the company is estopped to enforce the provision that the policy is void for lack of its consent, or will be held to have waived the provision. There is reason and justice in this rule. It is founded on the proposition that it is a fraud for an insurance agent to issue a policy that he knows to be void in its inception. This rule, however, is radically different from the proposition that when, in the parol negotiations preliminary to a written contract, one party announces his intention to do an act

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in the future that is material to the contract, the other party is estopped to contract with him that he shall have notice of and consent to this act when done, or his contract shall thereafter cease to be binding. This is the vital proposition on which the decision of this case turns. It is far-reaching in its effect, and if successfully maintained will, in my opinion, strike down the provisions of thousands of leases and agreements that attempt to fix by contract the rights of parties when contemplated acts shall be done. An examination of the authorities cited in the opinion of the majority which treat of either of these propositions will disclose the fact that *Pechner v. Insurance Co.*, 65 N. Y. 195; *Short v. Insurance Co.*, 90 N. Y. 16; *Morrison v. Insurance Co.*, 69 Tex. 353, 6 S. W. 605; *Bennett v. Insurance Co.*, 70 Iowa, 600, 31 N. W. 948; *West Coast Lumber Co. v. State Inv. & Ins. Co.* (Cal.) 33 Pac. 260; *Insurance Co. v. Earle*, 33 Mich. 143; *Insurance Co. v. Luttrell*, 89 Ill. 314; *Viele v. Insurance Co.*, 26 Iowa, 9; and *May, Ins.* §§ 369, 370,—go no further than to sustain the former proposition, and do not discuss the latter. *Carrugi v. Insurance Co.*, 40 Ga. 135, and *Planters' Mut. Ins. Co. v. Lyons*, 38 Tex. 253, hold that where, after the policy is issued and delivered, the insured applies to the agent for consent to take additional insurance, and the agent consents, but fails to write the indorsement on the policy, and thereupon the insured obtains the additional insurance, the company thereby waives the provision in question. But this is a very different holding from the proposition that a notice of intention to take subsequent insurance, given in the negotiations preliminary to the contract, estops the company from making a written contract that it shall have notice of the insurance when taken, and the option then to cancel its policy or to consent to the insurance. Suppose that the companies in the *Carrugi* and *Planters' Insurance Company Cases* had notified the insured in writing that they would not consent, and that their policies would be canceled, unless they were informed when and what amount of additional insurance was actually taken, would they then have waived the provision? In the case at bar the companies did more than that. They made the notice of the fact that the subsequent insurance was taken, and their consent to it, a condition of the continuance of their liability by the very terms of their original contract. *Havens v. Insurance Co.*, 111 Ind. 90, 12 N. E. 137, the only other case cited in the opinion of the majority which discusses either of the propositions, affirms a decision which sustained a demurrer to a complaint upon a policy which allowed no concurrent insurance where the insured had subsequently taken \$1,000 additional insurance without notice to the company, although the complaint contained the following allegation:

"The plaintiff further avers that it was expressly agreed and understood that said plaintiff was to have permission to take out an additional insurance of one thousand dollars on said building in any other company, and at any other time she desired, and said company agreed to insert said condition in said policy, which it wholly failed to do. And plaintiff says that, relying upon said promise, and in pursuance of said contract and agreement, she had effected an insurance on said building in the sum of one thousand dollars in the

Phoenix Insurance Company of Brooklyn, New York, as permitted by the express agreement aforesaid."

None of these cases appear to me to support the proposition on which the decision of this case must rest, and the case last cited expressly disaffirms it.

The evidence in this case does not support the plea that an agreement was made in the previous oral negotiations that a provision should be inserted in the policy allowing \$37,500 concurrent insurance. It goes no further than to prove that one of the insured stated that he intended to take out \$40,000 of insurance in all. Even if there had been such an agreement, it could not prevail over the written contract.

In *Insurance Co. v. Lyman*, 15 Wall. 664, 669, Mr. Justice Miller, in delivering the opinion of the supreme court, said:

"Undoubtedly, a valid verbal contract for insurance may be made, and when it is relied on, and is unembarrassed by any written contract for the same insurance, it can be proved, and become the foundation of a recovery, as in all other cases where contracts may be made either by parol or in writing. But it is also true that when there is a written contract of insurance it must have the same effect, as the adopted mode of expressing what the contract is, that it has in other classes of contracts and must have the same effect, of excluding parol testimony in its application to it, that other written instruments have. * * * We think it equally clear that, the terms of the contract having been reduced to writing, signed by one party, and accepted by the other at the time the premium of insurance was paid, neither party can abandon that instrument as of no value in ascertaining what the contract was, and resort to the verbal negotiations which were preliminary to its execution, for that purpose."

In *Thompson v. Insurance Co.*, 104 U. S. 252, 259, the policy provided that it should be void on the nonpayment of the note taken for the premium, and the supreme court held that a plea that a parol agreement was made at the time of the giving and accepting of the note and policy that the policy should not become void for the nonpayment of the note, but should only be voidable at the election of the company, was bad. Mr. Justice Bradley, in delivering the opinion of the court, said:

"An insurance company may waive a forfeiture, or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and cannot be set up to contradict the writing."

In *Insurance Co. v. Mowry*, 96 U. S. 544, 547, the policy provided that it should be void and wholly forfeited if the premiums were not punctually paid. The agent who procured the policy agreed with the insured that the company should give notice when the premiums fell due, but this agreement was not contained in the policy. The company failed to give the notice, and the insured failed to pay the premium. The agreement of the agent before the policy issued was claimed to be an estoppel of the company against insisting upon the forfeiture of the policy. Mr. Justice Field, in delivering the opinion of the court, said:

"All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, was

there expressed, for the very purpose of avoiding any controversy or question respecting them. * * * An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. * * * The doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions, parties must provide by stipulations in their agreements when reduced to writing. The doctrine, carried to the extent for which the assured contends in this case, would subvert the salutary rule that the written contract must prevail over previous verbal arrangements, and open the door to all the evils which that rule was intended to prevent. *White v. Ashton*, 51 N. Y. 280; *Bigelow, Estop.* 437, 441; *White v. Walker*, 31 Ill. 422; *Faxton v. Faxon*, 28 Mich. 159."

I concur in the views expressed in these opinions of the supreme court. I think that they are applicable to this case, and that the judgment should be reversed.

ANDERSON et al. v. HOWARD.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 351.

PUBLIC LANDS—RAILROAD GRANTS—WHAT LANDS INCLUDED.

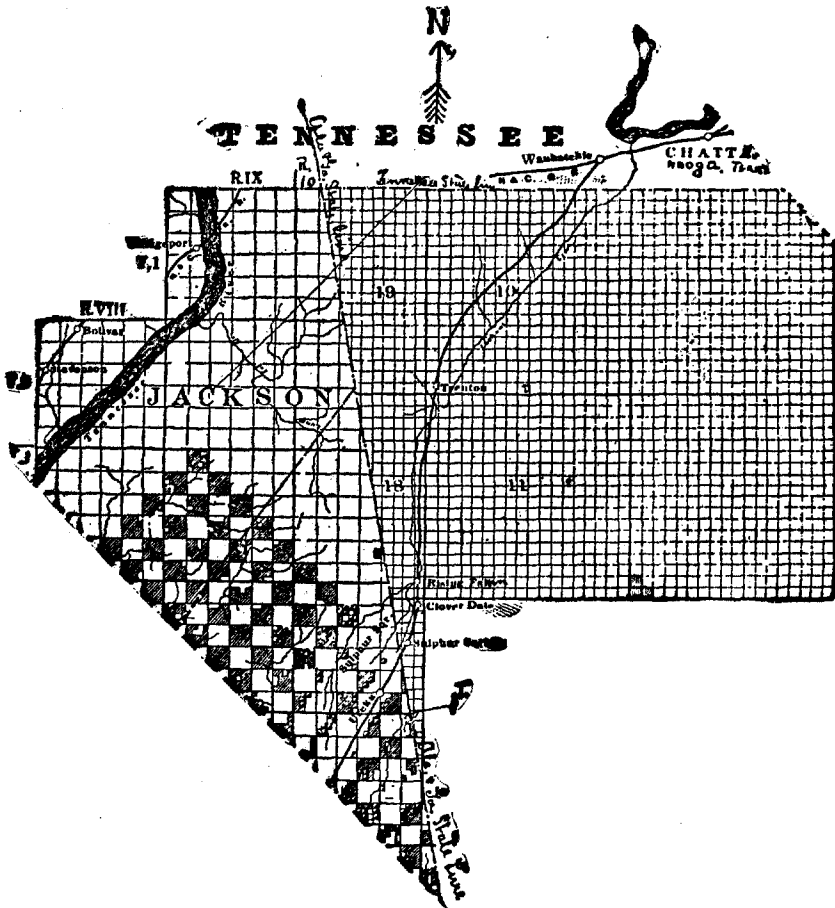
The act of June 3, 1856, granting to the state of Alabama, to aid in the construction "of certain railroads in said state," the odd sections of public land within six miles of each side of said roads, did not embrace lands within six miles of a part of the road which lay in the neighboring state of Georgia, and within six miles (but not in a perpendicular direction) of the road at the point where it crossed the state line. *Swann v. Jenkins*, 2 South. 136, 82 Ala. 478, approved and followed.

In Error to the Circuit Court of the United States for the Northern District of Alabama.

This was an action at law by Frank Y. Anderson and William J. Cameron, trustees, successors to John Swann and John A. Billups, trustees, against John Howard, to recover possession of certain parts of section 27, township 3 S., of range 10 E., in De Kalb county, Ala. In the circuit court a verdict was directed for defendant, and judgment entered accordingly. Plaintiffs bring error.

The following is part of an agreed statement of facts filed in the case:

It is agreed, by and between the parties to the above cause, that the plaintiffs have succeeded to all the right and title of the state of Alabama, and of the Wills Valley Railroad Company, and of the Alabama & Chattanooga Railroad Company, to all the land included in the grant of lands by the congress of the United States by act approved June 3, 1856 (11 Stat. 17), and renewed by act approved April 10, 1869 (16 Stat. 45); that all the terms and conditions of said acts of congress were fully complied with by the completion of the Alabama & Chattanooga Railroad, on May 17, 1871, from Wauhatchie, Tenn., to Meridian, Miss., the said Alabama & Chattanooga Railroad being a consolidation of the Wills Valley and the Northeast & Southwest Alabama Railroad Companies. Said consolidation was made by authority of the legislature of Alabama, by act approved October 6, 1868.



"Exhibit A."

It is further agreed that the map hereto attached, and marked "Exhibit A," and which is made a part of this agreement, shows the relative position of the track of the Alabama & Chattanooga Railroad, as completed on May 17, 1871, and as it has ever since remained, to the land in dispute. That the land in dispute is within six miles of the line of the Alabama & Chattanooga Railroad (now the Alabama Great Southern Railroad) at the point where it crosses the line dividing the states of Alabama and Georgia, but is not at right angle with said railroad at any point of said line of railroad in Alabama; that said land is in Alabama, and within six miles of the track, and at right angle thereto, of the said Alabama & Chattanooga Railroad (now the Alabama Great Southern Railroad), at a point where said railroad is within the state of Georgia, between the Georgia and Alabama state line and Waubatchie, Tenn.

J. A. W. Smith, for plaintiffs in error.

W. H. Wade, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. The question involved in this case is as to the proper construction of the act of congress approved June 3, 1856, entitled "An act granting public lands in alternate sections in the state of Alabama to aid in the construction of certain railroads in said state." 11 Stat. 17, 18. The circuit court followed the decision of the interior department (Decisions Department of the Interior Relating to Public Lands, vol. 3, p. 242) and the decision of the supreme court of Alabama in *Swann v. Jenkins*, 82 Ala. 478, 2 South. 136. We concur in this ruling. Judgment affirmed.

LYNCH v. NORTHERN PAC. R. CO.

(Circuit Court of Appeals, Ninth Circuit. June 24, 1895.)

No. 174.

CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

Plaintiff was driving along a road, parallel with the track of defendant's railroad, in an open, prairie country, where an approaching train could be seen for a considerable distance. Upon turning a curve towards the point at which the road crossed the railroad, and being then about 36 feet from the track, traveling at a moderate trot, plaintiff discovered a freight train approaching at the rate of about 8 miles an hour from the same direction in which he had been traveling. He stopped his team close to a side track, 8 feet from that on which the train was running. Plaintiff testified that, as soon as he turned the curve, he looked for a train; that his horses were very gentle, were used to the railroad, and had frequently stood with their noses nearer a train than they were when he stopped; but that they were frightened by escaping steam, and dashed in front of the engine, which struck and injured plaintiff. *Held*, that it was error to instruct the jury that, if plaintiff had looked or listened for the train, he could have seen or heard it when he was anywhere within 200 feet of the crossing, and that he neither looked nor listened within a reasonable distance, and he was therefore guilty of contributory negligence, and could not recover; but that the question of plaintiff's contributory negligence should have been left to the jury.

In Error to the Circuit Court of the United States for the District of Montana.

This was an action by Neptune Lynch, Sr., against the Northern Pacific Railroad Company for personal injuries. Judgment was rendered for the defendant in the circuit court. Plaintiff brings error. Reversed.

McConnell, Clayberg & Gunn, for plaintiff in error.

Cullen & Toole and Jos. D. Redding, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and BELLINGER, District Judge.

BELLINGER, District Judge. This is an action for damages for injuries at a crossing of the defendant company's track in Montana. The plaintiff lived near the place of the accident. He had been "down the road" to a blacksmith's shop, and had crossed the track at a public road crossing in doing so. As he returned, he traveled along the public road, parallel to the railroad track, towards the town

of Horse Plains in a trot, going at the rate of 5 or 6 miles an hour. He had reached a point where the wagon road curves towards the railroad track to cross it, when he saw a freight train approaching upon the main track of the railroad. There was a side track on the side from which plaintiff was approaching, and distant 8 feet from the main track. Upon seeing the train, the plaintiff "pulled up" his horses. He was at this time 36 feet from the main track. He succeeded in getting the team stopped close by the side track, but the horses, frightened by the noise made by the escape of steam from the locomotive, dashed forward upon the track, and the wagon was struck by the engine, from which the injuries complained of resulted. The engine whistled at the whistling-post, which is distant 3,945 feet from the crossing where the accident occurred. There is conflict in the testimony as to whether the engine bell was rung. The country in the vicinity is a level, prairie country, and a train could have been seen by the plaintiff at any time when within 200 feet of the crossing for a distance of a mile. The train approached the crossing from the same direction traveled by plaintiff, so that it was in his rear until he turned at the curve to go upon the crossing. The speed of the train, according to the testimony of the conductor, was at the rate of about 8 miles per hour. The engine ran about 300 feet beyond the crossing where the accident occurred before it stopped. There was an irrigating ditch between the track and the public road, which was crossed by a culvert, distant from the crossing some 160 or 170 feet. This culvert made an elevation in the road at that point. The plaintiff testified as follows:

"When I got off the little culvert there, close by under the wagon road, it was descending down hill, then they (the horses) trotted right along up until I came to the curve where I saw the locomotive. As soon as I made the turn I looked to see whether the road was clear."

The crossing in question is at Horse Plains, a village having a population of about 100 persons. The plaintiff resided then within a short distance of the place of the accident. He had lived there many years. The team he was driving was a "very gentle" one. As to this he testifies as follows:

"The team I was driving was a very gentle team. I had known them a long time. They had been used right around the railroad. They were so gentle that a Chinaman I had working for me could drive them any place. We generally had to drive them up here to load in the wagon, and my horses have frequently stood, when the train went by, with their noses nearer the train than where I stopped them the day of the accident."

At the conclusion of the testimony on the trial, defendant's attorneys requested the court to instruct the jury to return a verdict for the defendant, "for the reason that it appeared from the undisputed testimony that the plaintiff, if he had looked for the train at any time when he was within 200 feet of the crossing, could have seen it approaching at a distance of more than a mile, and if he had listened he could have heard it approaching within such distance; that the plaintiff neither looked nor listened for the approach of said train within any reasonable distance from the crossing; and that he did not see the train until it was within 75 feet of the point where

the accident occurred." The court gave the instruction as requested, and there was accordingly a verdict for the defendant.

The instruction was erroneous. Every inference favorable to the plaintiff that can fairly be drawn from the testimony must be conceded to him in deciding the question presented in the case; and upon the testimony in the case the court cannot say, as a matter of law, that the plaintiff was negligent. If the plaintiff had failed to look or listen for an approaching train before driving upon the track, he would have omitted an unmistakable duty, and would not be entitled to recover. In such case there is no room for an inference of reasonable care. The omission makes a plain case of negligence. The experience and observation of all men are matters of which courts take notice, and these agree in pronouncing such an omission a negligent one. No circumstance connected with it can alter this estimate of it, or reconcile it with prudence. There is, therefore, in such a case nothing for the jury to consider.

In this case, the plaintiff did look to see if a train was approaching. He was then 36 feet from the track, at the point where the public road turned to cross it. It may be inferred that he was negligent in not looking sooner, but there is no such conclusion of law. The law enjoins a duty, but the conditions under which that duty may be performed are not capable of exact definition. They necessarily depend upon the circumstances of the particular case. The plaintiff lived in the immediate vicinity of the place of the accident. The horses driven by him were very gentle. They were not only accustomed to cars, but to cars at that station. They had frequently stood, when the train went by, with their noses nearer the train than where the plaintiff stopped them at the time of the accident. These facts bear upon the plaintiff's conduct in determining how near to the track he might prudently drive his horses before stopping them, and must be considered in deciding whether or not he was in fact acting with reasonable prudence.

The testimony tends to show that the horses became frightened and unmanageable in consequence of the escape of steam from the locomotive as it approached the crossing. To what extent this contributed to the accident, and how far such a danger might have been foreseen and guarded against, in the exercise of reasonable care, are matters to be considered with reference to the plaintiff's alleged negligence. These circumstances are more or less complicated, and render the question of ordinary care, depending upon them, peculiarly a question of fact for a jury. "In cases of this sort, where the facts, though admitted, are debatable, and necessarily create doubt and hesitation, it is safer for the interest of the parties, and more consistent with the ground upon which the right of trial by jury rests, to submit them to the jury to resolve such doubts, than the court to dispose of them upon its own responsibility." *Walsh v. Navigation Co.*, 10 Or. 261.

The question presented in this case is, whether the plaintiff looked and listened within a reasonable distance from the crossing. What, then, is such reasonable distance? Manifestly, this is to be inferred as a fact from the circumstances of the case. It is not a matter

of legal judgment, but one of general observation and practical experience. It may be said, without doubt, that it would have been more prudent in the plaintiff to have looked when he was much further from the crossing than he was at the time he did look, but it is not a question of greatest or relative care. It is a question of reasonable care. The facts give to the argument in favor of the contention that plaintiff was negligent much force, but it is argument after all. The question is a debatable one. The opinions of men will not at once agree concerning it. It is fairly open to doubt, to say the least, whether the plaintiff might not reasonably conclude that his team of gentle horses might be safely stopped at any distance from the track greater than that at which they had frequently stood while trains were passing, and in all such cases, as we have seen, the question of contributory negligence is for the jury.

The judgment of the lower court is reversed, and a new trial ordered.

UNITED STATES v. CHICAGO, M. & ST. P. RY. CO.

(Circuit Court, E. D. Wisconsin. July 22, 1895.)

RAILROAD ACCOUNTS—ACT OF JUNE 19, 1878—TO WHAT ROADS APPLICABLE.

The act of June 19, 1878 (1 Supp. Rev. St. 194), requiring certain reports, prescribed by the auditor of railroad accounts, to be made by railroads to which the United States have granted any loan of credit or subsidy, in bonds or lands, or which have received from the United States lands, granted to them to aid in the construction of their roads, does not apply to the railroads which were incorporated by the several states, and received from them the grants of land made to such states to procure the construction of railroads.

This was an action by the United States against the Chicago, Milwaukee & St. Paul Railway Company to recover a penalty for failure to make reports called for by the auditor of railroad accounts under the act of June 19, 1878. The defendant demurred to the complaint. Demurrer sustained.

J. H. M. Wigman, U. S. Dist. Atty., for the United States.
John W. Cary and C. H. Van Alstine, for defendant.

SEAMAN, District Judge. The complaint is founded upon the alleged liability of the defendant to the terms of an act of congress entitled "An act to create an auditor of railroad accounts, and for other purposes," approved June 19, 1878 (chapter 316, 20 Stat. 169; 1 Supp. Rev. St. 194), and is for the recovery of the penalty imposed for neglect and refusal to make certain reports required by that act. The allegations are, in substance: That the defendant is a duly incorporated railroad company, and owns and operates railroad lines in several states, some of which are named, including Minnesota and Iowa. That in Minnesota it so owns and operates railroads which were constructed by companies incorporated by said state, and with the aid of lands which were granted by acts of congress to the territory and to the state of Minnesota, to be disposed of by

its legislature for the purposes of such aid, and for no other purpose, viz.: By the Minnesota Central Railroad Company, under act of March 3, 1857 (chapter 99, 11 Stat. 195), and supplemental act of March 3, 1865 (chapter 105, 13 Stat. 526); by the Southern Minnesota Railroad Company, under the same acts; and by the Hastings & Dakota Railroad Company, under act of July 4, 1866 (chapter 168, 14 Stat. 87). That in Iowa it so owns and operates a railroad constructed by the McGregor Western (subsequently known as the McGregor & Missouri River) Railroad Company, incorporated by said state, and which was aided by lands granted by congress to said state of Iowa for such purpose, by act of May 12, 1864 (chapter 84, 13 Stat. 72). It is further alleged that the several railroads so constructed have lawfully come into the possession of the defendant, by purchase in one form and another, are operated by it, and it is clearly implied that they have become incorporated into its great system of railroads operated as an entirety; that each of said "railroad companies" named is, "in whole or in part, west, north, or south of the Missouri river, and each received from the United States lands granted to it, respectively, to aid in constructing or furnishing its said respective roads"; that thereupon it became the duty of the defendant to make certain reports prescribed by the auditor of railroad accounts under the said statute creating that office; that it had refused and neglected to comply therewith, and thereupon has become indebted to the United States in the forfeiture provided, of \$1,000 to \$5,000, for which judgment is demanded.

The demurrer to this complaint presents a single question, whether the act of 1878 is applicable to these Minnesota and Iowa lines of railroad, for, if the original companies were within its terms, the act provides for its extension to any successors in ownership or operation. For the interpretation of this act it is necessary to have an understanding of the course and policy of congressional legislation in granting aid for the construction of railroads throughout the great West, and especially the legislation out of which the act in question arose. An examination of this long course shows the adoption of two distinct plans for aid to railroads, which differ radically in their method and policy. By the one first adopted, lands were granted to the state or territory for its disposal in procuring the construction of a certain line or lines of railroad, leaving the method of performance and any incorporation of companies for the purpose to its legislature, and conditioned only upon the fact of performance. Of this class were all the grants in question here. In 1862 another plan was adopted for transcontinental roads of a national character, and for which national charters were granted. The Union Pacific Railroad Company was thus incorporated, and received from the government direct grant of lands and a direct issue of bonds, and the same act provided for direct grants to the Central Railroad Company of California for constructing a portion of the line. Subsequently national charters were given, with direct grants of land to the Northern Pacific, the Atlantic & Pacific, and the Texas Pacific, respectively. Each of these companies was required to make certain reports to the government, and by an act of the Fortieth congress, approved

June 25, 1868, general provision was made for more specific reports from each of these national companies, named in the act.

In 1878 the act was adopted which is here alleged as the ground of liability. Its first section provides for the repeal of each of the above-mentioned provisions respecting reports by the Pacific national companies, and the act then creates an auditor of railroad accounts, prescribes his duties and a system of reports "to be rendered to him by the railroad companies whose roads are, in whole or in part west, north, or south of the Missouri river, and to which the United States have granted any loan of credit or subsidy, in bonds or lands," and requires such report from every company which has received bonds of the United States to aid in the construction of its road, "or which has received from the United States any lands granted to it for a similar purpose." This act is clearly applicable to the roads of the last-mentioned class, to which aid was directly furnished, and good ground and practical reason for its requirements are found in both the terms and the policy of the legislation by which the aid was granted. No such reason is apparent in respect to the roads aided by the first-mentioned plan, and no reservation or restriction is found in either of the acts granting the aid in question which would even imply a purpose or right of governmental control or dictation after the roads were constructed.

Counsel for the United States bases its contention that the statute should be applied to these roads upon a literal and independent reading of its terms,—that the roads lie north of the Missouri river, and were in fact aided by grants of the public lands,—but cites no reservation of power in the general government to impose such requirement, either in the constitution or in cognate legislation, except a reference to the regulation of interstate commerce. Surely that has no application to these roads, which are wholly within the respective states of their incorporation, except so far as they have become interstate through their acquisition by the defendant and entry into its system. I do not, however, find it necessary to consider whether there is any ground upon which a power might rest for the exercise of control over these roads, if they were clearly and specially designated by the act, because I am satisfied that the terms of the act do not embrace them by any fair construction, and that they were not within the intention of congress, as disclosed by the separate courses of legislation above referred to and the recitals in this act. Neither of the roads in question is a grantee of the United States in respect to the lands which were received in aid of its construction, but the grant was directly from the state. Employing the language of this act, they were not railroad companies "to which the United States have granted any loan of credit or subsidy, in bonds or lands," or which have "received from the United States any lands granted to" the company to aid in construction. The United States granted directly to the state or territory, and not to the company. The uniform construction of similar acts—and of these particular acts in *St. Paul & S. C. R. Co. v. Winona & St. P. R. Co.*, 112 U. S. 720, 5 Sup. Ct. 334, and subsequent cases—has been that the grant to the state was in present; and the most recent expression by the su-

preme court, in *Railroad Co. v. Forsythe* (not yet officially reported) 15 Sup. Ct. 1020, states this rule as follows: That the acts are "to be treated both as a law and a grant, and the intent of congress, when ascertained, is to control in the interpretation of the law"; that the state was the grantee of the government, and in accepting it impliedly undertook to construct the road, and the company which it incorporated for that purpose was made the beneficiary of the grant by the act of the state, and not by the act of congress; that congress dealt only "with the state, relying upon the state as the party to see that the roads were completed, and to use its own judgment as to the manner of securing such construction." The object of these grants by the government is thus stated:

"So far as railroads are concerned, it is the thought, not merely that the general welfare will be subserved by the construction of the road along the line indicated, but, further, that such grant shall not be attended with any pecuniary loss to the United States; for the universal rule is to double the price of even sections within the granted limits."

The demurrer to the complaint is sustained, and the complaint must be dismissed.

NORDLINGER v. UNITED STATES.

(Circuit Court, S. D. New York. June 3, 1895.)

No. 262.

CUSTOMS DUTIES—CLASSIFICATION—LEGHORN CITRON.

"Leghorn citron" was not dutiable under paragraph 302 of the act of 1883, as a "comfit, sweetmeat, or fruit preserved in sugar," but was entitled to free entry as a dried fruit.

This was an application by one Nordlinger, an importer, for a review of the decision of the board of general appraisers sustaining the action of the collector of the port of New York in fixing the rate of duty on certain Leghorn citron.

Albert Comstock (of Comstock & Brown), for importer.

James T. Van Rensselaer, Asst. U. S. Atty., for the United States.

TOWNSEND, District Judge (orally). The article in question is Leghorn citron. The importer claims that, under the provision of paragraph 704 of the tariff act of 1883, it is free of duty as a dried fruit not otherwise specially provided for. The collector classified it for duty under paragraph 302 of said act, as a comfit, sweetmeat, or fruit preserved in sugar. The board of general appraisers sustained the action of the collector, and the importer appeals. This citron is in fact a dried fruit, and is commercially classed among the dried fruits. Sugar is used to preserve it, and in that sense it may be said to fall within the classification of "comfits, sweetmeats, or fruits preserved in sugar," etc. The board of general appraisers heard no evidence and made no finding in regard to its commercial designation, but some 20 witnesses have since been examined upon this question. From such consideration as I have been able to give to their evidence, I conclude that this article is not commercially known as a preserve, and that by the practically universal custom of

the trade it is excluded from the class of "comfits, sweetmeats, and fruits preserved in sugar." I do not find competent evidence to the contrary sufficient to affect the validity of this commercial understanding. The decision of the board of general appraisers is therefore reversed.

WHITE et al. v. UNITED STATES.

(Circuit Court, S. D. New York. June 3, 1895.)

No. 875.

1. CUSTOMS DUTIES—CLASSIFICATION—JUTE BAGGING.

Jute bagging, which is commercially fit for bagging cotton, is dutiable under paragraph 366 of the act of 1890, and not under paragraph 374, as a manufacture of jute not specially provided for.

2. SAME—"SUITABLE" DEFINED.

The test of the suitability of an article for a certain purpose is not whether it is commonly used therefor, but whether it possesses actual, practical commercial fitness for that purpose.

This was an application by James F. White & Co., importers of certain merchandise, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of New York as to the rate of duty on such merchandise.

Stanley, Clarke & Smith, for importers.

Henry C. Platt, Asst. U. S. Atty., for the United States.

TOWNSEND, District Judge (orally). The article in question is jute bagging. The importer claimed it was a "material similar to cotton bagging, and suitable for covering cotton composed of jute," and therefore dutiable under paragraph 366 of the tariff act of 1890. The collector classified the article under paragraph 374 of said act, as a manufacture of jute not otherwise specially provided for. The board of general appraisers, after hearing evidence, found that said articles were not suitable for covering cotton, nor commonly used for that purpose. The bagging is composed of jute, and appears to be a material similar to cotton bagging. The single question is whether it is suitable for covering cotton. The witnesses generally agreed that the article in question had been sold and used for bagging for cotton, and that it was suitable for such purpose. The counsel for the government claims, however, that the finding of the board of general appraisers upon these points should not be disturbed. But it appears from said findings that said board, after defining the word "suitable," held as follows:

"When an article is commonly used for a given purpose, it may be said to be 'suitable' for such purposes; when not so used, it cannot ordinarily be said to be so 'suitable.'"

I think this statement is not altogether accurate, in view of the definition of said term, and the decisions. "Suitable," according to the definitions in Webster and the Century Dictionary, means "fitting," "capable of suiting," or "appropriate." In *Re Townsend*,¹ 56 Fed. 222, the court of appeals holds that "preparations fit for use" means "preparations actually and not theoretically fit for use, and

which can be practically used for such purpose." In *Paper Co. v. Cooper*, 46 Fed. 186, Judge Butler says that by fitness is meant "commercial fitness." The evidence of the actual, practical commercial fitness of this article for bagging cotton is uncontradicted. The decision of the board of general appraisers is reversed.

RUSSELL v. KERN.

(Circuit Court of Appeals, Seventh Circuit. July 10, 1895.)

No. 231.

1. APPEAL—ASSIGNMENTS OF ERROR.

Error is assignable upon an order or ruling, but not upon the opinion of the court or the reasons given for the ruling. *Caverly v. Deere*, 13 C. C. A. 452, 66 Fed. 305, followed.

2. PATENTS—EQUITY JURISDICTION—DISCRETION OF COURT.

Patents which have expired can afford no basis for equitable relief in respect to infringement; and, in respect to a patent which expires just after filing of the bill, and before the return day of the subpoena, it is within the discretion of the court to dismiss the bill for want of equity. 64 Fed. 581. affirmed.

3. SAME.

Where ten patents to the same person, all relating to one machine, were sued on, and four of them had expired before the bill was filed, and a fifth expired before the return day of the subpoena, and the others were found by the court to be invalid because for the same invention as that covered by the first five, *held*, that the bill was properly dismissed for want of equity. 64 Fed. 581, affirmed.

4. SAME—FLOUR-PURIFYING MACHINES.

The Smith patents, Nos. 187,923, 194,539, 208,936, 236,101, and 258,142, for a middlings-purifying and flour-dressing machine, are void, because granted to the same person for the same inventions covered by Nos. 133,898, 137,495, 154,770, 158,992, and 164,050. 64 Fed. 581, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

This was a suit in equity by John H. Russell against John F. Kern, surviving partner of the firm of J. B. A. Kern & Son, for infringement of certain patents for purifying middlings and dressing flour. The case was first heard on demurrer to the amended bill. 58 Fed. 382. Afterwards the bill was further amended, and defendant again demurred thereto, which demurrer was sustained, and the bill dismissed for want of equity. 64 Fed. 581. Complainant appeals.

Story B. Ladd, Geo. E. Sutherland, Halbert E. Paine, and Belva A. Lockwood, for appellant.

N. C. Gridley and L. M. Hopkins, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. Error is assignable upon an order or ruling, but not upon the opinion of a court or the reasons given for a ruling. *Caverly v. Deere*, 13 C. C. A. 452, 66 Fed. 305. Of the assignment in this record only the first and fifth specifications were necessary or proper. They are to the effect that the circuit court erred in sustaining the demurrer to, and dismissing for want of equity, the second amended bill. It was filed March 19, 1894,—the

original bill having been filed May 31, 1892,—to obtain an accounting and damages for infringement, and an injunction against further infringement, of 10 letters patent of the United States issue to Geo. T. Smith, of which the numbers and the dates of issue and of the applications therefor, respectively, are as follows: No. 133,898, December 10, 1872, October 31, 1872; No. 137,495, April 1, 1873, October 12, 1872; No. 154,770, September 8, 1874, August 17, 1874; No. 158,992, January 19, 1875, May 20, 1872; No. 164,050, June 1, 1875, July 12, 1871; No. 187,923, February 27, 1877, December 18, 1876; No. 194,539, August 28, 1877, September 8, 1874; No. 208,936, October 15, 1878, August 29, 1878; No. 236,101, December 28, 1880, November 2, 1880; No. 258,142, May 16, 1882, January 4, 1873. The claims of these patents are as follows:

No. 133,898: "The brushes, H, H, when attached to an endless belt chain, rope, or an equivalent of the same, and traveling in one direction on ways and around pulleys, as shown, in combination with a reciprocating bolt, substantially as set forth."

No. 137,495: "The herein-described process of manufacturing flour from middlings, by subjecting them to successive grindings, boltings, and intermediate purifications by currents of air, substantially as set forth."

No. 154,770: "In a middlings purifier, a reciprocating shaker having its bolting surface contracted at the discharging end, with a corresponding reduction in the air passage through the same, substantially as set forth."

No. 158,992: "(1) Two or more reciprocating bolting surfaces or shakers, through which a current of air passes, separated from each other by longitudinal partitions, the cloth upon one shaker differing in fineness from the cloth on the other shaker or shakers, thereby adapting them for receiving and bolting flour or middlings of different grades of fineness, substantially as set forth. (2) In combination with two or more reciprocating bolting surfaces or shakers, through which a current of air passes, the cloth upon one shaker differing in fineness from that of the other, a preparatory bolt constructed to divide the flour or middlings into different grades of fineness, the finer grade being delivered to the shaker which is clothed with the finer cloth, and a coarser grade to a coarser cloth, substantially as set forth."

No. 164,050: "The combination, in a machine for dressing flour or middlings, of a bolting surface through which an air current passes in one direction, while the flour or middlings pass in the other, with a brush, or a series of brushes, which traverse the under side of the bolting cloth, to remove the adhering particles of flour, substantially as set forth."

No. 187,923: "(1) The combination, in a flour-dressing machine, of a reciprocating shaker, having bolting cloth of different degrees of fineness, an air chamber arranged above the shaker, and divided into sections by transverse partitions, and a conveyor below the shaker, whereby the middlings may be divided into grades of fineness, and subjected to air currents of different degrees of strength, and afterward intimately remixed for a second purification, substantially as set forth. (2) The combination, in a flour-dressing machine, of a reciprocating shaker clothed with bolting cloth of different degrees of fineness, an air chamber arranged above the shaker, and divided into sections by transverse partitions, a fan arranged above the air chamber, and having an air trunk for each section of the air chamber and a brush traversing the under surface of the bolting cloth, substantially as set forth."

No. 194,539: "The combination, with the bolting surface, in a middlings purifier, of two fans in fan cases, which do not communicate with each other, each fan operating to produce independent air currents, in separate and distinct compartments, and through different sections of the reciprocating bolting cloth, substantially as set forth."

No. 208,936: "The combination, in a middlings purifier, of the following elements, namely, a shaking bolter provided with bolting cloths of different degrees of fineness; a fan to produce air currents through the bolting cloth; a bolting chest, which surrounds the bolter and forms part of an inclosed air

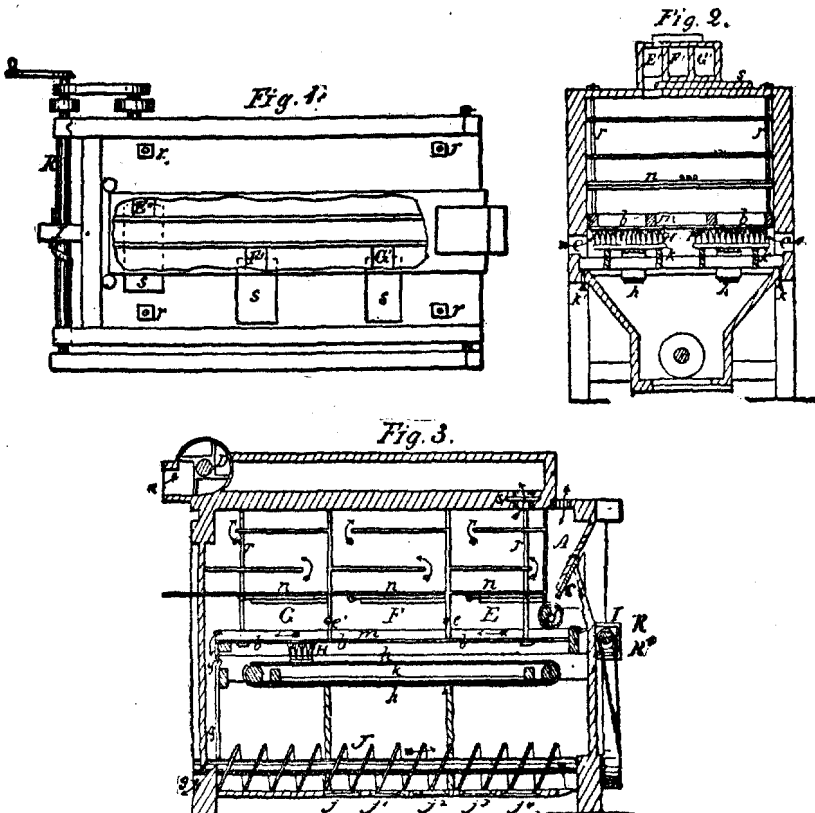
trunk, through which air currents pass after leaving the bolting cloth; valves for regulating the strength of the air currents, according to the size of mesh of the bolting cloth; and a chamber in the eduction passage for collecting light material carried off from the bolter by the air currents."

No. 236,101: "(1) The combination, in a middlings purifier, of a reciprocating screen clothed with cloths of different degrees of fineness, a fan for causing air currents to pass upward through the screen, and the chest which incloses the screen and forms an air trunk, by which the air entering below is directed through and escapes above the screen through a contracted tubular discharge, and provided with apertures which are made of different areas opposite the various sections of the screen, for the purpose of regulating the force of the current through such sections, substantially as set forth. (2) The combination, in a middlings purifier, of a reciprocating screen clothed with cloths of different degrees of fineness, a suction fan placed above the screen, a chest which incloses the screen and forms an air trunk between the air openings below and the fan above the screen, and adjustable openings placed opposite the different sections of the screen, whereby the force of the current may be regulated according to the texture of the cloth and material to be treated, and the material raised by the fan is carried away through the tubular mouth of the fan case, substantially as set forth. (3) The combination, in a middlings purifier, of a fan and reciprocating screen clothed with cloths of different degrees of fineness, a chest which incloses the screen and forms an air trunk, causing the entire current to pass through the screen, and constructed with transversely elongated and adjustable openings extending across the cloth, so as to equalize the action of the atmospheric currents upon the material traversing the sieve, substantially as set forth. (4) In a middlings purifier, in combination with a suction fan and reciprocating screen clothed with cloths of different degrees of fineness, a chest forming a portion of a continuous wind trunk inclosing the screen, and an auxiliary wind trunk connecting the fan with the interior of the chest through a series of openings of different areas placed opposite to the different sections of the bolting cloth, substantially as set forth. (5) The combination, in a middlings purifier, of a reciprocating screen clothed with cloths of progressively coarser mesh, a fan for causing an air current through the screen, a chest which incloses the screen and forms part of a continuous wind trunk to conduct the air put in motion by the fan through the entire extent of the screen, and controlling its delivery after it has passed through the screen, and a contracted, tubular air discharge, whereby a film of middlings is subjected to a current of air uniform across the width of the screen and continuously increasing in force as the residuum becomes continually coarser and the cloth proportionately increases in coarseness of mesh, substantially as set forth. (6) The combination, in a middlings purifier, of a screen having cloths of different degrees of fineness, a fan, and chest, which incloses the screen and directs the air currents through the entire series of cloths while the middlings pass from the finer to the coarser sections, a hopper which collects the middlings as they fall through the cloths, and a conveyor and slide for remingling the middlings from two or more cloths after they have separately passed through cloths adapted to their several sizes, substantially as set forth."

No. 253,142: "(1) In a middlings purifier, a vibrating screen, the cloth of which is formed in sections of increasing coarseness of mesh, and which is provided with supports for the cloth intermediate between its edges, to maintain the cloth in plane, substantially as set forth. (2) In a middlings purifier, a vibrating screen, the cloth of which is formed in increasing coarseness of mesh, and which is provided with supports for the cloth intermediate between its edges, to maintain the cloth in plane, in combination with a casing forming a wind trunk, extending from the fan case to the screen, so as to direct a current of air put in motion by the fan through the entire extent of the screen, whereby the middlings, if fed uniformly across the head of the screen, are subjected to the action of atmospheric currents substantially uniformly across the entire width of the cloth, and which increases in force as the meshes become coarser and coarser and the particles of middlings upon the screen become relatively coarser, substantially as set forth. (3) In a middlings purifier, a vibrating screen, the cloth of which is formed in sections of increasing coarse-

ness of mesh, and which is provided with supports for the cloth intermediate between its edges to maintain the sections of cloth in plane, in combination with a casing which forms a continuous wind trunk, extending from the fan case to the screen, so as to direct a current of air put in motion by the fan through the entire extent of the screen, and a cloth cleaner acting against the surface of the screen for keeping its meshes open, substantially as set forth."

The patents bearing numbers below 164,050 all expired before the suit was commenced, and therefore, as the circuit court held, afforded no basis for equitable relief. No. 164,050 expired just after the filing of the original bill, but before the return day of the subpoena; and, for that reason, it was within the discretion of the court to dismiss the bill in respect to that patent for want of equity. *Keyes v. Mining Co.*, 15 Sup. Ct. 772. The court also regarded it as "fully anticipated by No. 133,898." In respect to the later and unexpired patents, the view of the court was that they "were covered by those of earlier issue, and invalid under the rules declared in *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310; *Oval Wood Dish Co. v. Sandy Creek, N. Y.*, *Wood Manuf'g Co.*, 60 Fed. 285; *Heald v. Rice*, 104 U. S. 737." The accompanying drawings, taken from patent No. 236,101, are identical with the drawings of No. 164,050, and



not essentially different from those of Nos. 133,898, 194,539, 208,936, and 258,142, No. 137,495 being without drawings.

In the specification of No. 164,050, issued upon the first of the applications, the machine and its method of operation are thus described:

"In the accompanying drawings, A represents a hopper, into which the material to be bolted is delivered from an elevator, or by any other means. The material is fed by the roller, B, to the bolt, b, the amount of feed being regulated by the slide, c. The bolt is arranged in a chamber, through which a current of air is made to pass by means of a fan, D, the air entering through suitable openings, C, in the side of the bolt chest, the construction and arrangement of parts being such that the air is compelled to pass upward through the bolt cloth. The bolt or shaker is suspended from the framework by means of pivoted links, r, r, and has a reciprocating motion imparted to it by the eccentric, R¹, on shaft, R, and the inclosing box, I. As the material is agitated by the motion of the bolt, the flour falls through, while the smaller particles of bran are taken up by the current of air and carried off. As there is a continual current of air in an upward direction through the bolt, it will cause the very fine particles of flour and middlings to adhere to the thread of which the cloth is composed, and close up the meshes to such an extent as to interfere materially with the operation of the device. In order to obviate this objection, and maintain a free passage of the air and middlings, I employ brushes to traverse the under side of the cloth and keep it clean. H, H, are the brushes attached to and carried by endless belts, h, the brushes being supported upon ways, k, k, during their contact with the bolt. By preference, I make the framework and ways which support the brushes adjustable by means of set screws, b¹ (see Fig. 2), so that I can keep the brushes always in contact with the bolt. It is evident that the brushes would act upon the bolt equally well if they had a reciprocating motion, instead of being driven continuously in one direction by the endless belts or chains, although I regard the method shown for operating them as being the cheapest and most convenient, and also better adapted for doing the work. I am aware that a combination of brushes and air currents has been used in connection with flour bolts for many years; but in such machines the air current passed through the bolting surface with the flour; hence it could not, by any possibility, be made to perform the same functions as it does in my machine, one of which is to float a portion of the bran and refuse upon or above the bolting surface, and thus cause such particles to pass off at the tail of the bolt, instead of going through the cloth with the flour or clean middlings."

A minute comparison of the specifications and drawings of the several patents with reference to the claims of each is not necessary. It would serve only to demonstrate more clearly the facts so explicitly affirmed in the bill, that the Smith purifier is "one compact machine," of which the different parts described in the several letters patent are incapable of separate use, and that the machine itself is incomplete and incapable of use without the patented parts. We therefore make only a brief additional statement.

In No. 154,770 the discharging end of the shaker or bolting surface, which by preference is divided by two or more longitudinal ribs, is, by means of wedge-shaped blocks, made of less width than the receiving portion, and the area for the passage of air currents correspondingly reduced. A division of the chamber above the shaker into sections by means of partitions is also illustrated, and declared to be preferred.

In No. 158,992 the cloth on the two or more longitudinal sections into which the shaker is divided is of different degrees of fineness, and in connection therewith is to be used a preparatory or grading

bolt, which is illustrated in the old form of a reel, though of course it may be a mere duplication of the horizontal shaker described. The chamber is divided by vertical partitions arranged immediately above the ribs which divide the shaker, and the apertures from the several apartments of the chamber are provided with dampers for regulating the air currents. An adjustable swing board, hinged upon the gather boards below the shaker, is employed "to regulate the proportion of flour or middlings which shall be delivered to each conveyor."

In No. 187,923, the first of the unexpired patents, the shaker is divided into sections by longitudinal ribs, but the chamber above is divided, by transverse instead of longitudinal partitions, into three sections, each provided with a regulating damper, and the cloth of the shaker is of three grades, arranged so that the middlings will pass first over the finest, and last over the coarsest, grade.

In No. 194,539 there is shown a machine made by placing in juxtaposition two or more of the machines already described, each having its own fan, chamber, cloth conveyor, and other parts, and acting independently of the other. In order to admit the air freely to the central portion of the shaker, openings in the gather boards are provided.

In No. 208,936 special mention is made, and the utility explained, of the shelves, *n.*, in the air chamber, which, according to the specifications and claim, serve the purpose of "collecting light material carried off from the bolter by the air currents." The same shelves are shown in the drawing (Fig. 3) of 133,898, 164,050, and 187,923, but are not mentioned in any of the claims thereof.

No. 236,101 contains the same drawings as No. 164,050, and differs from the earlier and expired patents only in the wording of its claims.

The same is true of No. 258,142, the last of the series, of which the patentee, after acknowledging that "some of the important combinations included in this machine" are covered by the patents already taken out "in other divisions," declares the object to be "to cover all patentable points not covered by any such prior patents."

Special significance has been attributed to some of the averments of the bill. It is alleged, for example, "that the said George T. Smith's middlings purifier is one compact machine, operating together as a whole, parts of which are covered by the letters patent" mentioned, but no part thereof "covered by any other patent than those specified herein"; "that George T. Smith was the original inventor of said machine"; that, on July 12, 1871, he filed his application for a patent, about October 23, 1871, filed a caveat for "further improvements, and, on May 20, 1872, applied for letters thereon,"—which applications and caveat practically covered all the devices and patents mentioned,—but that, owing to alleged interferences and litigation thereon, Smith subsequently "made special applications for parts of his said invention not included in the alleged interference"; but "that the primitive idea of said George T. Smith was the invention of a machine made up by the devices" described; that all the patents "relate to the same subject-matter, to wit, the purifying of middlings by the same general mode, to wit, the ground grain

is fed forward through a shaking screen having progressively coarser meshes, while a current of air draws backward through the screen from below and lifts the coarse or light particles of bran or husk, while permitting the heavier or finer particles of nutritious flour to pass through the screen"; that the machine has no utility or practical value without the use of the patented devices mentioned, or their equivalents; that the devices "are not capable of separate use for the purposes designed; that the purifier is not capable of use without them," and that "the devices in such combination constitute the essential features of said machine, and are necessary to a complete running machine"; that, after the issue of No. 133,898, which was for one only of the mechanical devices set forth in the applications of July 12, 1871, and May 20, 1872, the issue of the other patents was suspended to await the result of the interference declared between Smith, "claiming under the said applications so filed by him, and Benjamin Barter, who claimed under letters patent No. 125,518, issued on the 9th day of April, 1872, for an improvement in the method of dressing flour," a copy of which, with accompanying specifications, is made a part of the bill; that the interference was declared in June, 1872, for the purpose of ascertaining whether Barter, claiming under letters patent No. 125,518, or Smith, claiming under his applications of July 12, 1871, and May 20, 1872, and caveat of October 23, 1871, "was the original inventor and discoverer of the inventions described in said patent (No. 133,898) and said applications for patents"; and that the interference was decided November 14, 1874, in favor of Smith.

In the case of *Miller v. Manufacturing Co.*, supra, after a review of authorities, the supreme court declared the conclusion that "no patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ; that the second patent, although containing a broader claim more generical in its character than the specific claims contained in the prior patent, is also void; but that, where the second patent covers matter described in the prior patent, essentially distinct and separable from the invention covered thereby and claims made thereunder, its validity may be sustained." See, also, *Fassett v. Manufacturing Co.*, 10 C. C. A. 441, 62 Fed. 404. Whether or not under these rules any of the first five of the patents here sued on are invalid we need not consider. It is clear that, singly or all together, they cover Smith's invention, and the machine in which it was embodied, so completely as to leave no room for further distinct and separable claims.

The allegation of the bill that, after the granting of No. 133,898, "the issue of other patents was suspended to await the result of the interference," can in no sense be true in respect to Nos. 187,923, 208,936, and 236,101, which were not applied for until after November 14, 1874, when the interference was determined. No. 194,539, too, was not applied for until September 8, 1874, and the interference affords no reason why that patent was not issued until August 28, 1877, nor why No. 258,142 was not issued until May 16, 1882. Besides, the interference was declared for the purpose of determining

the right of Smith, as against Barter, to the inventions covered by letters No. 133,898, the applications of July 12, 1871, and May 20, 1872, and the caveat of October 23, 1871. The patents granted upon those applications were Nos. 158,992 and 164,050. It was, therefore, only the claims of the three patents, 133,898, 158,992, and 164,050, which were involved in the interference, and there was no reason for suspending action upon other applications, unless they were for the same inventions. If they were for the same inventions, they ought not to have been granted, and, having been granted, are invalid. That the earlier "applications and caveat practically covered all the devices and patents mentioned" is alleged in the bill. The allegation is manifestly true, and consequently the patentee was without justification for making "special applications for parts of his said invention not included in the alleged interference." There were no such parts. It may be observed, too, that the features of the later patents are all described and illustrated in the patent of Barter, a copy of which is made an exhibit in the bill. If, therefore, they were not included in the interference and did not so become the established property of Smith under the three patents mentioned, then they belong to Barter, if included in his claims, and, if not to him, then to the public, because of his failure to claim them.

It is doubtless true, as contended, aside from any right to an injunction, that there may be ground for jurisdiction in equity in the nature and circumstances of the account, and in the necessity for discovery; but in respect to the expired patents, which are here assumed to be valid, it is not shown that the remedy at law would be inadequate.

The decree of the circuit court is affirmed.

THE EMPIRE.

GULF PORT STEAMSHIP CO., Limited, v. THOMAS et al.

(Circuit Court of Appeals, Fifth Circuit. May 28, 1895.)

No. 369.

CHARTER PARTY—EXECUTION BY SHIP BROKERS ON TELEGRAPHIC CONTRACT— VARIANCE—GUARANTY OF TONNAGE.

Ship brokers in New Orleans cabled ship brokers in Liverpool that they wanted a steamer for 2,500 tons oil cake or meal at 20 shillings per ton. This offer was communicated by the Liverpool brokers to the owners of the steamer Empire, but was refused on the ground that she could not carry her dead weight in freight of that character. The owners, however, made a counter offer, pursuant to which the Liverpool brokers cabled that the ship would take "a full cargo of oil cake, meal, or flour * * * guarantied 2,500 tons d. w. c. [dead-weight cargo] ex-bunkers." The New Orleans brokers replied that they had "closed, in accordance with telegrams exchanged," in answer to which the Liverpool brokers telegraphed, "We confirm charter." The charter was drawn by the New Orleans brokers, but, in place of the terms contained in the cabled offer of the owners, it read, "guarantied to carry not less than 2,500 tons (of 2,240 lbs.) of cargo." *Held*, that the real guaranty was to carry 2,500 tons dead-weight cargo, and that the inability of the steamer to carry 2,500 tons of light cargo like oil cake was no breach of the guaranty.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel by the Gulf Port Steamship Company, Limited, a corporation under the laws of Louisiana, and doing business in New Orleans, against the steamship Empire, William Thomas & Co., of Liverpool, England, claimants, to recover damages for breach of a charter party. The breach alleged consisted in the failure of the steamship to take the full amount of 2,500 tons of cottonseed oil cake or meal, tendered by libellant, it being claimed by it that she was guarantied by the charter party under which she was laden to carry that quantity. A cross libel was filed by the claimants for freight alleged to be due, and for demurrage and other charges. The district court entered a decree dismissing both the libel and the cross libel. The libellant alone appeals.

The charter party was executed under the following circumstances: On March 22, 1892, Ross, Howe & Merrow, ship brokers in New Orleans, cabled to Simpson, Spence & Young, ship brokers in Liverpool, that they "wanted a steamer for not more than 2,500 tons oil cake, and, or meal, and, or flour, in sacks, 20 shillings." Simpson, Spence & Young quoted this offer the next day in Liverpool to all their correspondents, among them William Thomas & Co., owners of the Empire. William Thomas & Co. refused to accept 20 shillings a ton for a cargo of oil cake, on the ground that they did not think that the steamer would carry her dead weight of such cargo. They, however, made a counter proposition, which was cabled by Simpson, Spence & Young to Ross, Howe & Merrow. This offer was to charter for a lump sum, the ship to take "a full cargo of oil cake, meal, or flour * * * guarantied 2,500 tons d. w. c. [dead-weight cargo] ex-bunkers." On the next day Ross, Howe & Merrow replied that they had "closed in accordance with telegrams exchanged." The same day the Liverpool brokers, acting on the reply of Ross, Howe & Merrow that the latter would draw the charter "in accordance with telegrams exchanged," cabled as follows: "We confirm charter. Send six copies of charter party at once." The Liverpool brokers then wrote the following letter to the owners of the steamship:

"Liverpool, March 25, 1892.

"Messrs. Wm. Thomas & Co., Liverpool, 'Empire'—Dear Sirs: We have closed this steamer subject to your confirmation for the New Orleans freight at 2,600 pounds to Glasgow, Hull, Newcastle, Hamburg, Antwerp, Rotterdam, Amsterdam, or Bremen,—2,500 pounds if ordered to Plymouth, Avonmouth, Liverpool, or London, twelve weather working days for loading ex S. and H., free of dispatch money, 2½ per cent. address, canceling nonreadiness 5th May. charterer's stevedore to be employed as customary, at current rates, all other usual conditions of charter, steamer guarantying 2,500 tons dead-weight ex-bunkers. We strongly advise you to confirm, as we are quite certain this is the best business in the market. For grain charterers now only offer to-day 39 c. f. o., with 25th April, canceling, and from the Northern ports the outside obtainable for April-May loading is 3-3 c. f. o. We have special order from Philadelphia to Copenhagen or Aarhus at 3-6, option Stettin, 3-9.

"Yours, faithfully, [Signed] Per pro Simpson, Spence & Young.

"Cargo oil cake, and, or meal, and, or flour in sacks.

J. T. G.

"[Indorsed on face in corner free of cables.]

J. T. G."

On the same day the Liverpool brokers wrote again to the owners of the steamship the following letter:

"March 25, 1892.

"Messrs. Wm. Thomas & Co., Liverpool—Dear Sirs: In accordance with your authority, we are now cabling our New Orleans friends concerning charter S. S. 'Empire' on terms of our letter to you this morning. We thank you for the authority, and will hand you copies of charter immediately they come to hand.

"Yours, faithfully,

Per pro Simpson, Spence & Young,
"J. T. Gibson."

The charter, however, as drawn in New Orleans by Ross, Howe & Merrow, instead of the guaranty of 2,500 tons dead weight, etc., read, "guarantied to

carry not less than 2,500 tons (of 2,240 pounds) of cargo." Without waiting for the arrival of the copies of the charter party, the ship was ordered to New Orleans, the owners delivering to her captain the first letter written to them on March 25, by Simpson, Spence & Young, and which contained a statement of the terms which they had authorized to be incorporated in the charter party. On arrival at New Orleans, the captain gave written notice to Ross, Howe & Merrow that he was ready to receive cargo "under charter dated 25th March, 1892." A copy of the charter party was handed to him in New Orleans, but he testified that he did not look at it, because he took it for granted that it was like the letter. It appears that the ship took all the cargo which she could properly carry, but that she had not sufficient space for the full 2,500 tons of light oil cake and meal tendered by libellant. Copies of the charter party having been received at Liverpool by Simpson, Spence & Young prior to April 14, 1892, they on that date wrote to Ross, Howe & Merrow a letter, containing the following: "'Empire'—Charters duly received, and we passed same on to owner. We are surprised that you have made this charter out on the lump sum, 'B' form, which is entirely unusual, as it ought to have been made out on the usual oil-cake form of charter, you simply inserting the guaranty of 2,500 tons dead weight. Owner absolutely refuses to allow clause 7, and this must be erased. There are one or two other points in the charter which he objected to, but we have now got him to agree to them, and the charter is therefore all in order with the exception of clause 7, which must be entirely erased."

Clause 7 was not in controversy in this case. In respect to this letter, Mr. John T. Gibson, manager of Simpson, Spence & Young, in his deposition made the following explanation: "On or about the 10th April I received copies of the charter party from Messrs. Ross, Howe & Merrow, and sent a copy on to Messrs. William Thomas & Co., and Mr. Jones, Messrs. William Thomas & Co.'s clerk, subsequently came to see me about it. He pointed out that in the guaranty as to carrying capacity the word 'deadweight' was omitted. It is quite possible that I told him that it must have been an oversight on the part of Messrs. Ross, Howe & Merrow, as it was arranged in the cablegrams that that was the guaranty. I afterwards saw Mr. Thomas, but I do not recollect quite what passed between us, but I think it very likely that I also told him that it must have been an oversight on the part of Messrs. Ross, Howe & Merrow. After these interviews, I wrote out to America to put the matter right, and a true copy of my letter is now produced and shown to me, marked 'J. T. G. 5.' I annex copy of certain letters and cables now produced and shown to me, marked 'J. T. G. 6,' which are true copies of what passed subsequently between Messrs. Ross, Howe & Merrow and ourselves."

Guy M. Hornor, for appellant.

James McConnell, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. The controlling question in this case is whether William Thomas & Co., owners of the steamship Empire, in chartering said steamship to the Gulf Port Steamship Company, guaranteed said steamship to carry a cargo of not less than 2,500 tons of cotton-seed oil cake, and, or meal, and, or flour, in sacks, or, as contended by the owners, the guaranty was for the ship to carry a cargo of 2,500 tons dead weight. The evidence is against the appellants, libellants in the court below, and, the district court having so found, the decree appealed from is affirmed.

THE ELMBANK.

WEIR et al. v. PRICE.

(Circuit Court of Appeals, Ninth Circuit. June 27, 1895.)

No. 199.

1. SALVAGE COMPENSATION—EXTINGUISHING FIRE BY CHEMICALS.

A cargo of sulphur having taken fire at the wharf, water was pumped in for several hours by tugs and by the city fire department, without apparent effect. The underwriters then employed a skilled chemist, who, with the master's assent, took charge of the vessel, and, by generating carbonic acid gas and discharging it into the hold, finally succeeded, with the aid of several chemical engines belonging to the fire department, in extinguishing the fire. At first there was probably some danger of an explosion, and the time employed was five or six days. The value of vessel and cargo as saved was \$97,000. *Held*, that an award of \$10,000 to the chemist was excessive, and should be reduced, on appeal, to \$6,000. 62 Fed. 306, reversed.

2. SAME—SERVICES RENDERED UNDER CONTRACT.

The fact that salvage services are rendered under a contract of employment by which the salvor will be compensated whether successful or not is a matter which should be considered in reduction of the award.

Appeal from the District Court of the United States for the Northern District of California.

This was a libel by Thomas Price against the bark Elmbank and cargo to recover compensation for salvage services; Andrew Weir and others being claimants of the bark, and John Stauffer & Co., claimants of the cargo. In the district court libellant was awarded \$10,000. 62 Fed. 306. The claimants both of the vessel and her cargo appeal.

Andros & Frank, for appellants.

Howell A. Powell and Walter G. Holmes, for appellee.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

GILBERT, Circuit Judge. The appellee was the libellant of the ship Elmbank, her cargo, etc., for salvage services rendered in extinguishing a fire that broke out in the cargo while the vessel lay at her dock in San Francisco. The cargo consisted of sulphur in sacks. The fire broke out at about noon of Saturday, the 10th day of June, 1893. A few minutes later the fire engines of the city fire department of San Francisco arrived. The firemen took off the hatches, and pumped large quantities of water into two of them. Three steam tugs came alongside and offered assistance, which was refused. The firemen continued to pour in water, and made two additional holes in the deck for that purpose. The master of the Elmbank engaged the steam tug Fearless to assist in pumping in water, at an agreed compensation of \$50 per hour. She passed her hose on board and commenced work. The fire, instead of being abated by the large quantity of water which was poured into the hold, appeared to be gaining in intensity. At about 3 o'clock, W. H.

Dutton, the agent of the underwriters of the vessel and cargo, who had arrived upon the scene, remembering that upon a previous occasion he had seen fire in a ship's hold extinguished by the libelant by the use of carbonic acid gas, went to the libelant's office, to procure his services. He returned with the libelant, and on arriving at the vessel, with the consent of the master, placed the libelant in charge of the efforts to extinguish the fire. The libelant directed that the engines cease pumping water into the ship, and ordered that all the hatches and other openings of the deck be tightly closed. He caused empty barrels to be procured, and to be fitted with the necessary tubes for the introduction of gas into the hold of the vessel. Into the barrels, eight in number, he caused large quantities of fragments of marble to be placed, and to be mingled with muriatic acid, for the generation of the gas. In the meantime, while these preparations were being made for the production of carbonic acid gas, chemical engines belonging to the fire department of the city of San Francisco were sent to the scene of the fire. These engines were intended to be used with bicarbonate of soda and sulphuric acid, from which chemicals carbonic acid gas is more speedily evolved than from the use of muriatic acid and marble dust. By 5 o'clock carbonic acid gas was being introduced into the vessel from the chemical engines, and by 8 o'clock, and perhaps earlier, the barrels, with their contents, were in operation. By 2 o'clock in the morning the chemical engines were withdrawn, for the reason that their supply of chemicals was exhausted, and none other could then be procured. The fire, however, was then under control. By Sunday morning the deck of the vessel had cooled, and the fire appeared to be extinguished, but the libelant continued to introduce gas from the barrels until the following day. By noon on Monday, upon the libelant's suggestion, the tug Fearless began to pump the water out of the vessel's hold. This would appear, upon the libelant's own testimony, to have been an error, for at 10 o'clock p. m. it was discovered that fire had again broken out, owing to the fact that, with the pumping, fresh air had been introduced into the hold, and had reached the sulphur that had been burning, before it had cooled sufficiently to prevent its reignition. Mr. Dutton, who was at the ship at the time, telephoned to the fire department again for the chemical engines, and sent for the libelant, who was at his residence. Six chemical engines arrived and were set to work, and the barrels were again brought into service. By 7 o'clock on Tuesday morning it was believed that the fire was again extinguished. The libelant continued, however, to cause gas to be introduced by the use of the barrels until Wednesday morning, when the hatches were opened, and it was found that the fire was extinguished. The libelant was engaged at the vessel almost continuously from Saturday at 3 p. m. until Wednesday morning. He remained thereafter for several days, superintending the discharge of the cargo. On Thursday or Friday he was notified by the master of the vessel, on his own behalf and on behalf of the underwriters, that his services were no longer required, but he continued to remain, stating in reply that

he should make no additional charge for what he should do thereafter. The value of the vessel as saved was \$76,000, and the value of the cargo as saved was \$21,000. The ship paid in general average net \$16,310. The cargo made \$5,735.58, besides paying its freight, \$4,984.32. The libelant was awarded salvage in the sum of \$10,000. The decree is appealed from upon the ground that the award is excessive.

The elements that enter into the adjustment of the amount of the award in a salvage case are, in general: (1) The value of the property by the use of which the salvor rendered the salvage service, and the danger to which that property was exposed; (2) the skill with which the services were rendered; (3) the time devoted thereto, and the nature of the labor; (4) the risk incurred by the salvor; (5) the value of the property saved, and the degree of danger from which it was rescued.

The consideration of the first of these elements is not involved in this case, for the libelant risked no property of his own. His skill as a chemist is unquestioned, and there is no doubt that his services were rendered in a skillful manner. The fact that fire may be extinguished by the use of carbonic acid gas, and that the gas may be generated from muriatic acid and marble dust, may be said to be fairly well known, and to be matters of common knowledge. It is also within common knowledge that the fire department of nearly every considerable city of the United States is fitted with chemical engines for extinguishing fires by the use of carbonic acid gas. The San Francisco fire department had eight such engines. But the process of introducing gas from retorts such as those improvised by the libelant may be said to require practical skill. The idea of extinguishing the fire in this case by carbonic acid gas was suggested by Mr. Dutton. He knew the libelant was a skillful chemist. He knew also of other practical chemists, and it is undisputed that there were several within his reach. If he had failed to secure the services of the libelant, therefore, he would have applied to others. The libelant faithfully and efficiently superintended the use of the agencies which he himself suggested and those that were placed at his disposal.

The time the libelant gave to the work of extinguishing the fire, and for which he was employed by the underwriters, included 5 or 6 days, two of which were given to the first fire, and the remainder to the second; and during that time his service was continuous, with the exception of short intervals for rest. The time he devoted to examining the condition of the hold and the cargo after the final extinction of the fire, and to superintending the unloading of the cargo, covered a period of 10 or 12 days; but the service so rendered was not within the terms of his employment, and was not rendered at the instance of either the master or the underwriters, but, on the contrary, was against their objection. The evidence proves, moreover, that soon after the second fire was extinguished the libelant was informed by the master that his services were not longer needed, either by him or the underwriters, and in response thereto

he stated that no additional charges should be made by him for his time or labor after that date.

Concerning the personal risk to the libelant, the evidence tends to indicate that, at and before the time when he arrived at the vessel, the introduction of water in the manner in which it was being poured into the ship produced currents of air, which distributed flowers of sulphur in impalpable dust through the unfilled spaces of the hold, and that if by any means fire had been communicated to the dust so commingled with the air there was liable to occur what is known as a "dust explosion," such an explosion as has upon occasions occurred in flour mills and in coal mines, and that the intensity of the explosion would have depended upon the proportions in which the dust and the air were present, and the extent of the space which they occupied in the hold. The danger, if it existed, however, was largely obviated by closing the hatches and shutting off the access of currents of air, and it was evidently not believed to be imminent at any time, for no difficulty was encountered in inducing a sufficient number of men to go upon the deck to batten down the hatches and to go into the rigging to make tight the openings in the masts, and enough men thereafter to remain on the deck or sufficiently near the vessel to conduct the operation of the chemical engines and the improvised retorts. If there were danger, it was at all times shared by the men in charge of the engines, and the gang of four or five men in charge of the retorts; and, while the evidence may be said to establish the fact that the danger existed, it fails to convince us that the peril was great, or that it endured for more than a comparatively small portion of the time. There appears to us in the testimony of the libelant an exaggeration of the danger. He says:

"I said, on entering the ship, that unless they did something to prevent the access of the large volume of air which was entering into the ship, all the hatches being open, the masts being all hollow, and creating a draught, that there would be at any moment a very dangerous explosion."

He declared that the masts were "open at the foot, and were acting like the stack of a reverberatory furnace." In short, he locates the source of the danger principally in the hollow masts, which caused draughts from below, and operated like furnace stacks. The evidence elsewhere shows beyond question that the masts, although they were hollow, were closed below, and that there was no opening whereby the air could pass through them. The currents of air through the open hatches were stopped immediately after the arrival of the libelant, for he testifies that he ordered the captain to close down the battens of all the holds, and sent the sailors to the mast head to make them as tight as possible.

In the danger of the loss of the vessel and cargo must be found the principal element of salvage service in this case. The value of the rescued property was \$97,000. If the fire had not been checked, the loss would, of course, have been total. The important inquiry is, what was the risk from which the libelant's efforts rescued the property? There is nothing in the nature of a fire of sulphur which

prevents its extinction by means of water in the ordinary manner. The failure of the efforts of the firemen in this case may be attributed to their inability to ascertain and reach the location of the fire. The smoke and fumes of sulphur prevented an inspection of the hold. The result was that water could only be poured into the vessel until it should rise to a sufficient height to reach the seat of the fire. Up to the time of the arrival of the libelant at the vessel, the water had not touched the fire. In the light of the evidence as to the location of the fire, as ascertained subsequently, it is probable that, had the use of water been continued for a short time, perhaps one or two hours, the fire would have been extinguished. The evidence also tends to show that the fire could have been successfully overcome by the use of the chemical engines of the fire department of San Francisco. Four only of the engines, as we have seen, were used. There is some conflict in the testimony as to whether their use was suggested by the libelant or by Mr. Dutton. Perhaps it is not material which; but an examination of the testimony leaves the conviction that the suggestion was Mr. Dutton's. The gas-producing capacity of the four chemical engines that were used was considerably greater than that of the eight barrels, and it is probable that if all the chemical engines, of which there were eight, had been used promptly, even after the employment of the libelant to take charge of the fire, the fire would have been extinguished even sooner than it was.

The agreement under which the libelant in this case undertook to render his services may be properly considered in determining the amount that should be awarded him therefor. The testimony concerning the terms of the agreement is not harmonious. The libelant testifies that no conversation on the subject occurred between him and Mr. Dutton until after they had left the office, and that while they were on their way to the vessel there was a conversation, the substance of which was that the libelant would charge for salvage, and that he would make no charge if he failed to save the property. Mr. Dutton, on the other hand, testifies that the only conversation on the subject occurred in the office. In this he is corroborated by another witness who was present. The conversation, as detailed by Mr. Dutton, was as follows:

"I said: 'Professor, what are you going to charge us for this, to put out this fire?' He laughed and said: 'I will charge you-- I will charge you what you gentlemen call "salvage."' I kind of hesitated at that. He laughed, and said: 'Oh, well, there will be no trouble about our coming to an arrangement, Mr. Dutton.' I said: 'No, professor, I guess there will be no trouble about that. We will come to an arrangement easy enough.' He said: 'Yes. It will depend on the amount of work I have to do how much I will charge.'"

If these are the terms on which the libelant was engaged,—and we are of the opinion that they are,—he was not a volunteer salvor in rendering the service, but he was an employé for hire, working under a definite understanding with his employer, the purport of which was that if his efforts were successful, and the property were rescued from the fire, the amount of his charge would thereby be enhanced, and would be as for salvage service, yet, whether successful or not,

he would nevertheless be entitled to compensation for his work. His contract was with the underwriters, and although the master of the vessel consented to his supervision of the efforts to extinguish the fire, and placed the property under his control, thereby subjecting it to his lien for salvage, the underwriters were directly responsible to him for his compensation, and he evidently so understood it. In procuring marble dust and muriatic acid and other material to be used, he caused the same to be charged to the underwriters. Afterwards, and before bringing this suit, he received from the underwriters \$300 on account of his demand.

There is a recognized distinction between a voluntary and an employed salvor. Said Dr. Lushington in *The Undaunted*, Lush. 90, 92:

"There is a broad distinction between salvors who volunteer to go out and salvors who are employed by a ship in distress. Salvors who volunteer to go out go out at their own risk, for the chance of earning a reward, and if they labor unsuccessfully they are entitled to nothing. The effectual performance of salvage service is that which gives them the title to salvage remuneration. But if men are engaged by a ship in distress, whether generally or particularly, they are to be paid according to their efforts made, even though the labor and services may not prove beneficial to the vessel."

In *The Sabine*, 101 U. S. 384, the court, after approving the doctrine of the case last cited, said:

"Reported cases may be found where the owners or insurers of such property, being informed that the property was in peril, sent out vessels and mariners for its assistance and relief; and in such a case it is undoubtedly true that the persons employed, both for their services and for the use of the vessels or other appliances, may maintain a libel in personam to enforce the payment of just compensation for all such services."

In *The Queen of the Pacific*, 21 Fed. 460, 471, it was held that in a case where there was a request for the services, and the compensation did not depend on success, the amount of salvage might very properly be diminished thereby.

In view of all the circumstances, we are of the opinion that a just estimate of the salvage service rendered to the Elmbank and her cargo must include the services of many others besides the libellant. It must include the men who had charge of the chemical engines and the retorts, and who, in discharging their duties, incurred the same danger that was incurred by the libellant. It must include the efforts of the fire department in partially filling the hold with water, thereby occupying the space which must otherwise have been filled with carbonic acid gas in the subsequent efforts to extinguish the fire, for, although the firemen may not receive salvage compensation, it is proper to consider the extent to which they contributed to the result in apportioning the salvage to others who have earned it. There should also be considered the efforts of Mr. Dutton, to whom must be accorded the merit, if any there be, of suggesting the use of carbonic acid gas, and of suggesting the use of the chemical engines. A proper award for all the salvage in the case might justly exceed the amount that has been decreed to the libellant, but we are unable to find that his services alone should be compensated in that amount.

In our judgment, the award to him of \$10,000 gives undue prominence to the part he took in rescuing the property. We are aware that this is a subject upon which no definite rule can be laid down, and that, in determining the amount of compensation, each court must be guided largely by its own judgment, having in view as nearly as possible the theory upon which salvage is awarded, and the purpose of its allowance.

Said Mr. Justice Bradley in *The Suliote*, 5 Fed. 99, 102:

"Salvage should be regarded in the light of compensation and reward, and not in the light of prize. The latter is more like a gift of fortune, conferred without regard to the loss or sufferings of the owner, who is a public enemy, while salvage is the reward granted for saving the property of the unfortunate, and should not exceed what is necessary to insure the most prompt, energetic, and daring effort of those who have it in their power to furnish aid and succor."

In view of all the facts, it is our judgment that the amount awarded the libellant by the district court is excessive, and that a liberal allowance would be \$6,000. The decree is therefore reversed, at the cost of the appellee, and is remanded for further proceedings in accordance with this opinion.

THE AMITY.

MARCUSSSEN v. SAUNDERS et al.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 360.

SALVAGE COMPENSATION—REDUCTION ON APPEAL.

A tug worth \$30,000, with some risk and damage to herself from intense heat, drew away from a burning wharf a bark which had already caught fire in her masts and rigging. By means of her powerful steam pump, the tug, in about six hours, succeeded in subduing the flames. After an absence of some four hours, the fire having broken out again, she returned to the bark, and, by request, lay by her all night, extinguishing the flames, which continued to break out afresh under a strong wind. The estimates of various witnesses as to the value of the bark after the fire ranged from \$1,500 to \$10,000, but she had been insured for \$23,000. The district court placed her value at \$10,000, and, the cargo being worth about \$10,000, awarded \$5,000 as salvage. *Held* that, while the valuation of the vessel appeared high, yet, under all the circumstances, the award could not be considered so excessive as to warrant the interference of an appellate court.

Appeal from the District Court of the United States for the Northern District of Florida.

This was a libel by E. E. Saunders, owner of the tug *Echo*, against the Norwegian bark *Amity* (P. E. Marcussen, claimant), to recover for salvage services. The crew of the *Echo* intervened to assert their claim. The circuit court rendered a decree for libellants in the sum of \$5,000, and the claimant appealed.

In the district court the following opinion was filed by SWAYNE, District Judge:

On October 27, 1894, the Norwegian bark *Amity* was lying at Muscogee wharf, in the harbor of Pensacola, loaded with kainit and muriate of potash,

and was discharging the same. She was on the east side of the wharf, bow in, heading northward. At about 11 o'clock a. m. on that day, the said wharf, warehouse thereon, and coal chutes attached thereto were discovered to be on fire, in close proximity to the said bark. The steam tug Echo, owned and operated by libelants, was at the time about three-quarters of a mile away, on the bay, engaged with another vessel. As soon as the officers of the tug saw the fire and the danger to the Amity, they went immediately to her assistance, and arrived alongside in about seven minutes from the time they discovered the fire. By the assistance of the crew of the bark, they made fast to her, and towed her away from the wharf, to a place of safety in the bay, and, by the aid of a powerful steam pump, succeeded in extinguishing the fire on her. At the time a wind was blowing from the north. When the tug reached her, the bark was afire in her masts and rigging, and the intense heat from the rapidly burning wharf was scorching her side next to the wharf. No other tug or steam vessel able to move the bark was near or available at the time, and she must have been very speedily destroyed, with her cargo, if the Echo had not acted promptly. The delay of a few minutes at this time must have rendered all efforts to save her fruitless.

The testimony in reference to the value of the bark varied greatly, ranging all the way from \$1,500 up to \$10,000; but the agent of the Norwegian Insurance Company, Mr. Moller, who was present, defending the suit, testified that she was insured for about \$23,000. It would seem, therefore, that \$10,000 was not too high an estimate of her value at the time of the fire. The cargo saved was worth \$9,825.97, making the total value of property saved by the Echo about \$20,000. The fire, being in the masts and rigging of the Amity, rendered the task of extinguishing it difficult and hazardous to the Echo and her crew. The Echo sent her men with her hose up into the rigging of the Amity, to play upon the fire. The masts and spars were coated with paint and oil, and in some places covered with iron, inside of which the fire lodged and burned persistently. The crew of the Echo thus engaged were in constant danger from falling bolts, chains, and other pieces of rigging above them, and two or three of them narrowly escaped serious injury in this way. The tug Echo was worth at the time about \$30,000, being large and powerful, and supplied with the latest improvements; and, though the danger to her was at no time great, yet she suffered somewhat from the intense heat at the wharf, and from falling fire and bolts after. The prompt and successful manner in which the bark was removed from the wharf, and the vigorous and successful method of extinguishing the fire on her, showed the Echo to be well equipped for such service, and to be manned by officers and crew skilled and fearless. The salvors were continuously engaged in their efforts to extinguish the fire from 11 o'clock a. m., on the 27th, to 5 p. m.; then went away for some three or four hours, but returned at the urgent request of the officers of the bark, and remained alongside of her until about 7 o'clock on the morning of the 28th, occasionally playing on the fire as it would break out afresh.

Salvors should not only be remunerated for risk of life and property, and for labor, privations, and hardships encountered, but the reward should be such as to furnish a sufficient incentive to similar exertions. See 21 Am. & Eng. Enc. Law, pp. 688, 689.

"The allowance for salvage should be sufficiently liberal to make every one concerned eager to perform the service with promptness and energy, and also to encourage the maintenance of steam vessels sufficiently powerful to make the assistance effective, but not so out of proportion to the service actually rendered as to cause vessels in situations in which it would be expedient that they should quickly accept the assistance to hesitate or to decline to receive it, because of its ruinous cost. *Ehrman v. The Swiftsure*, 4 Fed. 463."

After a deliberate review of the testimony, and a careful examination of the law, under the established doctrine so well expressed in the two paragraphs quoted, I am of the opinion that \$5,000 will be a proper award in this case.

By agreement of proctors for libellant and interveners, filed December 26, 1894, it is stipulated that the amount of salvage recovered shall be divided so as to give the libellant two-thirds and the interveners one-third of the amount; the latter one-third to be divided among the crew of the tug Echo according to their respective wages.

John C. Avery, for appellant.

W. A. Blount and A. C. Blount, Jr., for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. While the award for salvage against the ship appears to be high in reference to some of the values sworn to by witnesses in the case, yet the evidence, taken as a whole, is not so conclusive on the side of the claimant that we can find therefrom that the court below erred in the valuation fixed as the basis of award. On that basis, considering the value of the salving vessel, the risk it encountered in rendering the salvage services, and the complete success attending such services, the amount awarded cannot be characterized as excessive to such a degree as to warrant our interference. The decree appealed from is affirmed.

THE BELLE OF THE COAST.

FIGGANS v. AIKEN.

(Circuit Court of Appeals, Fifth Circuit. May 28, 1895.)

No. 373.

LIBEL FOR PERSONAL INJURIES—EVIDENCE.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel by Baptiste Figgans against the steamboat Belle of the Coast to recover damages sustained by libelant, who was employed on board said boat, by reason of having his fingers crushed between the ends of two barrels while engaged in loading sugar at the landing at Pike's Peak, on the Mississippi river. The district court dismissed the libel, and the libelant has appealed.

W. W. Handlin, for appellant.

E. H. Farrar, B. F. Jonas, E. B. Kruttschnitt, and Hewes T. Gurley, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. Only facts are involved in this case. On the evidence, the district judge found against the libelant, and we find the same way. The decree appealed from is affirmed.

McCONNELL v. PROVIDENT SAVINGS LIFE ASSUR. SOC. OF NEW YORK.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1895.)

No. 258.

PRACTICE—CASE IMPROPERLY HEARD IN EQUITY—OBJECTION FIRST RAISED ON APPEAL.

A case of a purely legal nature, involving no equitable feature and requiring no equitable relief, was brought in a state court, in the form of a bill in equity, under a local statute, and after removal to the federal court was conducted to its end by both parties under the forms of equity procedure, resulting in a decree dismissing the bill. From this decree the complainant took an appeal, and, by a motion to dismiss such appeal, made after the time for bringing a writ of error had expired, the respondent for the first time raised the objection that the proceeding was one at law, which could only be reviewed by writ of error. *Held*, that the decree should be reversed and the cause remanded, with instructions to redocket the case as one at law, and require the parties to reframe their pleadings to conform to the procedure at law.

Appeal from the Circuit Court of the United States for the Eastern District of Tennessee.

This is an appeal from a decree of the circuit court of the United States for the Eastern district of Tennessee. The cause was begun by an original bill filed in the chancery court at Knoxville, in Tennessee, by Mary F. McConnell, a citizen of Tennessee, against the Provident Savings Life Assurance Society, a corporation and citizen of the state of New York. The bill alleged that the complainant was the widow of one R. A. McConnell, deceased, who died July 28, 1893; that on the 27th of April, 1893, the said R. A. McConnell procured the defendant to issue to the complainant, his wife, a policy of \$5,000 upon his life, which policy was filed and made a part of the bill. The bill further averred that proper proofs of death were forwarded to the defendant; that by the terms of the policy the defendant, within 60 days after the presentation of the satisfactory proofs, became liable to pay the face of the policy, but failed and refused to do so; that there was actually paid, at the time of the issuance and delivery of the policy, the sum of \$20.65 on account of the premium thereon for the current year ending April 27, 1894; that the defendant was justly indebted to complainant in the full amount of the policy, less that portion of the premium due thereon for the current year ending April 27, 1894, which was the premium due for the whole year, less the \$20.65 paid. The prayer of the bill was for process by subpoena according to the practice of the court, for judgment and decree in favor of complainants for the amount of the policy, with interest thereon, less the portion of the premium for the current year; and, if mistaken in her special prayer, she prayed for all such other, further, different, and general relief as the facts might warrant and as the ends of justice might require. Upon this bill subpoena was issued summoning the defendant to appear before the chancery court at Knoxville to answer the original bill which the complainant had filed against it. The subpoena was served upon the agent of the defendant. Thereupon the cause was removed by defendant to the court below, and on the 9th day of July thereafter the following motion was made in that court: "Came the Provident Savings Life Assurance Society of New York, by its solicitor, George H. Pepper, and moved the court to allow the transcript in the above-entitled cause from the chancery court of Knox county removed to this court, on bond and petition to be filed in this court. And, it appearing to the court that the law in regard to removals has in all things been complied with, the court is pleased to sustain said motion, and order that the same be filed and docketed. Thereupon the defendant filed its answer. The answer begins as follows: "To the Honorable Judges holding United States Circuit Court at Knoxville, Tennessee: The answer of the Provident Savings Life Assurance Society of New York to the bill filed against it in the chancery court of Knox county, Tennessee, and removed to

this honorable court. Respondent, answering complainant's bill, admits that complainant is the widow of Robert A. McConnell, deceased." The answer admits certain facts in the bill, then sets out the issuance of the policy, its character, the proper construction thereof, the failure of McConnell to pay the amount due quarterly on the premium, the forfeiture of the policy accruing therefrom, and denies certain constructions put upon the policy by the complainant. The answer concludes: "All allegations in complainant's bill not admitted or denied are hereby expressly denied. Respondent denies that it owes complainant anything on account of said lapsed policy, and prays to be hence dismissed, with its reasonable costs." The answer is signed: "The Provident Savings Life Assurance Society of New York, by Sheppard Homans, President; George H. Pepper, Solicitor; Edwin B. Smith, of counsel." On July 21, 1894, the parties to the action signed an agreement as to facts, which was filed upon the same day. The caption of the agreement is as follows: "In the United States Circuit Court for the Northern Division of the Eastern District of the State of Tennessee. For the purpose of saving time and expense, and expediting the trial of this cause, the following facts are agreed upon between the parties, and as such may be taken and considered by the court in the determination of this lawsuit, so far as the facts themselves are competent, as fully as though established by competent testimony in regular form taken and submitted." At the end of the agreement is this: "Formal replication to defendant's answer is waived." On the same day was filed a stipulation as follows: "It is hereby stipulated by and between the parties hereto, and their attorneys, that this cause be tried by the court without a jury; a jury trial being hereby waived under sections 649 and 700 of the Revised Statutes of the United States." On July 28, 1894, a bill of exceptions was signed by the judge and filed. Special findings of fact were made by the court. Motions were made to set them aside, the motion was overruled, and the following entry was made in the court below: "Be it remembered that this cause came on for final hearing before the Honorable D. M. Key, judge of the United States district court, holding the United States circuit court at Knoxville, Tennessee, on this the 28th day of July, 1894, upon the pleadings and agreed state of facts, with the exhibits to said agreed state of facts, including application for insurance, and the policy issued thereon, and exhibits with bill and answer; and the same having been considered by the court, and the court being of the opinion that the complainant is not entitled to relief, the court is pleased to order that the complainant's bill be dismissed, and the defendant have and recover of and from complainant and C. L. McConnell, surety upon the prosecution bond, the costs of this cause, for which execution is awarded." A prayer for appeal was then filed by complainant, and it was allowed.

R. H. Sansom (Tully R. Cornick and Templeton & Cates, of counsel), for appellant.

George H. Pepper and Edwin B. Smith, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the case, delivered the opinion of the court.

A motion is made by the appellee to dismiss this appeal on the ground that the proceeding below was a proceeding at law, which can only be reviewed by a writ of error in this court. An examination of the record satisfies us that the cause was heard upon the equity side of the court. The action was begun by bill in the state chancery court, and removed to the circuit court of the United States. The forms of pleading were those of the chancery jurisdiction. It is true that there is a stipulation waiving a jury, and to that extent the proceedings were inconsistent with equity procedure.

But the bill throughout was treated as a bill in chancery, the answer was in the form of an answer in chancery, the formal replication required in chancery was expressly waived, and the action of the court was expressed in a decree by which complainant's bill was dismissed. There is nothing to show positively and conclusively that the cause was docketed on the equity side of the court, but we think this is the necessary inference from the form of the pleadings and the entries. This being so, the only mode by which the action of the court below could be reviewed was by an appeal. The cause of action of the appellant and complainant below was at law. It was a simple suit to recover the amount of the policy upon the happening of the condition upon which by the terms of the policy it was due. It had not a single equitable feature in it, and there was no relief needed or prayed for which necessitated a resort to the court of equity. The jurisdiction of the Tennessee chancery court rested only upon a Tennessee statute enlarging the jurisdiction of courts of equity, and not applicable to courts of the United States. In such a case we think that a United States court of equity has no jurisdiction whatever, and that it is the duty of this court to reverse the decree of the court below and remand the case, with instructions to redocket the cause as one at law, and to require the parties to reframe their pleadings to conform to procedure at law.

In *Reynolds v. Watkins*, 9 C. C. A. 273, 60 Fed. 824, we had occasion to consider the proper course for this court to pursue in regard to appealed causes which had been heard in equity below when they should have been heard at law. In that case Judge Lurton, delivering the opinion of the court, said:

"No question of jurisdiction was raised in the circuit court, but it is now, for the first time, insisted that complainants had a plain and adequate remedy at law, and that, therefore, a court of equity will not entertain this suit. An objection that the remedy at law was plain and adequate should be taken at the earliest opportunity. Yet neither consent nor negligence will confer jurisdiction in equity where none really exists, and the court may at any stage of a cause entertain such objection, or dismiss a bill *mero motu*. Yet there are cases where if the objection of want of jurisdiction because of an adequate remedy at law be not taken in the circuit court, and be for the first time presented upon appeal, this court will not feel itself obliged to entertain an objection coming so late, especially if the subject-matter of the suit is of a class over which a court of chancery has jurisdiction, and it is competent for the court to grant the relief sought. *Reynes v. Dumont*, 130 U. S. 355, 9 Sup. Ct. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594. Looking to the whole of the original bill, including the transcripts of two suits in equity involving and affecting the title and interest of complainants, and filed as exhibits to the bill, we are of opinion that the interest of the complainants was so essentially of an equitable character as to constitute a controversy over which a court of equity may well assume jurisdiction."

In *Reynes v. Dumont*, 130 U. S. 355, 395, 9 Sup. Ct. 486, the chief justice, speaking for the supreme court, said:

"It was held in *Lewis v. Cocks*, 23 Wall. 466, that if the court, upon looking at the proofs, found none at all of the matters which would make a proper case for equity, it would be the duty of the court to recognize the fact and give it effect, though not raised by the pleadings nor suggested by counsel. To the same effect is *Oelricks v. Spain*, 15 Wall. 211. The doctrine of these and similar cases is that the court, for its own protection, may prevent matters purely cognizable at law from being drawn into chancery at the pleasure of

the parties interested; but it by no means follows, where the subject-matter belongs to the class over which a court of equity has jurisdiction, and the objection that the complainant has an adequate remedy at law is not made until the hearing in the appellate tribunal, that the latter can exercise no discretion in the disposition of such objection."

We think that the case at bar is not of a class of suits usually cognizable in a court of equity, that there is nothing at all in it which makes it a proper case for chancery jurisdiction, and that the principle laid down in *Lewis v. Cocks*, 23 Wall. 466, is applicable. Both parties seem to have elected to treat the cause as one in equity, and not to have objected to proceeding on the equity side of the court. Owing to this action, the defeated party sought review in this court by appeal as from a decree in equity, and it is now for the first time objected by the successful party below, after the time has elapsed within which a writ of error can be brought, that the cause was not an equity cause, and that the proper mode of review was by writ of error. Under such circumstances, we think the decree of the court below should be reversed for want of jurisdiction, with instructions to remand the cause to the law docket, and to reframe the pleadings accordingly. The costs of the case in this court and in the court below will be divided.

STATE OF MICHIGAN v. JACKSON, L. & S. R. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1895.)

No. 266.

PUBLIC LANDS—SWAMP-LAND ACT—ESTOPPEL AGAINST STATE.

The state of Michigan filed a bill to remove clouds upon the title to lands to which it claimed to be entitled, under the grant in the swamp-land act of September 28, 1850, by reason of such lands having been included in the original surveys of public lands in the state, which were ascertained to be fraudulent and erroneous, but which surveys, as claimed by the state, were adopted at the time of the grant, as the means of ascertaining the lands covered by it. It appeared that, in the course of the administration of the grant, under the statutes of the state and the United States, and by the acts of the various officers of the state and general governments, the grant had been adjusted upon the general principle and purpose of reaching the real truth in regard to the character of the lands, and the lands, so ascertained to belong to the state, had been patented to it, largely upon the basis of the corrected surveys, excluding the lands now claimed, which were in fact not swamp lands, and that the particulars of such adjustment had been generally known, and had been set forth in the official reports of the officers of the state land office, and communicated to the legislature in messages of the governor, and that such adjustment had remained undisturbed for many years. The lands held by the defendants in this suit had been included in a grant by the United States to the state, in aid of the construction of a railroad, and, after being certified to the state as passing by such grant, in lists which remained on file in the state land office for several years, were patented to the railroad company. *Held*, that the claim of the state was without equity, and that it could not be permitted, after so long a period of acquiescence, during which third parties had acquired rights in reliance upon the validity of its public action, to assert such claim, in disaffirmance of the acts of its officers, whether done in excess of their powers or not. *Lumber Co. v. Rust*, 68 Fed. 155, approved.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This was a suit by the state of Michigan against the Jackson, Lansing & Saginaw Railroad Company, Henry B. Ledyard, Ashley Pond, and Orlando M. Barnes, to remove a cloud upon the title to land claimed by the state. The suit was commenced in a court of the state of Michigan, and was removed to the United States circuit court, where the bill was dismissed. Complainant appeals. Affirmed.

The bill in this case was filed on December 13, 1887, on behalf of the state of Michigan in the circuit court of the state for the county of Ingham. It was subsequently removed on petition of the defendants into the circuit court of the United States. The object of filing the bill was to remove a cloud alleged to have been cast upon the complainant's title to about 50,000 acres of land in the southern peninsula of the state by patents of the United States issued to the defendant railroad company, to restrain the cutting of timber thereon, and to obtain an accounting for timber already removed therefrom. The grounds upon which the state claims, in its bill, to establish its title are these: First, that by the act of congress of September 28, 1850, all the swamp and overflowed lands in the state which had not been previously disposed of by the United States were granted to the state; second, that the identification of the lands as of the character granted by the act was intrusted to the secretary of the interior; third, that the secretary proffered to the state its choice of certain methods for the ascertainment of the lands covered by the grant, one of which methods, namely, that of adopting the field notes of the survey on file in the surveyor general's office as the test of the character of the lands, was accepted by the state; fourth, that the lands in question were by that test swamp lands, and so within the grant; fifth, that in pursuance of instructions from the general land office the surveyor general prepared maps and lists showing what lands were swampy, and that this was an identification of the lands, binding upon the United States and the state of Michigan; sixth (by an amendment of the bill), that the lists so prepared by the surveyor general were reported to the land department, and were approved by the secretary, and that, in consequence of that approval and the several acts of congress confirming those lists, the state's title became full and complete.

The defendants, in respect to such of the lands in controversy as they now or at any time have claimed to own, rely upon patents of the United States issued to the defendant, the Jackson, Lansing & Saginaw Railroad Company, in the years 1869 to 1873, inclusive, in execution of the grant of lands to the state of Michigan, to aid in the construction of certain railroads therein, by act of congress of June 3, 1856, and which grant, in respect of the lands here in controversy, was conferred upon the Amboy, Lansing & Traverse Bay Railroad Company by the act of the legislature of Michigan of February 14, 1857. Lists of the lands passing by the grant were made and certified to the state by the secretary of the interior and filed in the office of the state land commissioner at various times extending from March 14, 1861, to May 12, 1864,—that is to say, about eight years, in the average, before they were patented. The defendants claim that the benefit of this grant inured to the Jackson, Lansing & Saginaw Railroad Company by virtue of a contract between it and the Amboy, Lansing & Traverse Bay Railroad Company, made under the provisions of an act of the legislature of Michigan approved March 14, 1865, authorizing such a contract and a transfer of the grant to the Jackson, Lansing & Saginaw Railroad Company, and another act, that of February 7, 1867, in confirmation of the rights of the last-named company under said contract. Prior to this contract the Amboy, Lansing & Traverse Bay Railroad Company had earned a part of the lands granted, and they were patented to that company. Those, although claimed by the complainant in this bill, did not pass to the Jackson, Lansing & Saginaw Railroad Company by the contract, and the title thereto is not represented by the parties to this suit. Others of the lands claimed in the bill, amounting to nearly one-half of the whole, had been

sold and conveyed, prior to the institution of this suit, to other parties, whose title is likewise here unrepresented. The lands in which the defendant railroad company retains a beneficial interest are held in trust by the defendants Ledyard, Pond, and Barnes to secure the payment of the bonds of said company under a contract made by it with the Michigan Central Railroad Company. Other facts, relating in the main, to the administration of the swamp-land grant in Michigan, and to the appropriation of the lands in controversy to the railroad grant of June 3, 1856, are stated or referred to in the opinion.

Fred. A. Maynard, Atty. Gen. (Frank E. Robson, of counsel), for the State of Michigan.

Ashley Pond and O. M. Barnes, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

Having stated the nature of the case as above, SEVERENS, District Judge, delivered the opinion of the court.

Shortly prior to the hearing of the present case the decision of this court was announced in the case of Lumber Co. v. Rust, 68 Fed. 155, and two other cases of Same Plaintiff v. Other Defendants, 68 Fed. 170, all of which came here on writs of error from the same court from which the present appeal was taken. They were actions of ejectment brought by parties deriving title under patents from the state of Michigan to recover the possession of lands which were claimed to have inured to the state under the swamp-land act of 1850 against parties holding under patents from the United States by purchase. The leading facts were, in the main, similar to those involved in the present suit, but some new features are developed in this which were not disclosed in the former cases; and they also differed in this, that those were actions at law while this is upon a bill in equity. A brief account of so much of the proceedings taken in behalf of the United States and of the state of Michigan for the adjustment of the swamp-land grant as was deemed material to the decision of those cases was given in the statement preceding the opinion in the principal case. Some further, and in some respects more definite, facts are brought to our attention in the present case, which will be alluded to as we proceed. The claim of title in the state as to some of the lands mentioned in the bill is based upon the proposition that the acceptance by the state of the offer to take the field notes then on file in the surveyor general's office as the basis on which the state would receive the granted lands operated as a binding agreement between the two governments whereby an identification of the lands was accomplished, and that thereupon the title passed to the state. The title to other tracts is based upon the preceding facts, supplemented by the additional fact that the surveyor general, in pursuance of instructions, made from the original surveys, and certified, lists, including these tracts, to the land department, wherein they were described as swamp lands. As to others, the title rests upon the foregoing and the further facts that the lists then made from the original surveys in which they were included were approved by the secretary of the interior.

In respect to such of the lands as were included in any list which had then been filed in the land department, it is claimed that the title

was confirmed to the state by the act of March 3, 1857. These are of two classes: First, lists made up before the resurvey from the notes and maps of the old survey, but which latter were superseded by the former, which showed they were not swamp; and, second, a few descriptions which are shown to be swamp by the resurvey, but were not by the old, and which descriptions are in townships in which the adjustment of the grant was made upon the basis of the old survey. As to the first of these classes, the contention that the title to the lands was confirmed in the state by the act of 1857 rests upon the supposition that congress intended to confirm lists which had been under consideration by the secretary of the interior, ascertained and determined to be founded on fraud and error, set aside and replaced by lists which were based on surveys which the department accepted as correct. As to the second, they were found in localities in which the old survey had been, by mutual consent of the state and the general government, made the basis upon which the lands were selected, and upon which they had been actually patented. The question in respect to what effect should be given to the selection and patenting of the land upon the old survey arose during the pendency of the proceedings for settling the grant. The position of the land department was that, in so far as the townships in which the land had been patented upon the old survey and lists, and the errors contained therein had passed beyond correction by the department, the selections should stand, and not be affected one way or the other by the resurvey. This was eminently fair to the state, and by it the state on the whole secured a great advantage, for the uplands described in the first survey as swamp, and patented, far exceeded the lands not therein described as such, but afterwards found to be swamp. And this position was acquiesced in by the state, and it became a part of the basis on which the settlement was reached. With respect to this, as in respect to the other matters adjusted in the course of the administration of the grant, it would be manifestly unjust for the judicial department to overhaul the proceedings, and, while not releasing one party from the bonds imposed upon it, give to the other free license to gather what it can reach.

It has been repeatedly held by the commissioners of the general land office that, after the patenting of all the lands in townships found by the old survey to be swamp,—such patenting having been based upon the old survey,—the state was not entitled to come in with a claim to take under the new survey also; in other words, that it could not claim under two surveys which were inconsistent with each other. In a letter to the commissioner of the state land office, dated June 15, 1874, Commissioner Burdett, of the general land office, rejecting a claim presented by the state commissioner of lands standing as swamp in the lists after resurvey, in localities where the patenting had already taken place on the old survey, said: "In such cases this office has always refused to admit new selections in the same townships when the first or old selections have been certified to the state." And there was no appeal by the state from this decision. And see, in this connection, *Chandler v. Min-*

ing Co., 149 U. S. 79, 13 Sup. Ct. 798, where the effect of the certification of lands in a given locality, and the refusal of the secretary to certify others therein, in excluding the right of the state, was discussed by Mr. Justice Jackson in delivering the opinion of the court. And, further, we are of the opinion that the act of 1857 was intended to have application to cases of non-action by the secretary, and not to cases which were already covered by his action.

In the view which we take of the case, it is not necessary to deal with each of the various classes of lands involved therein, separately. The present record exhibits in a striking way the false and fraudulent manner in which many of the original surveys in Michigan were conducted, and their condition at the time when the swamp-land act was passed, and the legislature of the state signified its acceptance of the field notes as the basis for the adjustment of the grant. Among other things, having special reference to the lands now in controversy, it appeared, by the report of the surveyor general, of November 5, 1849, made nearly a year before the passage of the granting act, that from the authorized examination of the original surveys it had been ascertained that in 5 districts, comprising 38 townships, in which nearly all the lands in this suit are located, only a small proportion of the lines had been run, and that few of the corners had been established, and those were so far out of their proper place as to be worse than useless, and that in 13 of the townships not more than $\frac{1}{30}$ of the lines had been run at all. In the case of *Lumber Co. v. Rust*, we expressed our reasons for dissenting from the positions necessary to be taken to support the state's title to any of the lands claimed by it and involved in the present controversy. Further consideration of the subject confirms our belief that the conclusions then reached are sound and just, and we think that the application of the strictly legal principles maintained in that case would be decisive against the claim of the state in this.

What had preceded in the execution of both grants was very much a matter of administration between the United States and the state, under the statutes of both, upon the true construction of which there had at the outset been doubt and difference of opinion. In such a case the courts will "lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change whereby parties who have contracted with the government upon the faith of such construction may be prejudiced." *U. S. v. Alabama G. S. R. Co.*, 142 U. S. 615, 621, 12 Sup. Ct. 306. In *U. S. v. Hill*, 120 U. S. 169, 7 Sup. Ct. 510, it was said that this principle "has been applied by the supreme court as a wholesome one for the establishment and enforcement of justice between the government and those who put faith in the action of its constituted authorities, judicial, executive, and administrative." And see, also, *U. S. v. Macdaniel*, 7 Pet. 1, and *U. S. v. Union Pac. Ry. Co.*, 37 Fed. 551, where Mr. Justice Brewer, at page 555, collected a large number of authorities of the same import, and noted the growth of this principle of law. This is not precisely the ground upon which an estoppel in pais, in its ordinary sense, is

based, but the doctrine rests ultimately upon the same rule of reason,—that of concluding the principal by the action of its agents, when such action has been of long continuance with the knowledge of, and without dissent from, the principal, and where other parties have shaped their conduct accordingly and founded their interests thereon.

In equity there is little in the complainant's case to commend it to the favor of the court. To begin with, it is not contended that these lands are of the character intended by congress to be granted to the state. It affirmatively appears that they are not. The bill rests upon the assumption that by some miscarriage the state has acquired title to these, which are parcel only of more than a million acres in the state which the record shows to be standing in the same plight. Whatever may have been the original understanding of the legislature of the state (a matter we have discussed in the former case), it is clear that the state co-operated with the general government in the final adjustment of the grant of 1850 upon the general principle and purpose of reaching the real truth and justice of the matter, and by a method wholly inconsistent with its present contention. By the method thus assented to, it has received a large amount of land which it would not otherwise have obtained, and which, or the proceeds of the sales thereof, it keeps. If there has been a departure from the original intention of the legislature by the agents of the state intrusted with the duty of looking after its interests in the settlement of the grant, the course pursued has been public and open. It would seem that what was well known to those at all conversant with the general subject, and being of facts and transactions extending through so many years, should be regarded as known to the state. But it is not necessary to rely upon presumptions. Express knowledge was communicated to successive legislatures by the reports of the commissioner of the state land office, and messages from the executive. It was informed, as early as 1869, that by the method which had been pursued and with which it had been previously made acquainted, the land grant had been practically adjusted and substantially closed up. It had then received the "nearly 6,000,000 acres of swamp lands," which Governor Crapo said, in his message to the legislature in 1867, "were donated to the state by the act of congress of 1850." That communication indubitably showed the understanding of the governor to be that the state had then acquired substantially all the lands due to it under the grant.

It is a rule devised for the protection of the public that the state shall not be held responsible for the acts of its agent when done in excess of his powers. Assuming, for the moment, that there was an excess of power by the officers of the state, what is the application of the above-stated rule to the circumstances as we now find them? It is a fit rule to apply to a transgression which the state has not condoned; but it has no application to a case in which no question of morals is involved, but where a course of action has been pursued with the knowledge and acquiescence of the state in the management and disposition of its property interests for so long

a time that the public have been led to reasonably believe that they may act upon the assumption that what has been done with the sanction of the state was validly accomplished. To apply the rule as the state asks us to apply it here would be to pervert it to an agency for mischief and wrong. The public have supposed, and had a right to suppose, that they could deal with the lands in the state upon the status given them by the action of the public officials of the state and of the United States, without dissent from either government. In a justly-inspired confidence in the integrity and validity of this public action, several hundred thousand acres of land in the state have been bought from the United States by citizens who are bona fide purchasers, and whose titles are mere nullities if this contention of the state can be maintained. It was for the public interest that the status of the lands should be settled, and that they should not remain as stumbling-blocks in the progress of the improvement of the country. The state cannot be permitted to say that it has slept during all this long period, and abandoned its sovereign duties to its citizens, as well as its reciprocal moral obligations to the government which had made to it so magnificent a gift. The state is not to be regarded as a mere machine, incapable of intelligence or conscience. And, while it is necessary and right to restrain or annul the unauthorized acts of its agents by which its interests might be impaired, yet there must come a time, after long-continued acquiescence in public action with knowledge of it, when, in the interest of its citizens, the state itself shall be precluded from despoiling others by the assertion of its original rights.

With respect to this defendant, the railroad company, it is shown that the state employed the grant made by congress to aid the state as an inducement to the building of the road, and in thus securing a public improvement; that these identical lands were certified to the state as passing by the grant in lists which remained on file in the state's land office for several years before they were at length patented by the United States to the company upon the completion of the work; and that the railroad company earned the lands is not questioned. Nor is there any room for doubt that it earned and received them in reliance upon the right of the general government to grant them and give a good title. It was equivalent in substance and effect to a purchase for value, and its good faith is not questioned except by the suggestion that the railroad company had notice by public record that the title was in the state. Here, too, as in the matter of the adjustment of the swamp-land grant, the executive officials participated in the appropriation of these very lands to the objects of the grant to aid the state in building railroads. The time has long gone by when the railroad company could obtain indemnity for the lands, and the state has given no sign of dissent until the filing of this bill. The facts that these lands had been certified to the state, to be conferred upon the railroad company of its adoption, and that they had been so conferred, had been manifest from the state's public records for more than 20 years.

The general doctrine of the immunity of the state for the unauthorized acts of its officials is clearly announced and firmly main-

tained in the decisions of the supreme court of Michigan. *Crane v. Reeder*, 25 Mich. 320; *Ellsworth v. Grand Rapids*, 27 Mich. 250; *Rogers v. Railroad Co.*, 45 Mich. 460, 8 N. W. 46; *Lake Shore & M. S. Ry. Co. v. People*, 46 Mich. 193, 209, 9 N. W. 249; *Plumb v. City of Grand Rapids*, 81 Mich. 381, 45 N. W. 1024. It is needless to fortify this doctrine, as its necessity is everywhere conceded. On the other hand, that court has recognized the reasonable limitations of the rule, and stated the counterpart, which it has not failed to apply in circumstances where the countervailing equities and reasons required it. *People v. Detroit & H. Plank Road Co.*, 37 Mich. 195; *Attorney General v. Ruggles*, 59 Mich. 124, 26 N. W. 419; *State v. Flint & P. M. R. Co.*, 89 Mich. 481, 51 N. W. 103.

The distinction established by these cases and the former, cited as supporting the general rule, is one which we approve as resting on solid grounds of public and private justice and convenience. The principles operating to create the distinction have been many times recognized in the federal courts and in those of other states. A large number of such cases are collected in *Bigelow, Estop.* (4th Ed.) p. 331, in support of the proposition that, in a proper case, an estoppel is applicable to the state. In the case of *State v. Flint & P. M. R. Co.*, 89 Mich. 481, 51 N. W. 103, the state of Michigan filed its bill in the state circuit court against the Flint & Pere Marquette Railroad Company for a purpose similar to that of the present bill. The facts were in all respects like those here shown. The supreme court, when the case reached it, putting aside all other questions, held that the state was estopped by its own conduct from asserting a claim so injurious to the defendant, and in emphatic language rejected the bill as having no foundation in equity, justice, or good conscience. The court cites its own previous decision in *Attorney General v. Ruggles*, 59 Mich. 124, 26 N. W. 419, and the following cases from the federal courts: *U. S. v. McLaughlin*, 30 Fed. 147; *State v. Milk*, 11 Fed. 389; *Cahn v. Barnes*, 5 Fed. 326; *Hough v. Buchanan*, 27 Fed. 328; *Pengra v. Munz*, 29 Fed. 830; *U. S. v. Missouri, K. & T. Ry. Co.*, 37 Fed. 68. To which may be added the more recent case of *U. S. v. Willamette Val. & C. M. Wagon-Road Co.*, 54 Fed. 807, 55 Fed. 711, 718.

Portrayed upon the broad lines of its main features, the state's case is this: It has received in the administration of the swamp-land grant patents for about one-half the land based upon the original survey. It is an open fact, upon which executive messages to the legislature have congratulated the state, that a large portion of the lands thus patented were not swamp, but were among the most valuable in the state. The state has also received the other half of the lands granted, but these it has knowingly received according to the fact as demonstrated by the corrected survey. The general government has, without objection from the state and upon the understanding that the state had got what belonged to it, retained and sold those lands which were falsely described as swamp in the old survey, and which upon the resurvey were proved to be valuable uplands, to parties purchasing in actual good faith. It now seeks to recover these uplands from such purchasers, and founds its right

upon a grant which was not intended to convey them. Sometimes, perhaps, it happens that, by the application of stubborn and inexorable rules of law, such incongruities with justice occur. Possibly a court of equity might sometimes, by reason of extraordinary circumstances immediately controlling the decision, find itself in a situation where it would be required to disregard a wrong which has become an accomplished fact. But here, upon a nearer view of the facts and the principles applicable to the case, we find no difficulty in holding that, whether it be considered upon either its strictly legal or equitable aspects, it is without merit.

The decree of the court below should be affirmed.

NORTHERN PAC. R. CO. v. CRAFT.

(Circuit Court of Appeals, Ninth Circuit. June 24, 1895.)

No. 205.

1. NEGLIGENCE—QUESTION FOR JURY.

One C., an employé of the N. Terminal Co., was run over and killed by an engine of defendant railway company, in the yards of the terminal company, which were used by defendant and two other railroad companies. The accident happened at night, while the engine was being run from the coal bunkers to the roundhouse, in charge of an engine hostler and two wipers. It appeared that one of the wipers, as the engine approached a switch, got down and ran ahead to open it; that he heard cries, and, looking back, saw C. being pushed along on the pilot of the engine; that he called to the hostler, who was running the engine, but it did not stop; that he then jumped on the engine and found the hostler in a situation which indicated that he was either asleep or intoxicated; and that in the meantime C. had been run over. It also appeared that the lights in the vicinity of the accident were such that C. could have been seen if a look-out was kept, and that the bell was rung until the wiper left the engine to open the switch; but there was no evidence that it was rung afterwards. There was some evidence that C. was intoxicated on the night of the accident, but also evidence that he was able to take care of himself and do his work. *Held*, that the questions of defendant's negligence and C.'s contributory negligence were properly left to the jury.

2. SAME—FELLOW SERVANTS.

The duties of C. were to the terminal company, and of the engine crew to the defendant railway company, and there was no evidence that there was any common superior having control of all persons engaged about the yards. *Held*, that the fact that both C. and the engine crew were engaged in moving and caring for defendant's cars in the yards did not make them fellow servants.

3. SAME—EVIDENCE.

Held, further, that it was not error to admit evidence tending to show that the engine hostler was intoxicated, though his intoxication was not pleaded as a specific act of negligence, since such intoxication, if it existed, was not an act of negligence, but a circumstance tending, with others, to prove the charge.

In Error to the Circuit Court of the United States for the District of Oregon.

This was an action by Julia Craft, administratrix of Benjamin P. Craft, deceased, against the Northern Pacific Railroad Company for causing the death of said Benjamin P. Craft. The plaintiff recovered

a judgment in the circuit court. A motion for a new trial was denied (62 Fed. 735). Defendant brings error. Affirmed.

Dolph, Mallory, Simon & Strahan and Joseph D. Redding, for plaintiff in error.

Watson, Beekman & Watson (Andros & Frank, of counsel), for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and KNOWLES, District Judge.

GILBERT, Circuit Judge. Julia Craft, the administratrix of the estate of Benjamin P. Craft, deceased, brought an action in the circuit court of the United States for the district of Oregon against the Northern Pacific Railroad Company to recover damages for the death of the plaintiff's intestate, alleging that on August 15, 1892, while said Benjamin P. Craft was lawfully engaged in the course of his employment as a car accountant of the Northern Pacific Terminal Company, the defendant carelessly and negligently, without ringing a bell or having sufficient lights displayed, or giving warning, or keeping a lookout on the track in front, ran one of its engines over the said Benjamin P. Craft, causing his death. The defendant denied this averment of negligence, and asserted the defense of contributory negligence, alleging that the accident resulted from the negligence of said Craft in being intoxicated, and while in that condition lying down and going to sleep upon the track. The deceased was a car accountant employed by the Northern Pacific Terminal Company, a corporation which had charge of the yards, station, and other terminal facilities at Portland, which were jointly used by the Northern Pacific Railroad Company, the Union Pacific Railroad Company, and the Southern Pacific Railroad Company, under contracts with the said Northern Pacific Terminal Company. The work of the said deceased consisted in taking the numbers and weights of cars that were brought into the yards by the various railway companies, and such service required his presence in different parts of the yards. The accident which caused his death occurred at 2 o'clock in the morning. He was last seen before the accident at about 1:30 o'clock. At that time he was about three or four hundred feet north of the depot, going north on the platform alongside the track, and carrying a lighted lantern. The engine that caused his death came in at about 12:45, with a passenger train, and was shortly afterwards taken about a quarter of a mile north of the depot to the coal bunkers, there to be coaled up, and it was in charge of Stapleton, an engine hostler, and Berry and Cobb, two engine wipers. After being coaled up, the engine started back toward the depot, on its way to the roundhouse. Two switches had to be thrown to enable it to run to the roundhouse, one connecting the coal-bunker track with the main line, the other the main line with the roundhouse track. A plank platform extends from the depot to a point about 50 feet north of where the deceased was struck. There are two tracks upon this platform. The switch connecting with the roundhouse track is about 200 feet south from the

north end of the platform. When the engine had approached within 150 feet of this switch, Berry jumped down and ran ahead to throw it. He had reached the switch, and was about to throw it, when he heard Craft cry out, and looking around he saw him being pushed along on the end of the engine pilot. Berry shouted twice to the engineer to stop, but the body of Craft passed under the engine immediately after Berry first saw him. The engine was not stopped immediately in response to Berry's call, and Berry climbed into the cab, and took hold of Stapleton's arm, and told him that the engine had run over a man. Cobb was just then getting down from the engine. Stapleton was sitting in his seat, and did not have hold of the lever. Craft's lantern was found 150 feet from his body. It was lying alongside the track, overturned and unbroken, but with the light out. Stapleton testified that the engine was running at about four miles an hour, and Berry testified that he rang the bell until he got off the engine to throw the switch. There was no evidence that the bell was rung afterwards. The jury returned a verdict for the plaintiff in the sum of \$3,200.

Error is assigned to the action of the trial court in admitting evidence tending to show that Stapleton, who was in charge of the engine at the time of the accident, was intoxicated, or under the influence of liquor. It is contended that the complaint contained no allegation of such intoxication, and did not allege the same as a specific act of negligence, and that there was consequently no ground upon which such evidence was admissible. The evidence so admitted was the testimony of the witness Berry, who said, in answer to a question concerning Stapleton's condition, that he did not know whether or not Stapleton had been drinking that evening, but that he had on occasion seen him drink a glass of beer, and he finally stated that he thought he had seen him drink one glass that night. There is nothing in this testimony which would tend to show that Stapleton was intoxicated at the time of the accident, and it is impossible to perceive how the plaintiff in error could have been injured thereby. But, in any view of the purport of that portion of the evidence, there was no error in its admission. The fact, if proven, that the defendant's servant whose negligence may have caused the injury was intoxicated at the time of the accident was not in itself an act of negligence, but it was a circumstance to be considered with the other evidence tending to prove the charge laid in the complaint. The negligence, if any there was, upon the part of the defendant's servants, consisted in their failure to take proper precautions while driving the engine through the yard, not in the fact that Stapleton or any one else was intoxicated. But evidence of such intoxication might properly be considered in connection with the other proof which was adduced showing Stapleton's actions and conduct at the time the accident occurred. *Wynn v. Allard*, 5 Watts & S. 524. *Williams v. Edmunds*, 75 Mich. 92, 42 N. W. 534.

It is also assigned that the court erred in declining to instruct the jury, at the close of the testimony, to return a verdict for the defendant. It is contended that such instruction should have been given, upon two grounds—First, that there was no evidence of

negligence on the part of the defendant; and, second, that the negligence of the deceased contributed to his death. Taking the whole testimony into consideration, we are unable to say that there was not evidence sufficient to go to the jury tending to show negligence of the defendant. The facts disclosed unquestionably gave room for the inference that proper precaution may not have been taken by the men in charge of the defendant's engine to give warning of the engine's approach at the time of the accident. Berry, it is true, testifies that a bell was rung. He says that he rang it from the time he threw the switch to let the engine on the main line until he got off the engine to throw the second switch. But he also says that he was at the same time looking out for the place to get off the engine, and that he has no knowledge whether or not the bell was rung after he got off. There was no other testimony that a bell was rung, and the jury may have reached the conclusion that, while Berry's testimony was in the main correct, the ringing may not have been continuous up to the time when he got off the engine. So far as keeping a lookout is concerned, it appeared that that duty devolved upon Stapleton. He testified that he did not see either the deceased or his lantern. His failure to see him was not on account of any obstruction, because the track was clear; nor was it on account of darkness, for the evidence shows that the headlight of the engine cast a light 150 feet ahead, and that there was an electric arc light not more than 300 or 400 feet distant. The only inference is that he was not keeping a lookout; otherwise it is not apparent that he could have failed to see the deceased. The evidence of Berry, moreover, tended to show that Stapleton was not attending to his duties. Berry's manner of testifying indicated an unwillingness to fully disclose the facts, but enough appears from his testimony to show this much, at least: That when he shouted the engine was not stopped; that he then jumped on the engine; that Stapleton and Cobb were there; that he laid his hand upon Stapleton and informed him that a man had been run over; and that Stapleton was then sitting on his seat, and said nothing, but threw his legs around the lever and got down off the engine. On being asked whether Stapleton was awake, he said: "I do not know. He was sitting there on the seat. The supposition is he would be awake." And, on being further and frequently interrogated as to Stapleton's appearance and condition, he admitted that he did not know whether Stapleton was running the engine or not, or whether he had hold of the engine or not, and, finally, in answer to the direct question whether or not Cobb was trying to run the engine after leaving the coal bunkers, he said: "Cobb backed it up from the coal bunkers, I think, onto the main line. After we got done putting on the coal, the man said he was done coaling, and Cobb says: 'I will back her up on the main line, and you go ahead and back her through the switch.' Cobb said this to me." It was a noteworthy fact—and it was doubtless considered by the jury in connection with this testimony—that Cobb, who was still in the employment of the defendant at the time of the trial, was not called as a witness by the defendant, and his absence was not explained.

The facts disclosed in the testimony of Berry were such as to suggest to the jury that Stapleton was either inattentive to his duty, or was for some reason disqualified to render his usual service as engineer. The fact that Berry got upon the engine and took hold of his arm to arouse his attention may have been understood to indicate that he was either asleep or stupefied. In short, the whole situation, as depicted by the witness, appears to have justified the inference that Cobb and Berry were substantially in charge of the engine, and that Cobb, who was an engine wiper, was attempting to act as the engineer in getting the engine back to the roundhouse, and that no one was keeping a lookout. Since there was evidence, therefore, tending to show that proper precaution was not taken while the engine was being driven through the yards, the case was properly submitted to the jury to decide whether the death of the plaintiff's intestate was attributable to the negligence of the defendant's servants. The deceased was not a trespasser upon the track. He was lawfully there in the discharge of his regular duties, and the defendant's employes owed him proper vigilance and care. *McMarshall v. Railroad Co.*, 80 Iowa 757, 45 N. W. 1065; *Erickson v. Railroad Co.*, 41 Minn. 500, 43 N. W. 332; *Schlereth v. Railroad Co.*, 115 Mo. 87, 21 S. W. 1110; *Whalen v. Railroad Co.*, 75 Wis. 654, 44 N. W. 849; *Davis v. Railroad Co.*, 58 Wis. 646, 17 N. W. 406; *Mark v. Railway Co. (Minn.)* 20 N. W. 131; *Railway Co. v. White*, 84 Va. 498, 5 S. E. 573.

Nor do we find in the record sufficient proof of contributory negligence on the part of the deceased to have justified the court in taking the case from the jury. There was evidence, it is true, that he had been drinking that night, and was intoxicated, but the testimony upon this point was conflicting. The last person who saw him before the accident was Millaine, who says that at half past 1 o'clock he was pretty full, but was able to do his work. At that time he was going north from the depot, probably to take account of the cars that had been brought in at 12:45. It is in evidence that in the performance of his duty he carried with him two books, in one of which he made entries of the weights of the cars, and in the other he kept account of cars forwarded and received. The first of these books was in evidence showing entries made that night, and there is nothing in the nature of the entries to indicate that his work was imperfectly performed. The other book, that in which would have been found, if made, the entries of the last train of cars, was not produced or accounted for by the defendant. The defendant's contention that the deceased was lying upon the track at the time of his injury, or had been lying upon the track at any time that night, rests upon conjecture, and is unsupported by evidence. The fact that the lantern was overturned and extinguished and lying off the side of the track at the point where the deceased was struck, and the further fact that he was probably carried a distance of 150 feet after he was struck and before he passed under the wheels of the engine, would tend to sustain the theory that he was walking on the track at the time, rather than that he was lying upon the same intoxicated. Under such evidence, it is clear that the court would not have

been justified in instructing the jury that the proof of contributory negligence on the part of the decedent was such that his administratrix could not recover. The fact that the deceased was at the time of his injury under the influence of liquor or intoxicated is evidence of contributory negligence to be considered by the jury, but it does not conclusively establish that defense unless it is proven to have been the proximate cause of the injury. *Holmes v. Railroad Co.*, 6 Sawy. 290, 5 Fed. 523; *Fitzgerald v. Town of Weston*, 52 Wis. 354, 9 N. W. 13; *Loewer v. Sedalia*, 77 Mo. 431; *Cramer v. Burlington*, 42 Iowa, 315; *Ward v. Railroad Co.*, 85 Wis. 601, 55 N. W. 771; *Bradwell v. Railroad Co.*, 153 Pa. St. 105, 25 Atl. 623. The plaintiff in error contends that there was error in the instruction of the court to the jury concerning the evidence of contributory negligence. The bill of exceptions shows, however, that no exception was taken to that portion of the charge. The question so raised cannot therefore be considered here.

It is urged that the deceased and the employés of the defendant who were in charge of the engine were fellow servants, in a common employment, and that therefore there can be no recovery by the administratrix. It is said that Stapleton was moving his engine along the tracks of the terminal company in pursuance of an arrangement between that company and his employer, and that he and the deceased, who was a car accountant, were both engaged in an employment necessarily bringing them in contact with passing engines, and that they both had the immediate common object of moving, checking, and caring for the cars and engines of the defendant in the yards of the terminal company. It is true that Craft's duties were to check up the cars that came into the yard, whether they belonged to the Northern Pacific Railroad Company or to other companies, but, so far as the record indicates, he was in a distinct and separate employment from that of Stapleton, and he and Stapleton were in no sense under a common master, or subject to the same control. Stapleton's duty was solely to his employer, the Northern Pacific Railroad Company, while Craft, on the other hand, owed no duty to that company, but his duty was to his employer, the terminal company. In taking account of the cars of the Northern Pacific Company, he was not acting for that company, or in its service, but for his employer, and presumably for purposes connected with the business of his employer, by whose permission or contract the cars of the different lines came and went. The fact that three railroad lines in common used the tracks and yards of the terminal company, and the fact that the deceased, while in the regular discharge of his duties, was exposed to the risk of injury from their passing engines, does not affect his relation to those companies. In entering the service of the terminal company he assumed the ordinary risks of his employment, one of which was the risk of injury from his fellow servants; but the employés of the railroad companies who used the tracks were not his fellow servants, and he assumed no such risk as to them. If the relation between the terminal company and the Northern Pacific Railroad Company had been such that all operations of the servants of both, while in the yards of the

terminal company, were commanded by a single authority, there might be ground for the plaintiff's contention, but there is nothing in the record in this case to show that such was the fact. In *Railroad Co. v. Armstrong*, 49 Pa. St. 186, the plaintiff's intestate had been in the employment of one railroad company, and the injury was caused by the cars of another company, which had the right to run its trains over the road of the first company. It was held that the plaintiff was not precluded from recovering on the ground that his intestate was in the same general employment with the defendant's servants. In *Philadelphia, W. & B. R. Co. v. State*, 58 Md. 372, the deceased was an employé of one of three railway companies who used the defendant's track, under an agreement with the defendant company. The court said:

"Whatever effect this agreement had upon the parties to it, it could not have any upon strangers to it, nor alter nor change the relation of either of them toward third parties, nor have the effect of making those who were employed and paid wages by either of the contracting parties the employés of the other parties."

In *Phillips v. Railroad Co.*, 64 Wis. 475, 25 N. W. 544, there was an agreement by which the Wisconsin Central ran its trains a short distance over the defendant's road, but on times, orders, etc., of the latter company. The deceased was employed by the Wisconsin Central, and was killed while on the defendant's road, by the negligence of defendant's servants. The court held that the employés of the two companies were not fellow servants, for the reason that the employer of the injured man had nothing to do with the selection of the negligent servants of the defendant, and had no power to dismiss them, and the deceased was not paid or employed by the defendant, but by a different and independent corporation. There are some cases which apparently hold a different doctrine, but it will be found that the decision in those cases was controlled by the fact that, by contract between the employer of the servant who was injured and the employer of the servant who was negligent, the control of the property which was jointly used was vested in one or the other of the two employers, and that thus a common control was established over all the employés of both. Thus, in *Railroad Co. v. Clark*, 2 Ill. App. 596, it was held that where a railroad company leases of another the right to use its track, the employés of both roads will be deemed fellow servants. But the decision was expressly based upon the stipulation of the lease which provided that the road should be used subject to the control, rules, and orders of the lessor company, and the court entertained the view that the lessor company became thereby the common master of the employés of both roads. The case of *Johnson v. City of Boston*, 118 Mass. 114, is relied upon by the appellant. That decision, however, also comes within the rule of the case last mentioned. The plaintiff was employed by a contractor, who had engaged a large number of men to drill and blast rock for the city of Boston, in constructing the sewers of that city. The city also, by its superintendent of sewers, employed other servants in the same work. Some of the latter caused the injury to the plaintiff for which he sued the city.

It was held that he could not recover, for the reason that, notwithstanding his separate engagement to work for his immediate employer, he was nevertheless in the service of the city, and had consented to the temporary transfer of his services to the control of the defendant's foreman, and was under the direct charge and management of that foreman, who also controlled the action of the employes by whose negligence he was hurt. Of similar import was the decision of the court in *Cornellson v. Railway Co.*, 50 Minn. 23, 52 N. W. 224. The judgment will be affirmed, with costs to the defendant in error.

MORRIS v. GRIFFITH & WEDGE CO.

DOVEY v. SAME.

(Circuit Court, S. D. Ohio, E. D. July 8, 1895.)

Nos. 666, 667.

CORPORATIONS—POWERS OF OFFICERS—SIGNING NOTES.

W., a stockholder to a small amount and vice president of the W. Company, which was substantially owned and managed by W.'s father, executed certain notes, in the name of the company, for loans, which he represented to be for the company's use. Neither the statutes under which the company was organized nor any regulations or by-laws adopted by the stockholders or directors gave the vice president authority to sign notes, and it did not appear that W. had ever signed any notes for the company, except those in question, and others of which they were renewals, but, on the contrary, that the notes of the company were usually signed by W.'s father, the president, and by the treasurer. The money received for the notes was used, in part, to pay a draft drawn on the company by W. and accepted by his father, in the name of the company, but without the knowledge of the directors, and solely for W.'s benefit, and, in part, deposited in the company's bank account, but credited to W.'s father, to replace a check of the company given to W. and charged to his father. The remainder of the money was retained by W. *Held*, that the W. Company was not liable upon the notes.

These were two actions by Henry G. Morris and John S. Dovey, respectively, against the Griffith & Wedge Company upon two promissory notes. The cases were tried by the court without a jury.

Butterworth & Dowell, for plaintiffs.

J. J. Stoddard and F. A. Durban, contra.

SAGE, District Judge. These actions are upon promissory notes executed in the name of the defendant company, in the city of Philadelphia, Pa., by Frank N. Wedge, who was at the time vice president of the defendant company, and by him there delivered to the plaintiffs. The notes to the plaintiff Henry G. Morris were for \$5,300, dated February 6, 1890, at 30 days, and for \$5,200, dated March 30, 1890, at 90 days, both to his order. The first was a renewal of a note of the same description dated October 3, 1889, at four months; the second, a renewal of a note dated January 6, 1890; and that was a renewal of a note of the same description dated October 3, 1889. The original notes were for money loaned by Morris, as he understood, and as was represented by Wedge, to the defendant company.

Morris, through his agent, Dovey, gave to Wedge, at Philadelphia, for the two original notes, a New York draft for \$10,000, dated October 4, 1889, payable to the order of Dovey & Co., and by them indorsed to the order of Frank N. Wedge. The note to the plaintiff John S. Dovey was made at Philadelphia, January 10, 1890, although dated as at Zanesville, Ohio, for \$5,000, and signed in the name of the defendant company by Frank N. Wedge, vice president, and by him there delivered to Dovey, who remitted the money therefor to Wedge in various sums, making up the amount of the note, within 10 days or 2 weeks after the delivery of the note to him, retaining a balance for interest or discount. This also was a loan represented by Wedge, and understood by Dovey, to be for the defendant company. The defense is that Frank N. Wedge had no authority to borrow money for the defendant company, or to use its notes; also that the money sued for was not borrowed for the company; that the company got no part of it, and that it was used by Frank N. Wedge for his individual purposes. That all the money was used by Frank N. Wedge for his individual purposes is in evidence, and uncontroverted, excepting that it appears that \$2,500 of the money obtained from Dovey was deposited in bank to the credit of the company. The defendant company was organized under and subject to the provisions of the corporation statutes of the state of Ohio. Section 3248, Rev. St. Ohio, provides that the corporate powers, business, and property of corporations formed under the act must be exercised, conducted, and controlled by the board of directors, or, where there is no capital stock, by the board of trustees. Section 3249 authorizes every corporation to adopt a code of regulations for its government, not inconsistent with the constitution and laws of the state. By section 3251 regulations may be adopted or changed by the assent thereto in writing of two-thirds of the stockholders, or by a majority of the stockholders at a meeting held for that purpose upon due notice. It is to be noted that the power to make regulations is vested in the stockholders, and not in the board of directors. Reference to section 3252 will make it apparent that section 3251 secures to the stockholders an effectual and beneficial control over the board of directors, and salutary means of keeping them and the officers of the corporation in check, so that its affairs shall be managed within due bounds and with due regard to the interests and rights of the stockholders. Section 3252 specifies what may be provided for by regulations, including "the duties and compensation of officers." Section 3250 authorizes the trustees or directors of a corporation to adopt by-laws for their government, not inconsistent with the regulations of the corporation or the constitution and laws of the state, and to change the same at pleasure. Here it is to be observed that the by-laws are for the government of the board of directors. The board of directors of the defendant company undertook, by article 4 of the by-laws of the corporation, to prescribe the duties of the president and of the vice president, as follows:

"It shall be the duty of the president to preside at all meetings of the stockholders and directors, and to sign the records thereof and all certificates of

stock, decide all disputes arising among the stockholders pertaining to the employment of employes, which decision shall be final, and in a general way to perform all the duties usually incident to such office, or which shall be required by the stockholders or directors. It shall be the duty of the vice president to perform all the duties of the president in case of the latter's absence or disability."

Article 5 defines the duties of the secretary, as follows:

"It shall be the duty of the secretary to keep an accurate record of the acts and proceedings of the stockholders and directors; give all notices required by law and the acts of the stockholders and directors; keep proper books of account and books for transfer of stock; on the expiration of his term of office deliver all books, papers, and property of the company in his hands to his successor or the president, and in a general way to perform all the duties usually pertaining to the office."

Article 6, in defining the duties of the treasurer, provides that:

"The treasurer shall receive and safely keep all money and papers of value belonging to the company, and dispose of the same under the direction of the board of directors."

Article 13 provides that:

"The board of directors may appoint an executive committee of not less than three members of their own number, who shall have charge of the management of the business and affairs of the company in the interim between the meetings of the directors, with power to fix prices for the company's products, determine credits, make investments, and generally to discharge the duties of the board of directors, but not to incur debts, excepting for current expenses, unless specially authorized. They shall at all times act under the direction and control of the board of directors, and shall make report to the same of their acts, which shall form a part of the records of the company."

These articles are relied upon as fixing the duty and limiting the authority of the president, the vice president, the secretary, and treasurer, and of the executive committee. As we have seen above, however, the duties of officers must be provided for by regulations adopted by the stockholders, and the by-laws which may be adopted by the directors are to be only for their own government. However, these by-laws, although not authoritative, may be referred to in considering the mode of conducting the business and administering the affairs of the corporation. From the testimony of Mr. Gigax, treasurer and bookkeeper of the defendant company, and called on its behalf, it appears that from the organization of the company down to and including the time of the transactions involved in these actions, Francis Wedge was its president and managing and directing spirit; that he directed its affairs, accepted bills of exchange, and signed notes, and that the treasurer did whatever he was by him directed to do. He testifies that if "we" (meaning the company) needed money he would say to Mr. Wedge or Frank Wedge or Charlie Wedge (brother of Frank N.) that "we needed some money, and I would draw up a note for whatever amount was needed, and we signed it, and we took it to the Citizens' National Bank [of Zanesville] and discounted it, and we checked against that to pay our bills. I would make a list of what we owned, and the Citizens' National Bank would give me New York drafts." He testifies that he wrote the checks and Mr. Wedge signed them. Who was "we" in his testimony respecting the signatures to notes, he was not asked, and did not explain, but if we turn to the record of his testimony as to the signing of a \$15,660.98 note, to which reference will hereinafter be made, we find

that Frank N. Wedge, the vice president, and his father, Francis Wedge, the president, were standing in the office of the company at Francis Wedge's desk, and the witness saw Francis Wedge, the president, sign the paper, and then Frank Wedge said to the witness, "Sign this note." Witness looked at it, and answered, "No, we don't owe the Citizens' National Bank \$15,000." Frank said, "Yes, we do." The witness insisted that they did not, and refused to sign it, except by order of the directors. Witness spoke to one of the directors, and, upon his suggestion, they went to the counsel of the company, and the matter was talked over. The counsel asked whether Mr. Wedge (the president) had credit on the books. The witness answered in the affirmative. Counsel responded that there was no objection to Mr. Wedge's drawing up to the amount of his credit. That was then, as the books show, \$27,000. The witness returned to the office, said he would sign the note, provided it was charged to Francis Wedge's account, and he did sign it and so charge it, but did not know what the note was for. From this it would appear that it was the custom for the treasurer as well as the president to sign notes made in the name of the company. There is no testimony in the case that Frank N. Wedge, the vice president, ever was authorized to sign notes, or did in fact sign notes, in the name of the company, excepting those in suit in this case, and others for which they were renewals, and still others,—all which were on account of his personal transactions, but made in the name of the company. Frank N. Wedge was a speculator. He had taken a venture in a proposed belt railroad at Zanesville, which resulted disastrously. He seems to have been a favorite of his father. At all events, his father was induced to assist him not only by advancing money, but by aiding him in the negotiation and use of the notes sued on, of the originals for which they were renewals, and of prior notes, which made up the note for \$15,660.98 above referred to. Charles Wedge, the elder brother, remained at Zanesville, was a stockholder in the company, attended strictly to business, and was not contented in his mind over the transactions of Frank N. Wedge, and the use he made of his influence over his father. Frank N. Wedge was the prodigal son.

For the plaintiffs it is urged that the defendant company was a large manufacturing concern which succeeded Griffith & Wedge, a prosperous and wealthy manufacturing firm. In 1885 Griffith died, and Francis Wedge purchased the interest of his estate in the business, and, to preserve the name and good will of the company, organized the defendant corporation. He subscribed for, and was until his death the owner of, all the capital stock, excepting 10 shares transferred to each of his five children, a few shares to workmen and employes, including one share to Gigax, 30 shares subsequently purchased by Charles Wedge, with possibly 50 other shares,—so that for all practical purposes Francis Wedge was the company, the other stockholders having been made such for the purpose of organization, and to enable Francis Wedge to continue the business without change of name through the agency of the corporation. The credit of the company depended upon the credit of Francis Wedge. He was president. Frank N. Wedge was vice president and secre-

tary and an active business officer of the company. He bought and sold for the company, contracted debts, and discharged the duties that pertained to the office he held. Francis Wedge chose his own directors, designated the officials, and was supreme in all the company's affairs, by obvious right and by vested authority. Counsel for plaintiffs disclaims any intent of calling in question the legal rights of a small stockholder, or to claim that the power or authority of an officer is greater where he owns substantially all the stock; nor does he claim that the authority of the defendant corporation is not limited and controlled by the statutes under which it was organized, there being no special charters in the state of Ohio. The point sought to be emphasized is that, whatever the legal theory, Francis Wedge was actually in ownership and authority, for all practical uses and purposes, the Griffith & Wedge Company; and that nobody could, and nobody did, dispute or question that fact until about the spring of 1890, when all objections were suggested and stimulated by Charles Wedge, who was solicitous about his prospective share in his father's estate.

Now, while it is unquestionably true that all the facts and circumstances may be looked at to ascertain what was the recognized course of business and the extent of the authority of Francis Wedge as president of the company, his large holdings of the stock of the company cannot be regarded as in the least conferring upon him any authority whatever to manage or control its business. The small stockholder in a corporation is the one especially under the care and protection of the law. Wedge's authority as president must be found, in the absence of any regulation fixing it, by reference to the usual and recognized course of business of the company. It is not shown that, excepting in the instances in question in this litigation, he ever issued the paper of the corporation over his own signature as president, without at least also the signature of the treasurer. As to Frank N. Wedge, it does not appear that he ever, aside from the transactions involved in this action, as vice president signed the name of the company to a note and issued it as such. The negotiation of the notes sued upon was directly between him and the plaintiffs. They relied upon his statement that he was authorized to execute the notes of the company. They were bound to know the statutory provisions hereinbefore cited, defining the rights and authority of the board of directors. All the transactions of the company in the matter of negotiating its notes had been with the home bank at Zanesville, and, so far as the evidence shows, the notes had been signed and used with the concurrence of the president, vice president, and Gigax, the treasurer. So far, then, as the case rests upon the authority of Frank N. Wedge to make and negotiate notes of the company, it is against the plaintiffs. The case of *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, is in point. There, upon a proposition signed by the vice president of the Fidelity National Bank, in his own name, without any official designation, a New York bank made a loan of \$200,000, which was placed on its books to the credit of the Fidelity Bank, and afterwards drawn out by drafts of that bank, the understanding of the New York bank

being that the proposition for the loan was from the Fidelity Bank. The supreme court said that it must be shown that the Ohio bank was really a party to the transaction, either by having authorized its vice president to effect the loan on its behalf or by having ratified his action and accepted and enjoyed the proceeds of the discount. The court said that there was no evidence whatever that the board of directors of the Fidelity National Bank gave authority to its vice president to borrow money on behalf of the bank, much less to borrow so enormous a sum. The court said the most that could be claimed in the case was that the vice president acted as the principal executive officer of the bank, but that it could not be pretended that as such he had power, without authority from the board, to bind the bank by borrowing \$200,000 at four months' time. Granting that the bank in certain circumstances might become a temporary borrower of money, the court held that such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan see to it that the officer or agent acting for the bank had special authority to borrow money; and that, whatever power the board of directors had to borrow that sum, it was obvious that the vice president, however general his powers, could not exercise such a power unless specially authorized so to do; and that it was equally obvious that persons dealing with the bank were presumed to know the extent of the general powers of its officers. So, here, the public statute under which the defendant corporation was organized declares that the corporate powers, business, and property of the corporation must be exercised, conducted, and controlled by the board of directors, and that the duties and compensation of officers are to be provided for by regulations made by the stockholders. In the case of *Bank v. Armstrong* the court said that there was no evidence that the board of directors of the bank had any knowledge of the transaction, and the same is true in the present case. It was said, however, that the bank might be held if ratification on its part could be shown, and that a corporation might become liable upon contracts assumed to have been made on its behalf by an unauthorized agent appropriating and retaining, with knowledge of the facts, the benefits of the contracts so made on its behalf.

This brings us the second reliance of the defense, to wit, that the money received from the plaintiffs was used, in the *Morris Case*, to pay outstanding obligations of the company, and in the *Dovey Case* was placed in part to the credit of the defendant company upon its bank account. The money received from Henry G. Morris was used by Frank N. Wedge to pay an acceptance of the company drawn by him in favor of Bolton Bliss and Dallett, of New York, and accepted by Francis Wedge, president. But that was an indebtedness of Frank N. Wedge upon his personal account. It never came to the knowledge of the board of directors of the defendant company. Here again we turn to *Bank v. Armstrong*, where the court says that:

"A ratification, to be efficacious, must be made by a party who had power to do the act in the first place,—that is, in the present case, the board of

directors; and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record that the board of the Fidelity National Bank, by any act, formal or informal, undertook to ratify Harper's action in the premises, or that they had any knowledge of the transaction."

It appeared also in that case that the money advanced by the New York bank was, at Vice President Harper's request, placed to the credit of the Ohio bank, but it was shown that it was withdrawn partly by Hopkins, the assistant cashier, and partly by Harper himself, by drafts in the name of the bank, but that the moneys thus drawn never came into the possession or use of the bank. The court said:

"The moneys were appropriated by Harper to his own use, or, at all events, it does not appear that the bank ever got a penny of the borrowed money, or any benefit or advantage whatever by reason of the transaction. The mere placing of the money in the name of the Ohio bank involved no ratification by the bank, unless it was so placed with their knowledge and assent, nor did the withdrawal of the money by drafts drawn by Harper or by his direction in the name of the bank constitute a receipt by the bank of such money, unless it was, in point of fact, received and used by the bank or for its benefit."

So, in this case, the money was applied to the discharge of a claim which had been put in the form of a claim against the defendant company without the knowledge or consent of its directors, but was in fact a claim growing out of an individual transaction by Frank N. Wedge; and the fact that he had, through his father, without the knowledge or consent of the directors, procured an acceptance of a draft drawn by him as vice president upon the defendant company did not and could not, under the ruling in the case of *Bank v. Armstrong*, convert the draft into an obligation of the defendant company. Looking at the transaction in its true light, and stripping it of all coverings and disguises, the money received from Morris went to pay Frank N. Wedge's individual indebtedness. As to the \$5,000 received from Dovey, it was all paid to Frank N. Wedge. According to his testimony, he turned over \$2,500 to the company, by depositing Mr. Dovey's check to that amount to the company's credit in the National Bank at Zanesville. Two days before that, his father had had a check issued to him (Frank N. Wedge) for \$2,100, but charged to himself, and when the \$2,500 check was deposited, \$2,100 of it was credited to his father's individual account. The remaining \$400 was credited to Frank N. Wedge's account, and he immediately drew that \$400 out. This is, in all essential particulars, what was done in *Bank v. Armstrong*. As was suggested by counsel, the company was simply made a clearing house in the matter. This case is clearly distinguishable from *Merchants' Bank v. State Bank*, 10 Wall. 604, where a cashier had certified checks in accordance with his custom, known to and acquiesced in by the directors of the bank. It also differs from the cases dealing with securities that were on their face actually within the scope of the authority of the officer of the corporation issuing them, but defended against because some condition precedent had not been performed, and from cases where the act was clearly within the apparent authority of the officer or agent, and the defense rested upon some fact aliunde. None of the citations recognizing

the presumption as to the regularity of the act, the power or authority of the person assuming to act not being in question, apply in this case. As was said by the supreme court in *Supervisors v. Schenck*, 5 Wall. 784:

"It is settled law that a negotiable security of a corporation which upon its face appears to have been duly issued by such corporation, and in conformity with the provisions of its charter, is valid in the hands of a bona fide holder thereof, without notice, although such security was in point of fact issued for a purpose and at a place not authorized by the charter of the corporation."

The distinction is that in this case there is no showing that either the president or vice president of the defendant corporation had authority to make and issue its promissory notes, nor that it had been their custom to do so. It has been held that the president of a corporation has no greater powers, by virtue of his office merely, than any other director of the company, except that he is the presiding officer at the meetings of the board. *Railway Co. v. James*, 22 Wis. 198. In *Titus v. Railroad Co.*, 37 N. J. Law, 98, the supreme court of New Jersey said that:

"In the absence of anything in the act of incorporation bestowing special power upon the president, he has, from his mere official station, no more control over the corporate property and funds than any other director. The affairs of corporate bodies are within the exclusive control of their directors, from whom authority to dispose of their assets must be derived." See, also, *Westerfield v. Radde*, 7 Daly, 326; *McCullough v. Moss*, 5 Denio, 567.

It is undoubtedly true that when the president of a corporation by custom exercises larger powers, with the knowledge and acquiescence of the board of directors, the corporation would be estopped to deny their authority. As was said in 10 Wall. 604, evidence of powers habitually exercised by the officer of a corporation (in that case the cashier of a bank), with its knowledge and acquiescence, defines and establishes, as to the public, those powers, provided they be such as the directors of the corporation may, without violation of its charter, confer on such cashier. The trouble with the case for the plaintiffs is that no such custom is shown. On the contrary, the testimony of Frank N. Wedge himself is that, excepting the notes signed by him for his personal individual benefit in the name of the company, he never affixed the company's name to a note; and as to Francis Wedge, it is not shown that he was accustomed to sign notes in the name of the company without the signature also of the treasurer of the company. It is significant in this connection that the necessity for the signature of the treasurer was recognized by both Francis Wedge and Frank N. Wedge when Gigax, the treasurer, refused to sign the note for \$15,660.98; for they did not undertake to use it, nor did they claim the right to use it, until Gigax's signature was affixed. The note was for use in the home bank, where all the paper of the company had been discounted, and where the method of doing business by the officers of the company was perfectly understood. The notes sued upon and the other notes made for the benefit of Frank N. Wedge were used at Philadelphia and New York, where the mode of business of the company was not known. Judgment will be for the defendant in each case, with costs.

CINCINNATI, H. & D. R. CO. v. VAN HORNE.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1895.)

No. 306.

EVIDENCE—OF REPAIRS TO MACHINE CAUSING INJURY.

Plaintiff sued a railway company for injuries caused by catching his foot in a guard rail. A statute made it obligatory upon the railway company to block its guard rails so as to prevent the feet of its employes from being caught therein. The defendant claimed that a block which would have prevented the injury would have been inconsistent with the safe running of trains, and so could not be required. *Held*, that evidence that after the accident a sufficient block was placed in the guard rail, without endangering trains, was admissible to show that such a block could be used with safety. *Railroad Co. v. Hawthorne*, 12 Sup. Ct. 591, 144 U. S. 202, distinguished.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

This was an action by Stephen A. Van Horne against the Cincinnati, Hamilton & Dayton Railroad Company for personal injuries. Plaintiff recovered judgment in the circuit court. Defendant brings error. Affirmed.

Wm. K. Maxwell (Ramsey, Maxwell & Ramsey, of counsel), for plaintiff in error.

Charles M. Cist and Edgar W. Cist, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. This is a proceeding in error to review the judgment of the circuit court for the Southern district of Ohio in favor of Stephen A. Van Horne for \$1,000. The plaintiff was a switchman in the employ of the defendant in its yards at Ivorydale, Ohio, in September, 1890. In the discharge of his duties his foot was caught in a guard rail on the track of the defendant company in such a way that he was unable to extricate himself before he was struck by a locomotive. His foot was torn from the shoe which he had on, and luckily was not caught under the wheels, but a bone in his foot was broken, and he suffered other injuries confining him to the hospital for some time.

A statute of Ohio passed March 23, 1888 (85 Ohio Laws, 105) provides that:

"Every railroad corporation operating a railroad, or part of a railroad, in this state, shall, before the first day of October, in the year 1888, adjust, fill or block the frogs, switches and guard-rails on its tracks, with the exception of guard-rails on bridges, so as to prevent the feet of its employes from being caught therein. The work shall be done to the satisfaction of the railroad commissioner."

The question of fact at issue in the case was—First, whether the guard rail in question had been blocked at all; and, second, whether, if blocked to the extent which the safety of trains would permit, the accident in this case could have been avoided. The defendant introduced evidence to show that a block which would have prevented

the injury would have been inconsistent with the safe running of trains, and contended that the statute did not require such an impossible precaution. To meet this evidence and contention, the plaintiff introduced evidence to show that there was a block, sufficient to have prevented this accident, put into the guard rail after the accident, which did not interfere with the running of trains. The only ground upon which a reversal is asked is the action of the court in allowing evidence to be introduced as to the presence of a block immediately after the accident between the guard rail and the switch. Counsel for plaintiff, in introducing this evidence, disclaimed any intention of relying upon it to show that there was negligence in not having put the block between the rails before, but insisted on its relevancy to show the possibility of blocking the guard rail without interfering with the running of trains. It is undoubtedly true that under the decision in *Railroad Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591, a subsequent alteration or repair of a machine alleged to be negligently constructed is not competent evidence of negligence in the original construction. The reason for this opinion is stated by the supreme court of the United States, adopting for that purpose the language of the supreme court of Minnesota in the case of *Morse v. Railway Co.*, 30 Minn. 465, 16 N. W. 358:

"But on mature reflection we have concluded that evidence of this kind ought not to be admitted under any circumstances, and that the rule heretofore adopted by this court is on principle wrong; not for the reason given by some courts, that the acts of the employes in making such repairs are not admissible against their principals, but upon the broader ground that such acts afford no legitimate basis for construing such an act as an admission of previous neglect of duty. A person may have exercised all the care which the law required, and yet, in the light of his new experience, after an unexpected accident has occurred, and as a measure of extreme caution, he may adopt additional safeguards. The more careful a person is, the more regard he has for the lives of others, the more likely he would be to do so; and it would seem unjust that he could not do so without being liable to have such acts construed as an admission of prior negligence. We think such a rule puts an unfair interpretation upon humane conduct, and virtually holds out an inducement for continued negligence."

The case of *Railroad Co. v. Hawthorne* has no application to the present case. There was no issue before the jury as to whether the failure to insert a block was negligence on the part of the railroad company. It was negligence as a matter of law, and the court properly charged the jury that, if the block was not there, and the absence of it caused the accident, the defendant was liable. The defendant was therefore not prejudiced by the tendency of the evidence to prove an admission by it that the block ought to have been there because such an admission only tended to prove what the law referred to conclusively established. Nor does the case of *Railroad Co. v. Hawthorne* decide that the character of evidence therein held to be incompetent for the purpose of showing an admission of negligence might not be admissible for some other purpose. On the contrary, in that case the supreme court expressly distinguished a case from Massachusetts,—that of *Readman v. Conway*, 126 Mass. 374, 377,—where such evidence was admitted to show, not an admission of negligence by the defendant, but an admission that the

instrumentality, the defect in which was charged to have caused the accident, was under the control of the defendant company. So here this evidence was competent to show that a block could be used which would not interfere with the running of trains, and yet which would have prevented the accident which here occurred. Judgment affirmed.

CREFELD MILLS v. GODDARD et al.

(Circuit Court, S. D. New York. July 12, 1895.)

CORPORATIONS—DOING BUSINESS IN OTHER STATES—NEW YORK STATUTE.

A statute of New York (Laws 1892, c. 687, § 15) provides that "no foreign stock corporation * * * shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state. * * * No such corporation now doing business in this state shall do business herein after December 31, 1892, without having procured such certificate; * * * but any lawful contract previously made by the corporation may be performed and enforced within the state subsequent to such date. No foreign stock corporation doing business in this state, without such certificate, shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate." *Held*, that the effect of such statute is not to invalidate contracts made in the state by foreign corporations doing business there without a certificate after December 31, 1892, but only to suspend the remedy thereon until such certificate has been procured.

This was an action upon contract by the Crefeld Mills against Warren N. Goddard and Frederick N. Goddard. The jury gave a verdict for the plaintiff, and the defendants moved for a new trial. Denied.

Hornblower, Byrne & Taylor, for plaintiff.
Abraham Gruber, for defendants.

WALLACE, Circuit Judge. Upon this motion for a new trial the defendants principally rely upon a review of the ruling at the trial adverse to their contention in respect to the invalidity of the contract upon which the suit is founded, this defense having been overruled pro forma, in order that it might be deliberately considered upon motion for a new trial in the event of a verdict against the defendants. The complaint alleges a cause of action in behalf of a corporation of the state of Connecticut, for a breach on the part of the defendants of a contract by which the plaintiff was to manufacture, and the defendants were to accept, certain cotton goods at a specified price. Among other defenses set up by the defendants in their answer they allege that the contract cannot be enforced by the plaintiff because of the provisions of chapter 687 of the Laws of New York of 1892 (section 15), which is as follows:

"No foreign stock corporation other than a monied corporation, shall do business in this state without having first procured from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state, and that the business of the corporation to be carried on in this state is such as may be lawfully carried on by a corporation incorporated under the laws of this state for such or similar business, or, if

more than one kind of business, by two or more corporations so incorporated for such kinds of business respectively. The secretary of state shall deliver such certificate to every such corporation so complying with the requirements of law. No such corporation now doing business in this state shall do business herein after December 31, 1892, without having procured such certificate from the secretary of state, but any lawful contract previously made by the corporation may be performed and enforced within the state subsequent to such date. No foreign stock corporation doing business in this state without such certificate shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate."

It appeared upon the trial that the contract was made in January, 1893, at the city of New York, where the plaintiff maintained a sales room and had a selling agent. It also appeared that the plaintiff did not procure any certificate from the secretary of state, such as was required by the statute referred to, until the 6th day of February, 1895, which was shortly before the commencement of the action.

The object of the statute is to compel foreign corporations to file copies of their charters or acts of incorporation, and a statement of the business which they are carrying on within the state, with the secretary of state, and designate an agent having an office or place of business within the state, upon whom process against the corporation may be served. Statutes having the like object in view are found in many other states of the Union, but the phraseology of these statutes differs so materially from that of the present statute that the decisions of the courts in construction of their provisions are of no material assistance in the present case. The question here is whether the statute intends to prohibit such foreign corporations as are doing business here, without having procured the certificate required by the statute, from making any contracts within this state in the course of that business, or whether its intention merely is to withhold any remedy in favor of such corporations upon such contracts until the certificate shall have been procured. Were it not for the last clause of the section, undoubtedly such contracts would be void, because they would be included in the general prohibition against doing business within the state. But, in view of that clause, such a conclusion is inadmissible without doing violence to the familiar principle of interpretation which requires effect to be given to all parts of a statute, and the several provisions to be harmonized, if possible, so as to allow each to have consistent operation.

It is the manifest purpose of the statute to prescribe a regulation with which all corporations must comply, and to enforce the regulation by attaching consequences in the nature of punishment for delinquency. It excepts from its operation, for a limited period, those corporations which were doing business in this state at the time of its enactment, and which, if not thus excepted, might be compelled to forego their ordinary transactions pending the procuring of a certificate. It was but just that these corporations, which had acquired a business domicile here, with the implied sanction of the state, and had adjusted their business arrangements accordingly, should be allotted a reasonable time in which to comply with the

regulation, without being in the meantime disabled or subjected to risk of loss. But this was no reason why they should be treated more leniently than other corporations if they should reject the privilege accorded to them. It was equitable and proper that there should be a temporary discrimination in their favor, but no conceivable reason can be suggested entitling them to a permanent favoritism. It was just as desirable in the interests of the public that they should comply with the regulation prescribed as that other corporations should do so. When the several clauses of the statute are read together, they naturally suggest these considerations. Upon first impression, and upon analysis, the reasonable meaning of the statute would seem to be not to vitiate illegal contracts made in this state by foreign corporations doing business here without having procured a certificate, but to suspend as to such corporations any remedy upon their contracts during their delinquency. Unless this is its meaning, the last clause of the statute can have no practical operation. Plainly, this clause does not apply to contracts made prior to December 31, 1892, by corporations doing business in the state at the date of the passage of the act, because it is inconsistent with the preceding clause, which distinctly permits such contracts, not only to be performed, but also to be enforced within the state subsequent to that date. Consequently, the last clause must be meant to apply to all contracts made by corporations doing business in disregard of the regulation. Thus applied, unless it is intended to qualify the general provision of the first clause which creates the disability to contract, and to mitigate the consequences of disobedience, it is meaningless. It cannot be believed that, if the legislature had intended to prohibit the making of contracts by foreign corporations during delinquency, any provision would have been inserted impliedly authorizing suits upon such contracts in the event of a subsequent compliance with the regulation. In many cases the delay to which a delinquent corporation would be subjected while endeavoring to secure a certificate might be injurious, and perhaps fatal, to its remedy upon a contract; and, doubtless, the legislature was of the opinion that the suspension of the remedy during the interim would furnish a sufficient incentive to coerce a compliance with the law.

The conclusion thus reached accords with the view of the statute adopted by the general term of the supreme court in *Gas Pipe Co. v. Connell*, 33 N. Y. Supp. 482. There is nothing in the case of *Neuchatel Asphalte Co. v. Mayor, etc.*, 12 Misc. Rep. 27, 33 N. Y. Supp. 64, reversing the decision in 30 N. Y. Supp. 252, inconsistent with this conclusion.

It has also been urged for the defendants in behalf of their motion for a new trial that evidence offered by them was erroneously excluded, which, if admitted, would have tended to show that delivery orders for the goods were given to the plaintiff by the defendants within a reasonable time. There was no dispute upon the trial that defendants had not given orders for the undelivered part of the goods upon which the claim for damages was based. The defendants refused to accept these goods, placing their refusal upon the breach of cer-

tain conditions of the contract on the part of the plaintiff. The jury were instructed that, if there had been such a breach on the part of the plaintiff, the defendants were entitled to a verdict. The evidence excluded had no bearing whatever upon the issues which were finally submitted to the jury.

The motion for a new trial is denied.

UNITED STATES v. WILSON.

(District Court, E. D. Missouri, E. D. May 20, 1895.)

1. CRIMINAL LAW—SELLING LIQUOR WITHOUT LICENSE—WHAT ARE LIQUORS.

The term "domestic distilled spirits," as used in the law requiring retail liquor dealers to pay a special tax to the United States before engaging in the business, does not include patent or proprietary medicines, manufactured and sold, in good faith, for curative or health-imparting properties, although they may contain a large percentage of distilled spirits as one of their essential ingredients; nor does the fact that men with strong appetites for drink occasionally buy such preparations, and by the use of them become drunk, furnish any adequate reason for classifying them as distilled spirits.

2. SAME—DECEPTIVE NAMES.

The law, however, is not to be evaded by mere deceptive names, and if alcoholic beverages in which the essential ingredient is distilled spirits, disguised by aromatic or other drugs, are commonly bought and sold as and for intoxicating beverages, the same are not to be classed as patent or proprietary medicines, by whatever names they may be known, and the seller thereof is liable to the tax as a retail liquor dealer.

Indictment for carrying on business of retail liquor dealer without having first paid special tax.

It appeared by the facts in evidence in this cause that the defendant was carrying on a general merchandise business, such as usually conducted at country stores. In addition to the usual stock of groceries, dry goods, agricultural implements, etc., he sold patent or proprietary medicines. Among the latter were preparations of the Donnell Manufacturing Company known as "Donnell's Empire Tonic Bitters." These latter were sold by the bottle, in the original package as put up by the proprietor. Each bottle contained about 13 ounces of liquid. Of this, $2\frac{1}{8}$ ounces was alcohol, $9\frac{4}{5}$ ounces distilled water, balance consisting of various barks, roots, drugs, flavors, and sugar. On each bottle a printed label was pasted, giving the name of the article, the various diseases for which it was supposed to be a specific, and the dose in which it was to be taken. The testimony on the part of the United States was that, while the defendant had sold by the bottle, in the original package or bottle, as received by him from the compounder, his customers had sometimes opened the bottles in his store, and drank from them on the premises, and that in some cases the same effect had been produced on persons using it as if they had drank whisky; that the preparation contained from 17 to 20 per cent. absolute alcohol, and was drunk as a beverage by some purchasers, to the knowledge of defendant. On the part of the defense, evidence was introduced tending to show that the preparation was a genuine medicinal preparation; that it was put up by the manufacturers in accordance with a prescribed formula, which they had followed for over 25 years, and sold by them to dealers as a medicinal preparation or patent medicine. Testimony of physicians and of chemists was also introduced, tending to show that the preparation contained no more alcohol than necessary to preserve the various drugs, etc., in solution, to prevent fermentation, and make the mixture palatable; that less alcohol present in the preparation would have rendered it liable to speedy fermentation, and that it was a useful tonic and alterative. The

defendant had not paid special tax as a retail liquor dealer. It was also in evidence that the Donnell Manufacturing Company, compounders of the preparation, had been in business for over 25 years, putting up these bitters and other preparations, and had never been required to pay special taxes as rectifiers, compounders, or wholesale or retail liquor dealers. At the conclusion of the testimony and argument of counsel on the law and the facts, counsel for defendant asked the court to charge the jury as it had charged in the previous case of *U. S. v. Holley*,¹ tried before the same court 10 days previously. The Court: "I will give substantially the same charge in this case that I previously gave at your request in the *Holley* case."

W. H. Clopton, U. S. Atty., and W. S. Anthony, Asst. U. S. Atty.,
for the United States.

Geo. D. Reynolds, for defendant.

PRIEST, District Judge (charging jury). The federal law requires all retail dealers of liquor to pay a special tax before engaging in that business. The defendant in this case is charged with a violation of that law,—that is, for selling by retail, liquor in less quantity than five gallons. The law itself defines who are retail liquor dealers. It says that every person who sells or offers for sale foreign or domestic distilled spirits, wines, or malt liquors, in less quantity than five gallons at the same time, shall be regarded as a retail dealer in liquors. The proof in this case shows the sale of no other liquor by the defendant in less quantities than five gallons, at the time charged in the indictment, than "Empire Tonic Bitters," prepared by Donnell & Co., and commonly referred to as "Donnell's Bitters;" and it is claimed by the government that this preparation comes within the definition of "domestic distilled spirits." Domestic distilled spirits, as used in the law just quoted, does not include patent or proprietary medicinal preparations manufactured and sold in good faith for curative or health-imparting properties, although they may contain a large percentage of distilled spirits as one of the essential ingredients of the preparation. The law, however, is not to be evaded or juries to be deceived by mere names which may be added to or used to designate a certain preparation composed in the essential parts of distilled spirits. If alcoholic beverages, in which the essential ingredient is distilled spirits, in the form currently known as alcohol or whisky, disguised by aromatic or other drugs, which are evidently mere substitutes for whisky or other forms of distilled spirits, are commonly sold and bought as and for an intoxicating beverage, then such preparations are not to be classed as patent medicines or proprietary medicines, no matter by what names they may obtain circulation and credit. If, on the other hand, it appears from the evidence that the quantity of alcohol employed in the preparation of them is not greater than is necessary to extract the virtue of the medicinal herbs used, and to hold the same in solution, and that the articles are put up, advertised, and sold by the manufacturers as medicinal preparations, and they possess, or at least in good faith are believed to possess, curative properties, or are promotive of good health, then they should be classed as medicinal preparations, and not as distilled spirits, and the dealers in the same

¹ See note at end of case.

are not retail liquor dealers within the meaning of the federal statute; nor does the fact that men with strong appetites for drink occasionally buy such preparations, and by the use of them become drunk, furnish any adequate reason for classifying them as distilled spirits. If a preparation is not intended as a beverage, but is put up in good faith as a medicinal preparation, and is only advertised and sold by the manufacturer as such, and there are reasonable grounds for believing it possesses curative or health-giving qualities, and no more spirits are used in the preparation than are reasonably necessary to extract and hold in solution the medicinal properties of the various drugs included, such preparation is medicinal, and does not lose its character as such, although it is intoxicating when used to excess. If, therefore, you find that the articles sold by the defendant were patent or proprietary medicinal preparations, then you should find the defendant not guilty. The article in controversy was, as it was in the actual bottle or package put up and sold by the manufacturer, either distilled spirits or a proprietary medicine. If it was distilled spirits,—that is to say, alcohol or whisky being the chief component part,—and only disguised by the presence of medical drugs when put up and sold by the manufacturer, then the defendant is liable to the tax as a retail liquor dealer, if he sold it, provided he knew that it was intoxicating, and was bought and used as a beverage, and not for any medicinal properties supposed to be contained in it; but if it was, when manufactured or compounded, a proprietary medicine, put up and sold by the manufacturer in good faith, and was sold by the defendant in the original package by the bottle, with the manufacturer's label on it, containing directions for using it, the article did not lose its character as a proprietary medicine, and the defendant, in selling it, did not become a retail liquor dealer, and is entitled to a verdict of not guilty at your hands.

It only remains for me, gentlemen of the jury, to call your attention to another principle of law, always of value in criminal cases: That is that the burden of proof rests upon the state, and that proof must go to the extent of convincing your understanding of the truth of the claims in the indictment beyond a reasonable doubt. In other words, if you have a reasonable doubt as to any element necessary to constitute the offense with which the defendant stands arraigned, it is your duty to give him the benefit of the doubt and return a verdict of not guilty.

Verdict, not guilty.

NOTE. On May 10, 1895, case of *U. S. v. Holley*, above referred to, was tried before the same court and a jury, and with the same counsel. The facts in it were practically the same as in the case of *U. S. v. Wilson*, except that the testimony of the government showed that on one occasion a gang of laborers had come into the store of the defendant, bought several bottles of the Empire Tonic Bitters, drank them on the premises, and had become intoxicated. Charge in this case practically the same as above, with a few verbal alterations. Verdict, not guilty.

UTICA FIRE-ALARM TEL. CO. et al. v. MUNICIPAL FIRE & POLICE
TEL. CO. et al.

(Circuit Court, D. Massachusetts. June 12, 1895.)

No. 381.

PATENTS—INFRINGEMENT—FIRE-ALARM BOXES.

The Palmer patent, No. 220,088, for an improvement in noninterfering fire-alarm boxes, cannot, in view of the prior art, as shown particularly in the Pond and Chester patents, Nos. 188,182 and 164,425, respectively, be construed as extending to all mechanism which performs the main functions effected by the devices described in claims 4 and 5.

This was a bill in equity by the Utica Fire-Alarm Telegraph Company and others against the Municipal Fire & Police Telegraph Company and others for infringement of a patent relating to fire-alarm boxes.

Richard H. Dyer, for complainants.

James J. Storrow, Jr., and Frederick P. Fish, for respondents.

CARPENTER, District Judge. This is a bill in equity to restrain an alleged infringement of letters patent No. 220,088, issued September 30, 1879, to Augustus H. Palmer, for improvement in noninterfering fire-alarm boxes. The claims alleged to be infringed are as follows:

"4. In combination with the carriage, A, the spring-barrel, spring, and pin-lever, p, rod, r, and armature, s, whereby the armature is positively raised and held to the magnet until the circuit is renewed, substantially as set forth.

"5. In combination with the rectangle-bar, U, and bent rod, l, the rod, m, thumbscrew and jam-nut, z, and armature, s, whereby the rectangle-bar is held from engagement with the signal-rack, and a positive noninterference obtained with all the other boxes of the circuit, substantially as shown and described, and for the purposes set forth."

The device employed by the respondents can be held to infringe this patent only by construing the two claims here in controversy to cover all mechanism which performs the main functions performed by the devices described in those two claims. Shortly stated, these are as follows: The device covered by the fifth claim causes the armature of the noninterfering mechanism to fall entirely out of the field of influence of the magnet which holds it in the normal position of the apparatus, while the device covered by the fourth claim mechanically replaces the armature within the same field of influence, by the automatic action of the motor mechanism which drives the system as a whole. These main functions, however, are performed in the mechanism shown in several earlier patents. I refer particularly, with respect to the fifth claim, to the patents to Pond, No. 188,182, and to Chester, No. 164,425, and, with respect to the fourth claim, to the Chester patent, above named. I therefore conclude that the respondents do not infringe, and that the bill must be dismissed.

RANSOME et al. v. HYATT.

(Circuit Court of Appeals, Ninth Circuit. June 27, 1895.)

No. 201.

PATENTS—ACTION AT LAW FOR INFRINGEMENT — PRESUMPTION FROM DEFENDANT'S PATENT.

In an action at law, where the alleged infringing machine is made under a subsequent patent, defendant is entitled to an instruction that the issuance of such patent creates a prima facie presumption of a patentable difference from the machine of complainant's patent. *Miller v. Manufacturing Co.*, 14 Sup. Ct. 310, 151 U. S. 208, and *Boyd v. Tool Co.*, 15 Sup. Ct. 837, followed and applied.

In Error to the Circuit Court of the United States for the Northern District of California.

This was an action at law by Thaddeus Hyatt against Ernest L. Ransome and others for infringement of a patent for improvements in compositions for floors, roofs, pavements, etc. In the circuit court there was a verdict and judgment for plaintiff in a nominal sum, and defendants bring error.

Wheaton, Kalloch & Kierce, for plaintiffs in error.

John L. Boone, for defendant in error.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

GILBERT, Circuit Judge. The defendant in error was the plaintiff in an action at law brought to recover damages for the infringement of the Hyatt letters patent, No. 206,112, of date July 16, 1878, for an improvement in composition floors, roofs, pavements, etc. The specification of the patent refers to what are claimed to be "new and useful improvements in the use and application of hydraulic cements and concretes in combination with metal as a building material," etc., and describes the building material so referred to as hydraulic cement, "concrete," etc., and describes the combination therewith of metal bars or ties embedded therein, and having their surfaces roughened in some manner to prevent them from slipping horizontally in the material, and proceeds thus:

"To prevent slipping, these ties require also a roughened surface. This roughened or nonslipping surface may be made in many ways. For some purposes a mere sanded, tarred surface may possibly suffice, but I prefer to use metal specially rolled for the purpose, with bosses or raised portions formed upon the flat faces of the metal."

The defendants manufactured building material in a manner similar to that described in the Hyatt patent, the only difference being that, instead of using metal rods with projections or bosses produced in the casting, they used a square rod, so twisted as to present the appearance of a screw. For the use of the twisted rod in such combination, the defendants had secured a patent of date September 16, 1884, which was read in evidence. The only assignment of error necessary to be considered is the refusal of the court to instruct the jury concerning the effect to be given to the fact that a patent had so issued to the defendants.

In *Corning v. Burden*, 15 How. 265, the supreme court, after referring to the presumption which attends the fact that, after an examination of the records of the patent office, a patent has been issued for the plaintiff's invention, said:

"It is not easy to perceive why the defendant who uses a patented machine should not have the benefit of a like presumption in his favor, arising from a like investigation of the originality of his invention, and the judgment of the public officers that his machine is new, and not an infringement of the patent previously granted to the plaintiff."

The case of *Blanchard v. Putnam*, 8 Wall. 420, overruled this holding of the court, and decided that evidence of the defendant's patent is not admissible.

The decision in *Blanchard v. Putnam* was followed in the trial of this case, as also in that of *Norton v. Can Co.*, 59 Fed. 137, where it was said:

"Abstractly, it would seem that, if the plaintiff's patent was *prima facie* evidence of novelty (difference from things before it); a subsequent patent to the defendant, or for a device used by defendant, would be *prima facie* evidence of novelty (difference from all things before it, and hence from the plaintiff's device), and hence would be admissible in evidence on the issue of infringement, and its use would be innocent; and it was so held in *Corning v. Burden*, 15 How. 271. But this case was overruled in *Blanchard v. Putnam*, 8 Wall. 420."

The recent cases, however, of *Miller v. Manufacturing Co.*, 151 U. S. 208, 14 Sup. Ct. 310, and *Boyd v. Tool Co.*, 15 Sup. Ct. 837, citing *Pavement Co. v. Elizabeth*, 4 Fish. Pat. Cas. 189, Fed. Cas. No. 312, expressly affirm the doctrine of *Corning v. Burden*, and hold that the issuance of the defendant's patent creates a *prima facie* presumption of a patentable difference from the prior patent of the plaintiff. The plaintiff in error was entitled, therefore, to an instruction which would permit the jury to consider the presumption that the law creates from the fact that a patent has issued in any case. The judgment will be reversed at the cost of the defendant in error, and remanded for a new trial.

ACME HARVESTER CO. v. FROBES et al.

(Circuit Court, E. D. Missouri, N. D. June 17, 1895.)

No. 184.

1. PATENTS—DECISIONS BY OTHER COURTS.

Where a patent was adjudged void by one circuit court after final hearing on the merits, and afterwards a demurrer to a bill for infringement was overruled by another circuit court, without an opinion, *held*, that the latter decision was not entitled to the same weight as the former, because the grounds of it were not apparent, and because a decision sustaining a patent is not entitled to the same consideration as one declaring the patent invalid.

2. SAME—WHAT CONSTITUTES INVENTION.

There is no invention in attaching to each end of a hay rake (of the class usually drawn by two horses hitched to the ends respectively) a pole extending forward, upward, and outward, to which the horse may be attached by a breast strap for the purpose of backing the rake from under its load.

8. SAME—HAY RAKES.

The Kenaga patent, No. 259,550, for improvements in hay rakes, *held void for want of invention*, notwithstanding the filing of a disclaimer. *Harvesting Co. v. Martin*, 33 Fed. 249, followed.

This was a bill by the Acme Harvester Company against William M. Frobes and others for infringement of a patent relating to hay rakes.

Peirce & Fisher (Paul Bakewell, of counsel), for complainant.
Banning & Banning, for defendants.

ADAMS, District Judge. This is an action for infringement of letters patent of the United States, No. 259,550, issued June 13, 1882, to Martin H. Kenaga, for improvements in hay rakes. The complainant brings this action as assignee of the patentee. It is claimed by the complainant that Kenaga invented a new and useful attachment for use on the ordinary horse hay rake or sweep, of the class employed with stackers, and particularly on those rakes of this class which are drawn by horses hitched, one at each end. This attachment consists of poles secured, one to each end of the head of the rake, extending therefrom forward, upward, and outward, in such way as to permit horses attached to a singletree, one at each end of the rake head, to be hitched by a breast strap to the free front end of the poles, and thereby to afford facilities for backing the rake out from under its load, instead of being required to turn the horses around, and draw the rake out, as formerly. These poles are intended also to serve the purpose of guiding the horses while turning the rake, and warding off or keeping the horses from stepping upon or becoming entangled in the teeth of the rake, which project along the ground in front of the rake head and between the two horses so attached to either end of the rake head, as aforesaid. Although reference is made in the specifications of the patent and proof to the advantages of having the two horses so attached to the rake as to be driven by one boy from a seat behind, midway the head of the rake, yet it is admitted by complainant's counsel that the invention, if at all, consists only in the attachment of these two poles to the ends of the rake extending therefrom forward, upward, and outward, for the purposes specified.

The record shows that complainant, prior to 1888, under its then name of Acme Harvesting Company, instituted a suit in the circuit court of the United States for the Northern district of Illinois on this same Kenaga patent, of like character and for like purpose as this, against Stephen Martin et al., and that, upon full hearing, the court (Judge Blodgett presiding), on the 9th day of January, 1888, rendered and entered a final decree on the merits, dismissing the complainant's bill, on the ground that the patent was invalid for want of invention and patentable novelty, and that the decree and judgment in said cause became and was final. On dismissing the bill in that case, Judge Blodgett filed an opinion, which is published in 33 Fed. 249. From this opinion it will be seen that, in Judge Blodgett's judgment, there was no invention involved in the use of these particular poles. He assimilates them, in principle, to the

ordinary thills which have been used, time out of mind, in connection with vehicles mounted on wheels to be drawn or propelled by animal power; and, in so doing, he expressed the manifest meaning of the specification of the patent, which reads as follows:

"If preferred, a pair of thills may be connected with each of the arms, B, B, in which the horse is hitched in the usual way, which construction would be the equivalent of that shown in the drawing. When thills are used, however, it will be advisable to employ the pole, C, by which to hitch the horses' heads as an aid in guiding them, in which case said poles may be relatively light."

After the entry of final decree by Judge Blodgett in the Martin Case, the complainant, on the 14th day of May, 1892, filed in the United States patent office a disclaimer, in which, after reciting the grant of letters patent to Kenaga, and the mesne assignment by which the complainant acquired the rights of the patentee, the following appears, namely:

"And your petitioner further represents that it has reason to believe that, through inadvertence, accident, or mistake, the specification and claim of said letters patent are too broad, including that of which the said Martin H. Kenaga was not the first inventor; and your petitioner hereby enters its disclaimer to the following matter occurring between line 67 and 77 of the specification of said patent, viz.: 'If preferred, a pair of thills may be connected with each of the arms, B, B, in which the horse is hitched in the usual way, which construction will be the equivalent of that shown in the drawing. When thills are used, however, it will be advisable to employ the pole, C, by which to hitch the horses' heads as an aid in guiding them, in which case said poles may be relatively light.' Your petitioner hereby disclaims a horse rake having the horses independently attached at the ends of the rake, and having the projecting draft bars in combination with forwardly projecting poles, except when such projecting poles are arranged so that the free front end of each is brought forward, upward, and outward from the ends of the rake head."

Besides the disclaimer, complainant has produced some additional evidence beyond that taken in the Martin Case, tending to show that straight poles would not accomplish the functions contemplated by the Kenaga patent, and also showing that the attachment of the poles extending forward, upward, and outward, as in the Kenaga patent, serve a useful purpose. Except as supplemented by the disclaimer and this additional evidence, the case is submitted on the same proof used in the Martin Case.

Complainant insists that, by virtue of the disclaimer and additional evidence, the case as now presented is substantially different from that presented to Judge Blodgett. By way of argument, counsel for complainant say that Judge Blodgett obviously did not take into consideration the peculiar features of the poles now claimed by them to be novel, but, on the contrary, construed the claim of the Kenaga patent to cover broadly the mere attachment to the ends of an ordinary sweep rake of the ordinary poles, such as are common to all vehicles.

On a careful consideration of Judge Blodgett's opinion, I cannot agree with counsel on this point. The Kenaga patent, including a drawing of the rake showing the attachment of the poles and their projection forward, upward, and outward, was before the court in the Martin Case, and Judge Blodgett, in his opinion, makes manifest reference to these peculiar poles. He says:

"If a person using such a rake conceived the idea that it would be more convenient to handle the rake to some extent by means of a guiding pole or backing pole, like that shown by this patent, it seems to me that with the common knowledge which exists among all those who have been in the habit of using horse rakes, that they had been backed and guided by means of a pole, there was no invention in applying a pole to rakes of this kind for that purpose."

The disclaimer, therefore, leaves the patent substantially as considered by Judge Blodgett; and the additional evidence taken in this case is cumulative in its character, and relates mainly to the utility rather than the novelty of the device. The case, therefore, now before the court, is substantially the same as the one before Judge Blodgett.

The rule is well established that where a court of co-ordinate jurisdiction has, on full hearing, declared a patent invalid, this court will not reconsider the case, unless there was in the former adjudication manifest error in law or manifest mistake in fact. *Meyer v. Manufacturing Co.*, 11 Fed. 891; *McCloskey v. Hamill*, 15 Fed. 750; *Cary v. Manufacturing Co.*, 31 Fed. 344; *Kidd v. Ransom*, 35 Fed. 588. I find no such manifest error or mistake. On the contrary, it seems to me that the conclusion reached by Judge Blodgett is correct.

The fact that, in a case instituted subsequent to the decision of the *Martin Case* by this complainant against the Famous Manufacturing Company, in the United States circuit court for the Southern district of Illinois, on the patent now under consideration, the court overruled a demurrer to the bill of complaint, does not, in my opinion, detract from the force and effect to be given to the decision upon the merits of the *Martin Case* by Judge Blodgett. Judge Allen, before whom this demurrer was heard, wrote no opinion; and it is impossible, from the record entry overruling the demurrer, to say that the court necessarily intended to rule that the patent was valid. But, if such were the intention, it would not change the result. A ruling declaring the validity of a patent is not entitled to the same consideration as a ruling declaring the patent invalid.

In *Robinson on Patents* (volume 3, § 1184) it is said:

"Judgments against the patents are, for obvious reasons, of higher value and wider influence, since a patent invalid upon any ground is invalid against all the world; and therefore any decision declaring it void, though in a different tribunal and between other parties, affords a presumption of its invalidity which the plaintiff can with difficulty overcome."

For the foregoing reasons, the opinion expressed by Judge Blodgett in the *Martin Case* must be held to be the law of this circuit, with respect to the patent under consideration, until the appellate court rules otherwise. The bill is accordingly dismissed.

NEW DEPARTURE BELL CO. v. HARDWARE SPECIALTY CO. et al.

(Circuit Court, D. New Jersey. July 24, 1895.)

1. COURTS—COMITY IN PATENT CASES—NEW EVIDENCE, ETC.

A decision in another circuit sustaining a patent and adjudging infringement does not preclude the exercise of an independent judgment, where important new evidence of anticipation is introduced and the alleged infringing machine is constructed in accordance with patents of later date than that sued on.

2. PATENTS—INVENTION—BELL STRIKERS.

It would seem to involve only common mechanical skill to pivotally connect the striker of a bicycle bell to the rotary arm by a hole through the center of the striker, instead of by a hole away from the center.

3. SAME—INVENTION—BICYCLE BELLS.

In relation to bicycle bells, there is no invention in substituting, in place of a vertically operative push bar for actuating the spring, a horizontally working thumb lever, already well known in the mechanism of bicycle bells.

4. SAME—CONSTRUCTION OF CLAIMS—LIMITATION.

Quære whether a combination claim for improvement in bells which names a "gong" as one of its elements, and concludes with "substantially as set forth," is not limited to a gong which, as described in the specification, and shown in the drawings, has an inwardly projecting lug to receive the stroke of the hammer, and where without such lug the described construction is inoperative, notwithstanding that this is stated to be a "preferable" construction.

5. SAME—BICYCLE BELLS.

The Rockwell patent, No. 456,062, for an improvement in bells, if valid at all, is limited to the precise device shown, without the use of equivalents. Patent No. 471,982, to the same inventor, also for an improvement in bells, is void for want of invention.

This was a bill by the New Departure Bell Company against the Hardware Specialty Company and others for alleged infringement of two patents for improvements in bells.

John J. Jennings, for complainant.

Coult & Howell and J. C. Clayton, for defendants.

ACHESON, Circuit Judge. This suit is based upon two letters patent granted to Edward Dayton Rockwell, assignor to the plaintiff, namely, No. 456,062, dated July 14, 1891, and No. 471,982, dated March 29, 1892, for improvements in bells. The earlier patent has a single claim, as follows:

"A bell striker having a central aperture for loosely pivoting it to a rotating hand and various striking points or surfaces around its exterior, and adapted to be rotated on its pivot by each blow, to bring to bear a new striking surface, substantially as set forth."

The defendants are charged with the infringement of this patent, and, also, with infringement of the second claim of the other patent, which reads thus:

"2. The combination, with a base plate, of a revoluble striker bar, spring-actuated in one direction, a lever operatively connected therewith, and adapted to rotate the striker bar in opposition to the force of the spring, and a gong, substantially as set forth."

These patents were before the circuit court of the United States for the district of Connecticut in the case of New Departure Bell Co. v. Bevin Bros. Manuf'g Co., 64 Fed. 859. The plaintiff insists that the rulings there made are conclusive in this court of the present controversy, and require a decree against the defendants, under the well-established rule that in patent causes a decision upon the merits at final hearing in one circuit will be followed, upon the like state of proofs, by courts of co-ordinate jurisdiction in other circuits. I cordially approve of this rule; and, if the facts had justified my so doing, I would unhesitatingly have acted upon it here. Its application to the present case in the manner proposed would have relieved me of the labor of original investigation. But, as I read the

opinion of the learned court of the second circuit, it does not by any means have the scope which the plaintiff claims for it. Besides, new evidence of great importance has been submitted here. Furthermore, the defendants are manufacturing bicycle bells under and in strict accordance with two letters patent numbered, respectively, 507,804 and 507,805, dated October 31, 1893, granted to Samuel Goulden, assignor to the Hardware Specialty Company. Under these circumstances, then, I conceive it to be my clear duty, in disposing of this bill, to exercise my own independent judgment.

It is quite plain, even upon the face of Rockwell's patents, and is still clearer by the proofs, that neither of his alleged inventions here involved was of a primary character. The avowed object of his first patent was simply to produce "a more effective and more durable device for sounding bells." Now, loosely-pivoted bell strikers, freely moving on their pivots, and having various exterior striking points, and so constructed and arranged as to be thrown by centrifugal force against the side of the bell, to sound it, and then instantly to rebound, and upon the next stroke presenting a new point of contact to the surface of the bell, were undoubtedly old and well known. This is indisputable under the proofs. The striker shown by the Rockwell patent has a central aperture, and it is loosely carried by a pin extending up from the striker plate. Upon the uncontradicted evidence, I have the greatest difficulty in discovering any patentable novelty in this device. It is operated by the same means and in the same way, and produces the same results, as the prior devices. Pivotal to connect the striker to the rotary arm by a hole through the center of the striker instead of by a hole away from the center would seem to involve, at the most, the exercise only of good judgment and common mechanical skill. If there is any invention here at all, it is of the lowest order. The plaintiff, then, is to be held strictly to Rockwell's specific device. Such, indeed, was the conclusion of the court in the case of *New Departure Bell Co. v. Bevin Bros. Manuf'g Co.*, supra. It was there declared: "Inasmuch as loosely-pivoted bell strikers are not new, the patentee must be limited to the construction claimed by him." The court therefore held that the defendant did not infringe. The language of the court was this: "Inasmuch as the striker of defendant's device has no central aperture, does not rotate, and does not by each blow bring to bear a new striking surface, it does not embody the invention claimed in said patent, and is not an infringement thereof." The defendants' hammers or strikers have shanks, which work in slots in the hammer arms, and are secured therein by burrs riveted on the hammer shanks; and between the burrs and hammer arms are sliding friction washers, to prevent rattling. It is very certain that the defendants do not use the construction described by Rockwell and specified in his claim. That claim calls for a bell striker having "a central aperture for loosely pivoting it to a rotating hand." The defendants' hammer does not have a central aperture. It has no aperture whatever. It has a projecting shank, which works in a slot in the hammer arm. Now, if, in the face of proofs to the contrary, it be conceded that Rockwell was the first to make the peculiarly formed striker described in his patent, the advance, if any, which he thus made was very slight, and he and

his assignee must be confined to the precise device he has claimed. The owner of this patent is in no position to invoke the doctrine of equivalents. *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, 278; *Railway Co. v. Sayles*, 97 U. S. 554; *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76; *Holman v. Jones*, 9 C. C. A. 385, 61 Fed. 105. The supreme court in its latest rulings seems more and more inclined to hold mere improvers rigidly to their claims. *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1; *Deering v. Harvester Works*, 155 U. S. 286, 294, 15 Sup. Ct. 118; *Coupe v. Royer*, 155 U. S. 565, 15 Sup. Ct. 199. Waiving the question of patentability, I am of the opinion that infringement of patent No. 456,062 is not shown.

The specification of patent No. 471,982 states that the object of the invention of that patent is "to produce a bicycle bell that is compact, simple, strong, durable, and reliable, and by which a sound resembling that of an electric bell, but of increased purity of tone, may be produced." It must, however, be noted here that bicycle bells having all these general characteristics and producing such a sound were old and well known prior to this invention.

The second claim of this patent, which only is here involved, is for a combination consisting of five constituents, namely, a base plate, a revoluble striker bar spring-actuated in one direction, a lever so connected with the striker bar as to move it in opposition to the force of the spring, the spring itself, and a gong. The combination, it will be perceived, is not limited to any particular form of hammer or striker, and, unless by implication, is not even limited to bicycle bells. The lever of the combination is pushed circumferentially of the bell by means of a thumb piece. This precise feature of construction, however, was old and in common prior use on bicycle bells. Reference here need be made only to the Serrell patent of October 2, 1883, for an "alarm bell for bicycles," which shows a horizontally acting thumb lever, conveniently located so that the rider can operate the mechanism. The claim under discussion is silent as to the general mechanism customarily employed to operate the striker bar and to produce the desired stroke of the bell; but this mechanism is to be implied as entering into the construction, otherwise the specified combination would be useless. The claim, which has the usual ending "substantially as set forth," calls for "a gong." The specification and drawing show a gong provided with a "lug," extending inwardly from the surface of the bill to receive the stroke of the hammer. No other form of gong is mentioned or shown. The specification here reads:

"This gong is preferably provided on one side with a lug, 25, against which the strikers impinge when the striker bar is revolved, producing thereby a clear musical tone. By this means, also, I am able to make the gong large enough to be for all time out of reach of the strikers, even after their pivotal apertures have become, as they will in use, enlarged by friction, and thereby avoid liability of their touching the gong at more than one place and interfering with its sounding properly."

As described and illustrated in the specification and drawings, the striker bar is pivoted centrally so that no sound can be produced at all without the presence of the "lug 25." The plaintiff's bicycle bells manufactured and put on the market under this patent always have had the projecting "lug 25." The bell adjudged to infringe in the case of *New Departure Bell Co. v. Bevin Bros. Manuf'g Co.*, supra,

had such a lug. On the other hand, the defendants do not use such a lug or any equivalent thereof. In the defendants' bells the hammer arm is pivoted eccentrically, and the hammer strikes against the surface of the bell itself. As already mentioned, the defendants are manufacturing under and agreeably to two later patents, the mere issuing of which creates a presumption of a patentable difference between the plaintiff's bells and the defendants' bells. *Miller v. Manufacturing Co.*, 151 U. S. 186, 208, 14 Sup. Ct. 310. Now, whether the lug does not impliedly enter into the claim under consideration is a serious question, notwithstanding the patentee's insertion into his specification of the word, "preferably." Certain it is that without such a lug or its equivalent Rockwell's construction, as disclosed to the public by this patent, is inoperative. But, if the gong called for by the claim is the described gong,—one with an inwardly projecting lug,—then the defendants do not infringe.

Assuming, however, that the claim is not so limited, we pass to the consideration of the question whether, in view of the prior state of this particular art, the combination involved invention. Here, upon the whole evidence, I am constrained to give a negative response. I shall not undertake to discuss the proofs in detail, but shall confine myself to a patent which was not before the court in the Connecticut case,—the French patent of November 16, 1881, to D'Allemagne, for improvements in bells imitating the call of an electric bell. In this patent is to be found all the elements of this Rockwell claim, combined and operating in substantially the same way and for the same purpose, with the single exception that the operative push bar of the French patent—of which the lever of the claim is the manifest mechanical equivalent—has a vertical action instead of a horizontal movement. Now, as we have seen, this horizontally working thumb lever for operating the mechanism of bicycle bells was not new. Did it, then, involve invention to substitute it for the vertical push bar of the French patent? To ask the question is to answer it. The substitution was evident to a mechanic of ordinary skill. As conclusive of the correctness of this view, I refer briefly to the Allen and Goulden patent of May 20, 1890, for improvements in alarm bells. That patent itself shows, in combination with a base plate, gong, and a rotary hammer spindle, provided with arms carrying the hammers, and spring-actuated in one direction, a lever fixed upon the driving spindle and adapted to rotate the hammer arms in opposition to the force of the spring. In this structure, it is true, the prime actuating device is a wire attached to the free end of "the lever, I," which is operated by pulling the wire. But the specification states:

"It is immaterial how the handle or lever, I, be actuated, as it might readily be moved by a suitable lever or handle engaging with its free end, as we have sometimes constructed it, or by any other suitable means."

Here we have the clearest instructions for putting in the place of the pull wire an auxiliary lever which, in the case of a bicycle bell, obviously would be the old thumb lever of the Serrell patent that Rockwell adopted. Let a decree be drawn dismissing the bill of complaint, with costs.

THE EAGLE.

THE THOMAS PURCELL.

WESTERN ASSUR. CO. OF TORONTO v. THE EAGLE et al.

(District Court, S. D. New York. June 6, 1895.)

COLLISION—TUGS AND TOWS—LONG ISLAND SOUND—INATTENTION—LOOKOUT—SIGNALS NOT GIVEN—SHEER DISCREDITED.

The tug P. going east, and the tug E. going west, brought their tows in collision at night, between Throgg's Neck and Stepping Stones, Long Island Sound. The P. had the E. on her starboard bow after passing Throgg's Neck and was bound to keep out of the way; she claimed to have mistaken the E. for a sail vessel, seeing no white lights; but the evidence of the E. showed the white lights properly set and burning; and the night, contrary to the P.'s testimony, was moonlight. *Held*, both in fault for inattention and lack of proper lookout; for not giving signals till within 300 or 400 feet of each other, and the alleged sheer of the P. was discredited.

This was a libel by the Western Assurance Company of Toronto against the steam tugs Eagle and Thomas Purcell, to recover damages for loss occasioned to the cargo of the canal boat McWilliams, through a collision with the Eagle while in tow of the Thomas Purcell.

Stewart & Macklin and Louis B. Adams, for libellant.

Owen, Gray & Sturges, for the Eagle.

Carpenter & Park, for the Thomas Purcell.

BROWN, District Judge. Between half past 12 and 1 o'clock of the morning of July 25, 1894, as the libellant's canal boat McWilliams was going east through the Sound, in tow of the steam tug Thomas Purcell, and on her starboard side, she was brought in collision with the steam tug Eagle, which was going west at a point about midway between Throgg's Neck and Stepping Stones, the stem of the Eagle striking the starboard side of the McWilliams and causing her to sink speedily. The libellant, as insurers of the cargo, having settled for the loss on the cargo, filed the above libel to recoup their damages, alleging negligence in both tugs.

The Eagle had in tow on her port side the disabled steamboat Vulcan, which was not under steam. Both had the regulation side lights burning. The witnesses for the Purcell contend that no staff lights were shown from the Eagle indicating her tow, nor any mast-head light on either the Eagle or the Vulcan to indicate that they were steamers. From the contrary testimony on the part of the Eagle, however, it is probable that the tow lights were set, though it is certainly somewhat remarkable that so many witnesses in behalf of the Purcell saw no tow lights. The evidence of some of the Purcell's witnesses is weakened by their statement that the night was dark, and that the hulls of vessels could be seen but a few hundred feet. The almanac shows that the moon at the time of collision was nearly two hours high; and while that might possibly make the tow lights less sharply visible, it must have afforded the Purcell sufficient opportunity to see that the Eagle and the Vulcan were steamboats long before they were within 300 or 400 feet of each other,

when for the first time any signals were given by either. The boats were on crossing courses, differing about three-quarters of a point from opposite after the Purcell had rounded Throgg's Neck and taken a course of N. N. E., or allowing for an error of about one-quarter of a point, N. by E., three-quarters E.; the Eagle being on a course S. W. by S., half S. Upon these courses the Purcell when from one-quarter to one-half mile distant, saw the Eagle's red light, soon after rounding the red buoy at Throgg's Neck, a little on her starboard bow; and she was bound to keep out of the way of the Eagle, as well as to signal her properly under the inspector's rules. She did neither. Her excuse is, that not seeing any white light to indicate a steamer, she did not know what the two red lights seen might be, and therefore gave no signal at all until after receiving a single blast from the Eagle, when about 300 or 400 feet distant. I cannot accept this as a reasonable or sufficient excuse for not signaling earlier. It must have been seen that the boats were steamers long before this, had any proper attention been given to them; and even if the red light had been that of a sailing vessel, as the Purcell's witnesses say they first supposed, her duty to keep out of the way would have been the same. Nothing effectual was done by her until too late, when the only chance of escape was seen to be to go on as fast as possible, and this was unavailing. The fault of the Purcell was, the lack of suitable care and attention, i. e. a proper lookout, and consequent failure to take any efficient and timely measures to keep out of the way of the red lights admitted to have been seen, as well as the failure to signal when the two red lights ought to have been seen to be steamers' lights.

The fault of the Purcell does not excuse the equally plain fault of the Eagle. Her contention is, that the red light of the Purcell continued to bear about half a point upon her port bow until the vessels had come within about 300 or 400 feet of each other, when the Purcell, it is alleged, made a sheer to the westward across the bow of the Eagle, showing then for the first time her green light; whereupon the Eagle gave a signal of one whistle, which was soon followed by collision. It is evident, however, that no continuous watch was kept by the Eagle after the red light of the Purcell was first seen. No person was stationed as a constant lookout. The sheer of the Purcell, as alleged by the Eagle, is altogether improbable. It is denied by the Purcell, whose course of N. N. E. by her compass, was taken and kept from the time of rounding the buoy at Throgg's Neck. Her story in that regard is consistent and probable, and should be accepted.

I have no doubt that the red light of the Purcell testified to by the Eagle's witnesses was the light seen while the Purcell was rounding the buoy at Throgg's Neck, and before she had taken her compass course of N. N. E.; and that the change from red to green was made as soon as she took that course, which must have been when she was from one-quarter to one-half a mile distant from the Eagle. That no one on the Eagle was watching the Purcell, and did not know just when that change of light from red to green was made, is shown

by the fact that none of them saw the Purcell's green and red lights at the same time, which they must have seen had they been watching, and known when the change was made. It was the duty of the Eagle to keep a proper continuous lookout; to observe in time the change which put the vessels on crossing courses after the Purcell rounded Throgg's Neck, so as to involve danger, and required the rules as regards signals to be observed. Through lack of proper attention in this regard, the Eagle failed to give the signal which she was bound to give under the inspector's rules, and which if given in time, as required, would have corrected the mistake and confusion to which the Purcell's witnesses testify in regard to the Eagle and Vulcan, through not seeing the vertical staff lights, whether they were properly set and burning, or not.

For these reasons, both vessels must be held in fault, and the libellant is entitled to a decree against both vessels, with costs.

THE FLORIDA.

HILLS et al. v. THE FLORIDA.

(District Court, E. D. New York. May 27, 1895.)

SHIPPING—DAMAGE TO CARGO—NEGLIGENCE IN DISCHARGING.

A steamship held liable for damage where bags of filberts, in the course of discharging, were placed so near the coal bunkers that dust from the coal blew upon and through the bags.

This was a libel by John Hills and others against the steamship Florida to recover for damage to certain bags of filberts, constituting part of her cargo.

Carpenter & Park, for libellants.

Convers & Kirlin, for claimants.

BENEDICT, District Judge. This is an action to recover of the steamship Florida for alleged damage to 383 bags of filberts, caused by coal dust upon the filberts. These filberts were part of a consignment shipped from the port of Messina on board the steamship Florida, which arrived in New York about August 5, 1890. Upon their discharge on the dock a large number of the bags were found to be covered with coal dust, and considerably damaged thereby. The allegation of the libel is that the cargo in question was damaged by coal dust from the bunkers of the ship permeating said bags, and damaging their contents, and that the same was caused by negligence and improper attention on the part of the master of the vessel, his agents and servants. Although some point has been made upon the testimony as to the sufficiency of the evidence to show that the filberts in question came by the steamship Florida, the testimony, taken together, leaves no doubt on that point; and it is found that the filberts were transported in the steamship Florida, and that they were damaged by the coal dust, as alleged in the libel. It is true that the evidence shows good stowage of the filberts on board the

ship, and makes it plain that no coal dust from the bunkers could have reached them while so stowed; but this fact, taken with the fact that the filberts, when landed, were covered with coal dust, would warrant the inference that the filberts were permitted to come in contact with coal dust while discharging. But the case is not left to depend upon this inference. There is positive proof in the case that the filberts, while discharging, were placed by the bunkers of the ship where the coal was put down, and that coal dust blew right through the bags of filberts. It must therefore be found that the filberts were damaged by negligence on the part of the ship. For such negligence as this the ship is not absolved by the terms of the bill of lading, under the law of this country. Let there be a decree for the libelants, with an order of reference to ascertain the amount.

The VICTORIA.

DAVI v. The VICTORIA.

(District Court, E. D. New York. July 8, 1895.)

SHIPPING—PERSONAL INJURY TO STEVEDORE—FELLOW SERVANTS.

Where a stevedore engaged in discharging cargo was injured by being struck by a sling which the winchman, employed by the vessel, started too rapidly, *held* that the doctrine of fellow servants did not apply, and that the ship was liable.

This was a libel by Antonio Davi against the steamship Victoria to recover damages for personal injuries.

Francis L. Carrao, for libelant.

Convers & Kirlin, for claimants.

BENEDICT, District Judge. This is an action for personal injury sustained by the libelant. The libelant was a stevedore, engaged in discharging the steamship Victoria at the time he was hurt. The immediate cause of the injury was the swinging of a sling of fruit against the end of a board which the libelant was at the time adjusting in the hold, whereby one of his fingers was cut off and serious injury was done him. There is a conflict of testimony as to which sling did the injury, but the weight of the evidence seems to me to support the allegation of the libel in that particular. The evidence further shows that the libelant's injury was caused by negligence on the part of the winchman in not heeding the direction to "go easy," and in starting the winch so rapidly as to cause the sling of boxes to swing past the center of the hold, and against the board which the libelant was at the time adjusting. The owner of the ship furnished the power, machinery, and winchman to hoist the cargo out of the hold. The doctrine of fellow servant does not apply in such a case (see *Johnson v. Navigation Co.*, 132 N. Y. 576, 30 N. E. 505), and the ship is liable for the injury caused by the negligence of the winchman.

Let there be a decree for the libelant, with an order of reference to ascertain the amount of the damages.

In re THE JARNECKE DITCH.

(Circuit Court, D. Indiana. July 30, 1895.)

No. 9,225.

1. FEDERAL COURTS—EFFECT OF STATE DECISIONS—REMOVAL OF CAUSES—STATUTORY PROCEEDINGS.

Decisions by a state supreme court that a special statutory proceeding under the state laws (such as a proceeding to establish a drain, and assess the benefits and damages thereof) is not a civil suit or action, are not controlling upon the federal courts, when the question is whether the proceeding is a civil suit in law or equity, within the meaning of the acts relating to the removal of causes.

2. REMOVAL OF CAUSES—REMOVABLE CONTROVERSIES—SPECIAL STATUTORY PROCEEDINGS FOR THE ESTABLISHMENT OF DRAINS.

Under the Indiana statutes relating to the establishment of drains (2 Burns' Rev. St. §§ 5622-5664) the proceedings are commenced by a petition of landowners, after which the drainage commissioners locate the route of the proposed drain, ascertain the cost, assess benefits and damages, and then file their report in the circuit court. Thereafter any landowners opposed to the drain may file remonstrances putting in issue the questions whether the drain will promote public health or be of public utility; whether the scheme is practicable, and can be accomplished for the aggregate amount of benefits assessed; and whether the assessment of benefits to the lands of the remonstrant is too large. These issues are to be tried by the court without a jury, and each party aggrieved has a right of appeal from its decision. *Held* that, within the meaning of the removal acts, this proceeding presents a controversy of a "civil nature," in which the petitioners for the drain may be regarded as complainants, the remonstrants as defendants, and the report of the commissioners as a complaint stating the cause of action.

3. SAME—DIVERSE CITIZENSHIP—SEPARABLE CONTROVERSY.

In such a proceeding there is no separable controversy which will authorize a removal by some of the remonstrants, who are citizens of other states, for all the parties to the proceeding are inseparably interested in the main issue, namely, the right of the petitioners to have the drain established; to which issue the question as to the amount of benefits assessed to each remonstrant is merely incidental.

4. SAME—SEPARABLE CONTROVERSIES—SEPARATE DEFENSES.

There are no separable controversies within the meaning of the removal acts unless the case as made by the complaint embraces controversies which are separate. The cause of action is not made separable because one defendant sets up a separate defense, peculiar to himself, which may defeat the entire cause of action.

These were applications by the Tolleston Club of Chicago, James Stinson, the Michigan Central Railway Company, and John Gunzenhauser for leave to file in this court a transcript of certain proceedings had in the circuit court of Lake county, Ind., in relation to the establishment of a drain, and to docket the said proceeding herein as a removed cause.

J. Kopelke, for petitioners.

J. W. Youche, Winston & Meagher, and W. C. McMahon, contra.

BAKER, District Judge. On September 9, 1892, John F. Jarnecke and 72 others, owners of land in the county of Lake, in the state of Indiana, filed their petition in the circuit court of that county, alleging that a large amount of land in said county would be benefited by drainage, which could not be accomplished without affecting the

lands of others, who are named, with a description of the lands owned by them; that such drainage could be best effected in the manner particularly described in the petition; that the public health would be promoted, and public highways and the right of way of railroads would be benefited by such drainage, and that the same would be of public utility. Notice of the filing and pendency of the petition was given in the manner provided in the statute. On December 23, 1892, the court referred said petition and the matters therein contained to the commissioners of drainage of said county. On April 22, 1895, said commissioners filed their report, accompanied with a map and profile of said drain. On May 3, 1895, 27 landowners, parties to, and who would be affected by, said proposed drainage, filed their several remonstrances to said report. On the same day, and contemporaneously with the filing of said remonstrances, four of said remonstrants, to wit, the Tolleston Club of Chicago, James Stinson, the Michigan Central Railway Company, and John Gunzenhauser, filed their several petitions and bonds for the removal of said cause from the state court into this court. The state court found that the petitions for removal, which are substantially alike, were in due form, and that the bonds tendered therewith were sufficient, but refused to grant the prayer of either petition, for the reason that, in the opinion of the court, no removable controversy was shown to exist. A transcript of the proceedings in the state court has been presented here, and the petitioners for the removal now ask leave to file the same, and to have said cause docketed, to which the petitioners for the drain object.

The proceedings for the establishment and construction of a drain are purely statutory. The statute providing therefor depends for its validity on the power of eminent domain and the taxing power of the state. A drain cannot be established or constructed unless the work will promote the public health or conduce to public utility. The landowner can only be assessed for the accomplishment of this public purpose to the extent that his land will receive a special and particular benefit from the drain, as contradistinguished from the benefit to the general public. The drainage act in question (2 Burns' Rev. St. §§ 5622-5664, incl.) has been repeatedly considered by the supreme court of this state, and it has always been regarded as providing a special statutory proceeding for the establishment and construction of drains, kindred in character to statutes providing for the establishment and construction of gravel roads, streets, sewers, and other like public improvements. A commission is provided for, which determines the public utility of the drain, the extent of the district on which the assessments are to be laid, the amount of the benefits or injuries to each parcel of land situated therein, and how much each landowner shall pay or receive on account of such public improvement. In the case of *Hays v. Tippy*, 91 Ind., 102, 106, the court, in construing the drainage act in question, held that a drainage proceeding was not a civil suit or action. The court said:

"This proceeding is not, in any proper sense, a civil action or a civil case. It is a special proceeding, authorized by the general assembly for the express

purpose of promoting public health or improving public highways. Throughout the entire statute it is manifest that the legislature did not intend that such a proceeding should be subjected to any of the delays ordinarily incident to the trial of a civil cause."

The court further said that it was clear that the provisions of the statute governing proceedings in civil suits did not apply to proceedings under the drainage act. The doctrine of this case has been reaffirmed and applied in later cases. *Dukes v. Working*, 93 Ind. 501, 503; *Anderson v. Caldwell*, 91 Ind. 451, 454; *Crume v. Wilson*, 104 Ind. 583, 587, 4 N. E. 169. But the legislature of a state cannot, by making special provisions for the trial of particular controversies, nor by declaring such controversies to be special proceedings and not civil suits at law or in equity, deprive the federal courts of jurisdiction nor prevent a removal. A state legislature, if the constitution of the state does not forbid it, may provide for the trial of any cause in some special way unknown to the methods of procedure at law or in equity. But, whatever the method of procedure, it would be none the less a trial if conducted by a tribunal having power to determine questions of law and fact; and, if the subject-matter constituted a controversy involving the legal or equitable rights of parties, it might be cognizable in the courts of the United States. Unless this were so, the only thing the legislature of a state would have to do to entirely destroy the jurisdiction of the federal courts and the right of removal would be to abolish all suits at law and in equity, and substitute special statutory methods of procedure. Neither the legislature nor the courts of a state have the power, by giving new names to legal proceedings, to change their essential character. Courts will look beyond forms to the substance, and from it determine whether the controversy, in its essential nature, is a suit at law or in equity, as understood by the courts of the United States. *Railway Co. v. Jones*, 29 Fed. 193, 196. From these considerations it follows that the decisions of the supreme court of the state are not controlling on the question now before the court.

Section 5623 of the statute provides that, after taking certain preliminary steps, "the commissioners shall proceed and definitely determine the best and cheapest method of drainage, * * * estimate the cost thereof, divide the drain or ditch into sections, * * * and compute and set out the number of cubic yards of excavation in each section and assess the benefits or injury, as the case may be, to each separate tract of land to be affected thereby." The statute further provides that any landowner may remonstrate, and that, after the remonstrances have been filed, all questions arising on the petition, report, remonstrance, or remonstrances shall be tried by the court. The court may modify or equalize the assessments as justice may require, by diminishing the assessments on one or more tracts and by increasing them on others, or by giving or withholding damages; and for such purposes all persons whose lands are reported to be affected * * * shall be deemed to be in court," and the court may, if the facts shall justify it, make assessments against the same; and as such assessments are so changed, modified, or

equalized or made, they shall stand, and be adjudged valid. The statute further provides that the county commissioner or other person charged with the execution of the work shall pay all damages that have been assessed or laid by the court, and the cost of the construction of the work; and it is further provided that the assessment shall be a lien on each separate piece of property on which the same is assessed, and that such liens shall be deemed to exist from the date of the filing of the report of the commissioner. The report of the commissioner constitutes the complaint to which the remonstrances are addressed. The findings contained in the report may be put in issue by any remonstrant who may allege that the drain will not promote the public health or be of public utility, or that the drainage proposed is not practicable, or that the work cannot be accomplished for the aggregate amount of the benefits, or that the lands of the remonstrant are assessed too high as compared with the assessment on the lands of others. Each remonstrant has the right to have such issues as are presented by his remonstrance tried by the state court without a jury. And it is further provided that if the court find that the proposed drainage will not promote the public health, or be of public utility, or that the drainage is not practicable, or that it will cost more than the aggregate amount of the benefits, the proceedings shall be dismissed.

The proceeding contemplates the taking of lands for the drain and its embankments, and the proportionate assessment of the benefits upon all lands benefited by such drainage, and the collection of so much of such benefits as may be necessary to construct the drain. Do the appropriation and condemnation of lands whereon to construct the drain and the assessment of benefits upon the land benefited by its construction constitute a controversy of a civil nature at law or in equity, cognizable by the federal courts? It is clear that the proceedings had by and before the drainage commissioners do not constitute a controversy of a civil nature at law or in equity. When the report is filed in court it becomes a complaint, to which remonstrances may be addressed in the nature of pleas in bar, which will give rise to controversies which may result in defeating or modifying the report. The report states a cause of action against each landowner named therein. It states that each landowner will be benefited in a specified sum by a work which will promote the public health and be conducive to public utility. Each remonstrant is entitled, if he desires it, to have these questions tried in a suit or proceeding in which the petitioners are plaintiffs and the remonstrants are defendants. The questions of taking the lands of the remonstrants for the construction of the drain, and the amount of benefits which his lands will receive therefrom, are to be heard and decided by the state court as other suits are tried and decided; and either party, if aggrieved, may have an appeal from such judgment to the supreme court. These questions, at least, constitute a controversy of a civil nature. If several separate remonstrances present the same issues, the court may undoubtedly order them to be consolidated and tried together, but in such case the finding and judgment as to the amount of benefits or damages sustained by each land-

owner would have to be separate. Each remonstrant can introduce evidence, reserve exceptions, and take a separate appeal, if he so desires. As each remonstrant is entitled to file a separate remonstrance, and to have a separate trial thereof, in which the only parties actually concerned in the litigation are the petitioners as plaintiffs and himself as defendant, it is difficult to perceive why that controversy does not constitute a suit.

The case of *City of Chicago v. Hutchinson*, 11 Biss. 484, 487, 15 Fed. 129, was a proceeding under and by virtue of an ordinance of the city of Chicago to open Dearborn street through that city, and for that purpose some 200 lots, owned by 40 different persons, were sought to be condemned. The petition on the part of the city, which made all the landowners defendants, was filed in the county court of Cook county, Ill. The owner of one of the lots filed in that court her petition and bond for removal. The court sustained her right of removal. It was said that the condemnation of land for the street was an exercise of the right of eminent domain, and that this was an exercise of sovereignty residing exclusively in the state; but that, when the legislature made the exercise of this power dependent on questions of law and fact, to be ascertained and determined by a judicial tribunal, it gave rise to a controversy in the nature of a civil suit, so far, at least, as related to the determination of the value of the property to be condemned, and the amount of benefits to the remaining land created by opening the street. And it was held that these questions constituted a civil suit between the city on the one side and the lot owner on the other, and that it was a separable controversy, removable into the federal court. The case was subsequently re-argued before Judges Drummond and Blodgett, and the decision of Judge Drummond was affirmed, it being held that the proceeding was a civil suit, and that a separable controversy existed therein as between the city and the lot owner.

The same question came before the supreme court in the *Pacific Railroad Removal Cases*, 115 U. S. 2, 22, 5 Sup. Ct. 1113. One of these cases—the case of the *Union Pacific Railroad Company v. City of Kansas*—was a proceeding instituted by the common council of that city for the widening of a street through the depot grounds of the company, and thereby taking a portion of its grounds, and the property of many other persons. A jury was summoned before the mayor to inquire into the value of the property taken for the street, and to assess the amount upon the surrounding property benefited thereby. The jury found the value of the company's property taken to be \$7,305, and assessed as benefits upon the remaining property the sum of \$12,325. The verdict of the jury was confirmed by the mayor. The laws of Missouri gave to the party dissatisfied with the award of the jury in such cases an appeal to the circuit court of Jackson county, in which Kansas City is situated; and the *Union Pacific Railroad Company* and some other parties filed separate appeals, and the proceedings were certified to said court, where the appeals were by law directed to be tried "in all respects and subject to the same rules as other trials had in the circuit court, and the same record thereof made and kept." After the case was certified

to the circuit court of Jackson county, the company in due time filed its petition and bond for the removal of said cause into the circuit court of the United States for the Western district of Missouri. The court held that a separable controversy existed between the city and the company, which was removable into the federal court. It was observed that there were three distinct issues or grounds of controversy: First, the value of the property taken for the street; secondly, the amount of benefits which the widening of the street would create to its remaining property not so taken; and, thirdly, the right of the city to open the street at all across the depot grounds. It was held that these issues involved a controversy of a civil nature, cognizable by the courts of the United States; and that the controversy involving these issues was separate and distinct as between the city and the company. It was further said that in this view of the case there was no difficulty in removing the controversy between the city and the company for trial in the circuit court of the United States. It was said that the proceeding in the state court might have to await the determination of this controversy, and that the result of its determination might modify, or possibly defeat, the proceedings in the state court, but that this furnished no good reason for depriving the company of the right of removal. The present proceeding is one seeking to condemn land for the construction of a drain and to assess the benefits of such drainage on all other lands benefited thereby. The controversy between the petitioners and each remonstrant is whether the drain will promote the public health or be of public utility; whether the drainage is practicable, and can be accomplished for the aggregate amount of benefits; and whether the assessment of benefits to the lands of the remonstrant is too large. This controversy, if tried in the state court, is one triable by and between these parties, and possesses all the characteristics of a civil suit. The petition, report, and remonstrance represent controversies involving the several issues or questions above stated. The taking of land for a drain, and the fixing of a charge upon other lands for its construction, involve rights of property or claims thereto capable of pecuniary estimation, which are the subject of litigation presented by the petition, report, and remonstrances. Such litigation constitutes a suit within the meaning of the removal act. "The term 'suit,'" said Mr. Chief Justice Marshall in *Weston v. City Council*, 2 Pet. 449, 464, "is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but, if a right is litigated between the parties in a court of justice the proceeding by which the decision of the court is sought is a suit." And in *Upshur Co. v. Rich*, 135 U. S. 467-477, 10 Sup. Ct. 651, it is said:

"The principle to be deduced from these cases is that a proceeding not in a court of justice, but carried on by executive officers in the exercise of their proper functions, as in the valuation of property for the just distribution of taxes or assessments, is purely administrative in character, and cannot in any just sense be called a suit; and that an appeal in such a case to a board of assessors or commissioners having no judicial powers, and only authorized to

determine questions of quantity, proportion, and value, is not a suit, but that such an appeal may become a suit if made to a court or tribunal having power to determine questions of law and fact, either with or without a jury, and there are parties litigant to contest the case on one side or the other."

The controversy presented in the present case by the petition, report, and remonstrances is one to be tried by a state court of general jurisdiction clothed with the power to determine questions of law and fact; and there are parties litigant to contest the case on both sides. It seems difficult to withdraw the present controversy from the principle announced in *Upshur County v. Rich*, *supra*. From the time the report is filed in the state court, the proceeding becomes, in my opinion, a suit between the petitioners on the one side and all others who are made parties thereto by the report on the other side. As to such parties as do not remonstrate within 10 days, the report will be confirmed, subject, however, to the whole proceeding being defeated and dismissed, if upon the trial of any remonstrance to said report it shall be found and adjudged by the court that such drainage will not promote the public health, or be of public utility, or that its construction is not practicable, or that its cost will be in excess of the aggregate amount of benefits. The proceeding does not involve the mere exercise of the taxing power of the state. It is in the nature of the exercise of the power of eminent domain, and contemplates the taking of land whereon to construct the drain, as well as the assessment of benefits on the remaining lands, whereby to pay for its establishment and construction. In this particular it differs from a proceeding solely for the purpose of raising money by the exercise of the taxing power to aid in the construction of a public improvement. This differentiates the present case from that of *In re City of Chicago*, 64 Fed. 897, and other cases of like character, which hold that a proceeding solely for the purpose of raising money by the exercise of the taxing power for the construction of a public improvement is not a suit, although such proceedings may be conducted in a court of general jurisdiction. Without expressing any opinion on the doctrine of this class of cases, it seems to me that the existing controversy between these several remonstrants and the petitioners for the drain constitutes a suit between the latter on the one side and the remonstrants on the other. For these reasons I am of the opinion that the petition, report, and remonstrances present a controversy in the state court in the nature of a civil suit. Whether the controversy between the petitioners and each remonstrant is one wholly between citizens of different states, which can be fully determined as between them, can only be ascertained by a consideration of the nature of the controversy. The petition and report allege that the drain will promote the public health, and be of public utility; that its construction is practicable, and can be accomplished at a cost not in excess of the aggregate amount of benefits; and that the lands of each remonstrant will be benefited in the amount assessed upon them. These allegations are put in issue by the several remonstrants. All of these questions except the one relating to the amount of benefits concern every land-owner named in the report alike. The interest of the remonstrants

in these questions is not different in kind, though it may be in extent, from that of the petitioners, and other parties who do not remonstrate.

Regarding the report, as we must, as a bill of complaint, does the fact that each petitioner for removal sets forth in his or its remonstrance and petition a separate defense thereto, make the controversy separable in the sense of the removal act? By section 1 of the acts of congress of March 3, 1875 (chapter 137), as amended by the acts of March 3, 1887 (chapter 373), and August 13, 1888 (chapter 866), it is enacted that the circuit courts of the United States shall have original cognizance concurrent with the courts of the several states of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of \$2,000, "and arising under the constitution or laws of the United States or treaties made or which shall be made under their authority; or in which the United States are plaintiffs or petitioners; or in which there shall be a controversy between citizens of different states; or a controversy between citizens of the same state claiming land under grants of different states; or a controversy between citizens of a state and a foreign state, citizens or subjects." And by section 2 the defendant's right to remove a suit, whether arising under the constitution, laws, or treaties of the United States, or coming within any other class above enumerated, from a state court into a circuit court of the United States, is restricted to suits of "which the circuit courts of the United States are given original jurisdiction by the preceding section." 25 Stat. 434. And by section 2 it is further provided that "when in any suit mentioned in this section there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy may remove said suit into the circuit court of the United States for the proper district."

The question whether there is a separable controversy authorizing its removal into this court must be determined by the state of the pleadings and the record at the time of the application for removal, and not by the allegations of the petition therefor, nor by the subsequent proceedings in the state court. *Barney v. Latham*, 103 U. S. 205. The petition for removal, and the report filed in the state court, and the relief sought for thereunder do not present a controversy which is wholly between citizens of different states, nor one which can be finally determined between the petitioners for the drain and the parties seeking a removal without the presence of other parties whose interests are directly involved in the controversy. The original petition and the report do not present several causes of action, some of which are against the resident defendants and others against the nonresident defendants, but embrace a single cause of action and a single ground of relief. Considering the character of the relief sought by the original petition and report, and the relation of the various parties to the same, it cannot be properly said that the whole subject-matter of the pro-

ceeding is capable of being fully and finally determined between the original petitioners on the one side and these four remonstrants on the other side without the presence of the other parties who have a direct and immediate interest in all the questions in controversy except that relating to the assessment of benefits on the lands of the remonstrants. Nor does the fact that some of the parties have not answered by remonstrance or otherwise place the remonstrants in any different position with reference to a removal than they would have occupied if those parties had filed remonstrances denying the allegations of the report. *Putnam v. Ingraham*, 114 U. S. 57-59, 5 Sup. Ct. 746; *Wilson v. Oswego Tp.*, 151 U. S. 56, 14 Sup. Ct. 259.

The case of *Rosenthal v. Coates*, 148 U. S. 142, 147, 13 Sup. Ct. 576, was a suit in effect by the assignee to disincumber the fund in his possession of alleged liens. It was held that the fact that each defendant had a separate defense to his claim did not create a separable controversy as between him and the assignee; citing *Insurance Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733; *Graves v. Corbin*, 132 U. S. 571, 586, 10 Sup. Ct. 196; and *Young v. Parker*, 132 U. S. 267, 10 Sup. Ct. 75. And it was observed that none of the defendants could create a separable controversy by setting up in his answer a claim for the payment of his debt out of the fund in the hands of the assignee. So in the present case the proceeding in the state court was one in effect by the original petitioners to procure the establishment and construction of a drain, and to charge upon all the lands benefited by its construction the amount of such benefits; and the fact that each remonstrant had a separate defense to this proceeding does not create a separable controversy by setting up that the proposed drain is not practicable, or is not of public utility, or that his assessment is too large as compared with the assessments of any or all other parties to the proceedings.

The case of *Bellaire v. Railroad Co.*, 146 U. S. 117-119, 13 Sup. Ct. 16, was a suit by the city of Bellaire against the lessor and lessee of a parcel of land to condemn it for the purpose of extending a street. It was held that it could not be removed into a circuit court of the United States upon the ground of a separable controversy between the lessee and the plaintiff. "The object of the suit," it was said, "was to condemn and appropriate to the public use a single lot, and not (as in *Union Pac. Ry. v. City of Kansas*, 115 U. S. 2, 22, 5 Sup. Ct. 1113, cited by defendant) several lots of land, each owned by a different person. The cause of action alleged, and consequently the subject-matter of the controversy, was whether the whole lot should be condemned, and that controversy was not the less a single and entire one because the two defendants owned distinct interests in the land, and might be entitled to separate awards of damage;" citing *Kohl v. U. S.*, 91 U. S. 367, 377, 378. And it was further said that the ascertaining of those interests and the assessment of those damages were but incidents to the controversy, and did not make that controversy separable, so that the right of either defendant could be fully determined by it-

self, apart from the right of the other defendant and from the main issue between both the defendants on the one side and the plaintiffs on the other. So here the main controversy in which every land-owner is concerned is whether the drain is of public utility, and whether its construction is practicable, and can be accomplished at a cost not in excess of the aggregate amount of benefits; and the assessment of benefits is but incidental thereto.

The case of *Torrence v. Shedd*, 144 U. S. 527, 530, 12 Sup. Ct. 726, was a suit in a state court for the partition of lands. It was held that it could not be removed into a circuit court of the United States by reason of a controversy between the plaintiff and a citizen of another state intervening and claiming whatever might be set off to the plaintiff. It was said:

"But, in order to justify such removal on the ground of a separate controversy between citizens of different states, there must, by the very terms of the statute, be a controversy which can be fully determined as between them; and by the settled construction of this section the whole subject-matter of the suit must be capable of being finally determined as between them, and complete relief afforded as to the separate cause of action, without the presence of others originally made parties to the suit. *Hyde v. Ruble*, 104 U. S. 407; *Corbin v. Van Brunt*, 105 U. S. 576; *Fraser v. Jennison*, 106 U. S. 191, 1 Sup. Ct. 171; *Winchester v. Lowd*, 108 U. S. 130, 2 Sup. Ct. 311; *Shainwald v. Lewis*, 108 U. S. 158, 2 Sup. Ct. 385; *Ayres v. Wiswall*, 112 U. S. 187, 5 Sup. Ct. 90; *Insurance Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733; *Graves v. Corbin*, 132 U. S. 571, 10 Sup. Ct. 196; *Brown v. Trousdale*, 138 U. S. 389, 11 Sup. Ct. 308. As this court has repeatedly affirmed, not only in cases of joint contracts, but in actions for torts which might have been brought against all or against any one of the defendants, separate answers by the several defendants sued on joint causes of action may present different questions for determination, but they do not necessarily divide the suit into separate controversies. A defendant has no right to say that an action shall be several which a plaintiff elects to be joint. A separate defense may defeat a joint recovery, but it cannot deprive a plaintiff of his right to prosecute his own suit to final determination in his own way. The cause of action is the subject-matter of the controversy, and that is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. *Railroad Co. v. Ide*, 114 U. S. 52, 56, 5 Sup. Ct. 735; *Pirie v. Tvedt*, 115 U. S. 41, 43, 5 Sup. Ct. 1034, 1161; *Sloane v. Anderson*, 117 U. S. 275, 6 Sup. Ct. 730; *Little v. Giles*, 118 U. S. 596, 601, 602, 7 Sup. Ct. 32; *Hedge Co. v. Fuller*, 122 U. S. 535, 7 Sup. Ct. 1265."

The case of *Shainwald v. Lewis*, 108 U. S. 158, 2 Sup. Ct. 385, was a suit by one partner for a settlement of partnership affairs, in which a judgment creditor of the defendant and a receiver appointed in a suit upon the judgment were admitted as defendants; and it was held that there was no separable controversy between them and the plaintiff which would entitle them to remove the suit; the court saying:

"The suit was brought to close up the affairs of an alleged partnership. The main dispute was about the existence of a partnership. All the other questions in the case are dependent on that. If the partnership is established, the rights of the defendant are to be settled in one way; if not, in another. There is no controversy in the case now which can be separated and be fully determined by itself."

So in the present case there is now no controversy which can be separated from that touching the practicability and utility of the drain and be fully determined by itself.

The case of *Little v. Giles*, 118 U. S. 596, 600, 601, 7 Sup. Ct. 32, was a suit in which the bill charged the defendants jointly with having defrauded the plaintiff of her property. The defendants denied the fraud, and set up separate defenses. Mr. Justice Bradley, delivering the opinion of the court, said that one of the defendants "could not, by merely making contrary averments in his petition for removal, and setting up a case inconsistent with the allegations of the bill, segregate himself from the other defendants, and thus entitle himself to remove the case into the United States court." So in *Railroad Co. v. Grayson*, 119 U. S. 240, 244, 7 Sup. Ct. 190, which was a suit in equity against two corporations, the question was whether there was a separable controversy between one of them and the plaintiff which would warrant a removal into the federal court; and it was said by Mr. Chief Justice Waite, who delivered the opinion of the court, that the allegations of the bill must, for the purposes of the inquiry, be taken as confessed.

The case of *Railroad Co. v. Wangelin*, 132 U. S. 599-603, 10 Sup. Ct. 203, was an action at law charging two correspondents with having jointly trespassed on the plaintiff's land. The defendant, seeking a removal on the ground of a separable controversy, set up that its codefendant did not have a corporate existence, and that the alleged trespass had been committed by it alone; but the court, denying the right of removal, observed that whether they had committed the alleged joint trespass was a question to be decided at the trial; and that, as the cause of action disclosed by the declaration did not show a separable controversy, the removal was wrongful, and the order remanding the cause to the state court was affirmed.

The case of *Insurance Co. v. Huntington*, 117 U. S. 280, 6 Sup. Ct. 733, was a creditor's bill to subject incumbered property to the payment of the judgment of the creditor by selling it and distributing its proceeds among lienholders according to priority. It was held that no separable controversy existed within the meaning of the removal act, although the defenses of the several defendants were separate and distinct. The court said:

"The suit, as brought by Huntington, is a creditor's bill to subject incumbered property to the payment of his judgment by a sale and distribution of the proceeds among the lienholders according to their respective priorities. There is but a single cause of action, and that is the equitable execution of a judgment against the property of the judgment debtor. The cause of action is not divisible. Each of the defendants may have a separate defense to the action, but we have held many times that separate defenses do not create separate controversies within the meaning of the removal act."

It was further observed that the judgment sought against the Fidelity Company was incidental to the main purpose of the suit, and the fact that this incident related alone to that company did not separate this part of the controversy from the rest of the action. These cases establish the doctrine that, unless the case made by the complaint embraces separable controversies, there can be no removal; that a cause of action is not made separable and removable because the defendant sets up a separate defense peculiar to himself which may defeat the entire cause of action. In the present case the main and primary question is the right of the petitioners to estab-

lish the drain, and this presents a single and entire controversy, in which all the landowners are equally interested. The assessment of benefits and damages is merely incidental to the main, and, for the purpose of removal, the indivisible, issues tendered by the original petition and report. Whether a removal could be had if the sole issue presented by the remonstrants was the amount of the assessments, it is not necessary to determine. But see *Brooks v. Clark*, 119 U. S. 502, 7 Sup. Ct. 301. Tested by the principle established in these cases, it is manifest that neither the original petition nor the report discloses any such separable controversy wholly between the petitioners for removal on the one side and the original petitioners for the drain on the other as will warrant a removal.

Leave to file the transcript and docket the cause is denied at the cost of the petitioners for removal, and the transcript is ordered to be transmitted to the circuit court of Lake county, Ind.

MULCAHEY v. LAKE ERIE & W. R. CO.

(Circuit Court, N. D. Ohio, W. D. July 27, 1895.)

1. EVIDENCE—STENOGRAPHER'S NOTES—PRACTICE IN FEDERAL COURTS.

Act of congress providing that, in addition to the mode of taking depositions in courts of the United States, depositions or testimony may be taken in the mode prescribed by the laws of the state in which the courts are held, merely allows a change in the mode of taking a deposition where some other act of congress allows a deposition to be used in place of oral testimony, but does not authorize the admission of testimony found in the stenographic notes of a former trial, where the laws of the state in which the court is held allows it.

2. FEDERAL COURTS—JURISDICTION—GRANTING NEW TRIAL TO QUESTION.

Where a case has been removed to a federal court, and tried there without objection to the jurisdiction, verdict will not be set aside and new trial granted to enable objection to be made to the jurisdiction, but the party will be left to his remedy by writ of error.

Action by Patrick Mulcahey against the Lake Erie & Western Railroad Company. There was a verdict for plaintiff, and defendant moves for a new trial.

Finley & Bennett, John N. Doty, and Hurd, Brumback & Thatcher, for plaintiff.

A. W. Scott, and John B. Cockrum, for defendant.

HAMMOND, J. On its merits the motion for a new trial in this case must be overruled. I do not think the exclusion of the testimony of Andrew Shainer, which was found in the stenographic notes of the former trial, was error. The act of congress (Acts 52d Cong., 1st Sess., c. 14) which provides "that in addition to the mode of taking the depositions of witnesses in cases pending at law or equity in the district and circuit courts of the United States it shall be lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the states in which the courts are held" has not changed the ordinary rule of the federal courts that the witness must be produced and his testimony taken orally. Con-

gress has prescribed the only conditions under which depositions may be substituted for oral testimony, and we can use other than oral testimony only in compliance with those conditions, which are so familiar that it is unnecessary to cite them. All that the recent act of congress above quoted has done is to permit depositions authorized by congress to be taken according to the mode in vogue in the state. It has not enlarged or changed the conditions under which depositions may be substituted for oral testimony, and the state of Ohio cannot, therefore, prescribe other and different conditions than those prescribed by congress. Except, therefore, in directing how a deposition may be formally taken, section 5243 of the Revised Statutes of Ohio (Laws Ohio 1894, p. 86) has no effect upon this question. Our acts of congress prescribe that the deposition of a witness beyond the jurisdiction of a court may be taken under certain conditions, and the testimony of this witness so beyond the jurisdiction of this court might have been taken under that act of congress in any mode authorized by the laws of Ohio. But it is quite another thing to say that his testimony found in the stenographic report of a former trial may be used in evidence, and, congress not having said this, the legislature of Ohio cannot prescribe such a rule of evidence for us. The recent act of congress was not intended to have any such effect.

In regard to the objection that the court excluded from the jury the evidence of the negligence of the conductor it is sufficient to say that for the reasons so fully stated in the charge itself I still think that was the correct view of the rights of the parties. The result is that the verdict here must be sustained and the motion for a new trial overruled.

But we are now confronted with another and an anomalous ground for a new trial, one that, so far as I know, has not been presented before; at least no case has been cited in which it has occurred. This case has been twice expensively tried in this court, once resulting in a mistrial and now in this verdict for the defendant. Yet, for the first time, attention is called to a defect of pleading in the petition for removal which is said to be fatal to our jurisdiction. And we are asked to set this verdict aside and grant a new trial in order that we may then hear a motion to remand the case to the state court from which it came for want of jurisdiction here. It does seem to me that if ever a new trial should be refused upon such a ground as that it should be done in this case. It is entirely true that the recent legislation of congress has made it quite unnecessary to make any objection to the jurisdiction, and the court is required, whenever the want of it appears, to dismiss the case. This legislation is in hostility to the jurisdiction of the federal courts, and reverses the general rule for quieting all questions of jurisdiction by the appearance and waiver of the parties, and the final judgment in the case. And these cases are dismissed in the appellate courts where the want of jurisdiction appears, and often on the motion of the courts themselves. But it does not follow from this, in my judgment, that the court here must aid this objection to the jurisdiction by changing the attitude of the party making it, releasing him from the technical obstructions that

exist to his motion, and complacently putting him in an attitude where he may make it. Evidently and technically the obligation of this court to dismiss a suit whenever a want of jurisdiction appears terminates with verdict and judgment. The right of the party to object to the jurisdiction, like all other rights preceding judgment, is by verdict and judgment technically terminated. This is the technical condition here. It is true the court still has power to set aside the verdict and grant a new trial, and until the term is adjourned that power subsists, although an execution may in the meantime issue upon the verdict and judgment, if it be not before that time suspended. It is not impossible that the money may have been collected and be in the pocket of a plaintiff before the term adjourns and the execution is satisfied. Upon good grounds a new trial may nevertheless be granted and restitution commanded; but it would hardly be said that these acts of congress would require us to do that in order to entertain an objection to the jurisdiction. It would not, in such a case, be a good ground for a new trial that we had no jurisdiction. But none the less is this verdict and judgment final in the sense we are now considering it from its rendition and entry. It must be a mere matter of grace and favor to the plaintiff to grant him a new trial in order that he may object to the jurisdiction.

And I am not disposed, for sound and substantial reasons, to grant that indulgence in this case, but shall leave the plaintiff where the verdict and the judgment left him in that behalf. It may be that, through the effect of a writ of error, the plaintiff can take this case to an appellate tribunal, and there have the case dismissed for want of jurisdiction. This would be to transfer to the appellate court the determination of the question whether or not this petition is insufficient and the jurisdiction wanting; and also the question whether or not, even in the appellate court, it be not too late, after verdict and judgment, to take this objection, unless there be substantial ground for vacating the judgment and restoring the case to a condition in which the objection to the jurisdiction would be technically available. And in my judgment, after verdict, that is the proper tribunal to determine these questions, and only that tribunal, and it would be unwise for the trial court, if not unlawful, to assume the decision of them, possibly to usurp it after verdict by exercising the power of granting a new trial in order to take hold of the question of jurisdiction again, and decide it. I have here and now no power to decide this question of jurisdiction, and the appellate court has, through the medium of a writ of error, the power to decide it, and should be permitted to exercise that power in all justice to the parties involved. I could, through the medium of a preliminary and previous grant of a new trial, again acquire the power of decision, but I doubt if a court should by such means assume the function of decision, and for this reason: If it does, and the case be remanded, the defendant is finally and conclusively precluded, upon the question of jurisdiction, by the judgment here that the jurisdiction does not exist because there is no appeal from an order remanding the case. If, however, the court should decide in favor of the

jurisdiction, the objecting plaintiff could take the case to the supreme court of the United States under the recent act of congress. This would seem an unfair advantage. And now that the case is in the attitude of giving both parties the right to the judgment of the appellate court, whether the court of appeals or the supreme court, under the recent acts of congress, I need not say, I do not feel disposed to reinstate the plaintiff to the advantage of having here a final adjudication upon the question of jurisdiction, and think he should be put to his writ of error to correct his misprisions and neglect to heretofore take objection to the jurisdiction, as he might have done and ought to have done. I shall therefore not grant a new trial in order that the plaintiff may make an objection to the jurisdiction in the present attitude of the case.

It is perhaps well that I should now state the objection to the jurisdiction, so that this ruling may be fully understood. The petition for removal states only that the plaintiff, Patrick Mulcahey, is a citizen of the state of Ohio, and a resident thereof. It does not also aver that he was likewise a citizen of the state of Ohio at the time the suit was brought, and on the authority of *Stevens v. Nichols*, 130 U. S. 230, 9 Sup. Ct. 518, it is claimed we have no jurisdiction, and we are asked to grant a new trial in order that a motion may be made to remand the case to the state court. Reply has been made to this objection to the jurisdiction that, although it does not appear in the petition itself that the plaintiff was a citizen of Ohio at the time the action was commenced, it does appear from the proof in this case taken at the trial that such was the fact, and it is contended that this cures the defect of the petition and supports the jurisdiction. Of course, I need not and should not decide this point after what has been said upon the subject of leaving the plaintiff to his remedy by writ of error, but it may be well enough, in explanation of the record, to state the fact that, while on the whole proof there can be no doubt that this plaintiff was at the time the suit was brought a citizen of Ohio, and possibly has always been from his birth up, it is rather a matter of inference from the facts that were proved, such as his residence in Ohio and his home there, that his mother and family were living there, and his neighbors and friends all recognizing him as a resident and inferentially a citizen of Ohio. But inasmuch as a man may reside and have a home and have all his family in a place where he is not a citizen, it may be that the fact of his citizenship does not technically appear, even if it be conceded that it cures the objection to the jurisdiction to have it appear that he was a citizen at the time the suit was brought in the oral proof taken down by a stenographer, and is not required to appear upon what is known as the technical record of the case. All these questions the plaintiff might have tried in this court if he had made the objection in time, but it is too late now to make them, unless a new trial be granted for that purpose, which I have concluded not to grant. Motion overruled.

ZIEGLER v. LAKE ST. EL. R. CO. et al.

(Circuit Court, N. D. Illinois. June 18, 1895.)

CORPORATIONS—AGREEMENT AMONG STOCKHOLDERS—FRAUD.

One Z. and others, holders of a majority of the stock of the L. Ry. Co., entered into an agreement to pool their holdings and act together in the election of directors, and control of the road. Directors were elected in pursuance of the agreement, one of them being Z., who, on his resignation, was succeeded by a nominee of his own. The L. Ry. Co. obtained authority to extend its road, and made contracts for building the extension. Subsequently, instead of completing the extension itself and obtaining the money to do so, and to maintain its credit, from the members of the pool, as it might have done under their agreement, the company, under resolutions of the directors, entered into agreements with other elevated railway companies for the construction of the extension and formation of a connection with the other roads, giving them a right to use the extension to connect with the L. Co. Z. filed a bill against the company, alleging that the independent construction and ownership of the extension was of so great value to the L. Ry. Co. that the contracts for combination with other roads in its use amounted to fraud, and asked for an injunction and receiver. He also alleged that certain of the directors were also interested in the other roads with which the combination was made, and that other contracts looking to the same general purpose had been made, which Z. believed to be fraudulent. It appeared from the bill that the course pursued by the company was adopted by the directors, in pursuance of the pooling contract, in accordance with the views of Z.'s associates, who held a larger proportion of stock than he, and that such contract was still in force, and still insisted on by Z. *Held*, that the bill failed to show fraud on the part of the directors, and that Z., having joined in the pool, was not in a position to prevent, by a stockholders' bill, acts which appeared to be within the scope of what might be done by such pool, under the contract.

This was a suit by William Ziegler against the Lake Street Elevated Railroad Company and others to enjoin the performance of certain contracts. The defendants demurred to the bill.

T. S. McClelland and S. P. Shope, for complainant.

Knight & Brown, Dupee, Judah & Willard, S. P. McConnell, and John A. Rose, for defendants.

SHOWALTER, Circuit Judge. On April 8, 1895, complainant, a citizen of New York, filed his bill against the Lake Street Elevated Railroad Company, an Illinois corporation, its nine directors, citizens of Illinois, and one John J. Mitchell, also a citizen of Illinois. On April 20th complainant filed an amendment to his bill, and on May 3d a further addition, in the form of a supplemental bill, wherein he makes the Northwestern Railroad Company, the West Chicago Street Railroad Company, the Columbia Construction Company, the Union Elevated Railroad Company, and the City of Chicago parties defendant. Complainant asks for an injunction and receiver, with other relief, and the defendants, or some of them, now question the sufficiency of the bill by a demurrer. The capital stock of the Lake Street Elevated Railroad Company is \$10,000,000, divided into 100,000 shares of \$100 each. Complainant says "he is the owner of 10,000 shares of said stock," and the theory of the bill,

which is a stockholders' bill, is that the defendant directors have wronged the corporation.

On June 29, 1894, the Lake Street Elevated Railroad Company owned and operated an elevated road on Lake street, Chicago, from Market street to Fifty-Second, a distance of seven miles. Besides this piece of road, the company had property then estimated to be worth \$881,000. The company's property was then subject to a mortgage to secure bonds aggregating \$6,500,000, and its total liabilities, figured as of the date last mentioned, aggregated some \$7,500,000. On the 5th of July, 1894, a writing was made between complainant and the defendant Mitchell. The latter had acquired, in part by purchase from complainant himself, some 52,000 shares of the capital stock of the Lake Street Elevated Railroad Company. Mitchell, it seems, represented in his holdings of stock other persons not disclosed in the body of the writing. The purpose of the agreement was that the members of the combine should control and manage the corporation. It was agreed that complainant, Ziegler, should go upon the market and buy other shares, sufficient to make the aggregate of all the stock in the pool 60,000 shares. In case the price paid by him should exceed \$18 per share, the other members of the combine were to advance to him five-sixths of the excess; and in case the stock should cost less than \$18 per share, then Ziegler was to account in the same proportion to the pool. It was stipulated that the said stock "should be voted as a unit in all matters pertaining to said company; and for the purpose of making the stock of said company more valuable, the said parties hereto each agree to contribute or pay such sum or sums of money as may be necessary towards the payment of present liabilities against said company, which said parties hereto may deem advisable or necessary to pay in order to add such value to said stock holdings, in the following proportions, namely, said Mitchell's principals five-sixths ($\frac{5}{6}$), and said Ziegler one-sixth ($\frac{1}{6}$); and all moneys so advanced by said parties shall be so advanced upon like and equal terms, conditions, and securities therefor. Said Ziegler shall be entitled at his election to take one-sixth of any bonds sold by said railroad company coming to parties hereto and entitled to one-sixth ($\frac{1}{6}$) of all assets and benefits covered or acquired in said purchase, and in case any sale is made of the stock represented by said Mitchell's principals, or any part thereof, Ziegler shall be permitted at his election to join in the sale and have a pro rata share of his stock sold at the same price and on the same terms as the said stock of said Mitchell's principals is sold. In case any construction company is formed for the purpose of building any railroad or furnishing equipment for said Lake Street Elevated Railroad Company, or any contract let for such purpose, in which said Mitchell's principals are interested, then said Ziegler shall be permitted at his election to stand in the same relations to such construction company or said contract as said Mitchell's principals, and be entitled to share in the benefits and privileges of the same to the extent of one-sixth ($\frac{1}{6}$) thereof; and in case any purchase is made, or other line of railroad acquired, or in case of any sale or consolidation of said

Lake Street Elevated Railroad, then said Ziegler shall have the option to join in said purchase or consolidation upon the same terms, conditions, and requirements as said Mitchell's principals. The purpose and intent of this agreement is that in all matters pertaining to said railroad company the parties shall stand represented in the same proportion as their respective stockholdings, represented and held by each of the parties hereto, stand in relation to the whole capital stock of said railroad company, owned by all of said parties, namely, five-sixths ($\frac{5}{6}$) thereof by said Mitchell's principals, and one-sixth ($\frac{1}{6}$) thereof by said Ziegler, and that at all times said Ziegler shall be permitted to designate at least one director in said company, and that at all elections for directors of said company the said stock shall be voted in such manner that at all times said Ziegler shall designate and choose at least one member of the board of directors of said company. This agreement shall be valid and binding for a period of three years from the date hereof."

By an arrangement made prior to this agreement, and as a condition of the purchase of said 52,000 shares of stock by Mitchell, the directors of said company, except Ziegler himself, resigned, and the directors who are named as defendants in this bill, except John Morris, were thereupon elected. Ziegler continued to be a director down to the month of January, 1895, at which time Morris was elected as his successor. On October 1, 1894, the Lake Street Elevated Railroad Company was licensed by the city of Chicago and the property owners interested to extend its road along Lake street east to Wabash avenue. Construction contracts were, or a construction contract was, thereupon made, the materials for the superstructure were manufactured, and a portion of said extension from the Market street end had been completed at the time of filing the amendment to the bill. On December 18, 1894, it is said in the bill the work of constructing said extension "had progressed favorably."

On the date last named, the said defendant directors voted to make a treaty between the Union Elevated Railroad Company, of the one part, and the Lake Street Elevated Railroad Company, the Northwestern Elevated Railroad Company, the Metropolitan West Side Elevated Railroad Company, and the Chicago South Side Rapid Transit Railroad Company, of the other part. It was proposed that the Union Elevated Railroad Company should construct a line of elevated road from Lake street south on Franklin to Van Buren street; thence east on Van Buren to Wabash avenue; thence north on Wabash avenue to Lake street; thence west on Lake street to the place of beginning. The Metropolitan road might then connect with such loop at the southwest corner, the South Side Rapid Transit Company at the southeast corner, and the Northwestern Elevated Railroad Company at some point on Lake street. The said Union Elevated Railroad Company was to arrange with the Lake Street Elevated Railroad Company to use its extension on Lake street from Market to Wabash avenue as the north side of said loop. The Union Elevated Railroad Company was spoken of as lessor and the four other companies as lessees. The lessor was to obtain the consent of the prop-

erty owners and the city, and if it failed in so doing by a certain time the agreement might be terminated. The said lessor, instead of procuring "an ordinance authorizing the construction of the north side of said loop line, and constructing the same according to the provisions of said ordinance, might procure from the said Lake Street Elevated Railroad Company all its rights in and to that portion of its railroad hereinafter described, including the right to construct or complete the construction thereof, so that said lessor may lawfully include in the leases hereinafter provided for the same right of use by the lessees in and to said portion of said Lake Street Railroad as a part of said loop line as is provided to be given in respect to the east, south, and west portions of said loop line, which is to be constructed under the ordinance aforesaid. Said portion of said railroad of said Lake Street Elevated Railroad Company is described as follows: The double-track elevated railroad of said Lake Street Elevated Railroad Company, to be constructed on and along Lake street from the point of commencement of the west side of said loop line to the point of termination on the east side of said loop line, as hereinabove described, and the elevated railroad of said lessor (which by this agreement is made the subject of lease and demise) shall, in the event of said substitution, be considered to be the loop line or circuit formed by the railroad to be authorized by the ordinance aforesaid, upon the east, south, and west, and that part above described of the elevated railroad of said Lake Street Elevated Railroad Company upon the north. In the event of such a substitution, if said double-track elevated railroad on that portion of said Lake street above described has not been fully completed, the said lessor shall with all diligence fully complete the same and equip it as herein provided for the remaining portion of said loop line." A further provision was "that no trains or cars shall be run upon said loop line or any part thereof, except those of the lessees, and that while the use of said loop line by all of the lessees shall be equal in character, the number of trains run by each shall be in proportion to the rental paid by each." And, further, "that the terms and conditions of the leases to each of said lessees shall be identical, and that the said leases shall provide that the amount of rental to be paid by each of said lessees shall bear that proportion to the whole amount of rental to be paid by all the lessees that the number of passengers carried by each lessee bears to the whole number of passengers carried by all of said lessees," etc. Another stipulation in said treaty was as follows: "It is further agreed and understood that if the said lessor shall be unable to procure from the said Lake Street Elevated Railroad Company all its rights in and to said railroad on Lake street, it shall at least procure the right to complete said railroad and operate the same, and to grant to the said lessees the exclusive right of user thereof under the leases hereinafter mentioned."

On the 28th of December, 1894, the Lake Street Elevated Railroad Company entered into a contract with the Union Elevated Railroad Company concerning the said Lake street extension. It was recited in the preamble to this agreement that the Lake Street Company "is without the necessary means to complete the construction of its said

line of railway in Lake street between Market street and the east line of Wabash avenue, as authorized by the ordinance of October 1, 1894, and is unable to make the payments or perform its agreements, stipulated to be paid and performed, in and by a certain agreement, in writing, of date October 15, 1894, made by said Lake Street Railroad with the Phoenix Bridge Company for the construction of said railroad in Lake street between Market street and the east line of Wabash avenue." It was thereupon agreed that the Union Elevated Railroad Company should make the payments stipulated to be paid to said Phoenix Bridge Company so as to complete the said extension. The Union Railroad Company further agreed to reimburse the said Lake Street Company all such sums as had been expended by the latter company in securing frontages for its said line of railroad in Lake street; also such further "sum or sums of money as have been expended by said Lake Street Railroad for rights of way in said Lake street, or for other privileges, matters, or things properly and justly chargeable to that part of its right of way in Lake street; and also the further sum of \$55,000 expended by said Lake Street Railroad in putting in the structural foundations for said Lake street line under its agreement with the said Phoenix Bridge Company." It appears that the amount to be paid for the right of way here mentioned was \$140,000, which, with the \$55,000, amounted to \$195,000. This sum, aside from the additional cost of building and completing the extension from Market to Wabash, was to be paid by the Union Railroad Company to the said Lake Street Elevated Railroad Company. It was further provided that the permission and authority "to use the said tracks of the said Lake Street Railroad, in the manner and for the purpose of this agreement expressed, shall not pass any interest, nor alter or transfer property in anything belonging to said Lake Street Railroad; that the permission and authority and privileges hereby granted by said Lake Street Railroad to said Union Railroad and other elevated railroads shall be held and considered as a mere permission or license to use the tracks of said Lake Street Railroad in the manner aforesaid and for the purpose aforesaid, without said Union Railroad or other elevated railroads acquiring or possessing any estate therein." It was further provided "that no consideration or compensation should be paid by or charged to said Lake Street Railroad for the use of, or right to use, any part of the railroad belonging to said Lake Street Railroad Company in said Lake street. But otherwise, said agreement shall be made upon the same terms and conditions in every respect as shall be stipulated and agreed to between such other elevated railroads and said Union Railroad." It was further provided as a condition on which the Lake Street company licenses the other companies to run over its track, that such other companies shall agree to "operate their cars upon and along the proposed elevated loop to be constructed by said Union Railroad."

On the 27th of December, 1894, the directors of the Lake Street Elevated Railroad Company passed a resolution reciting in the preamble that the company would be unable to pay the interest which would be due on its bonds on January 1, 1895, and unable to pay a

debt of \$61,725.80, also maturing in January, and that a corporation called "Columbia Construction Company," which the bill avers was organized to construct the Northwestern Elevated road, had offered to loan \$250,000, on condition that the Lake Street Company, in the event that the Union Company failed to obtain permission from the city and property owners to build its loop, would agree with the Northwestern Company granting to the latter the right to use its Lake street extension in consideration that said Northwestern Company would pay half the cost of constructing and maintaining the said extension; and thereupon declaring that the proposition of the said Columbia Construction Company be accepted, etc. Afterwards, on the 31st of December, 1894, the said defendant directors rescinded the said resolution of December 27, 1894, and agreed to turn over to the Columbia Construction Company the interest coupons which fell due in January, to be held by said company as collateral for the sum of \$178,750, advanced by said company to pay said coupons, and they further agreed to borrow from said Columbia Construction Company, or from any person willing to make the loan, enough money to pay the above-mentioned debt of \$61,725.80, giving such collateral "as the company might be able to furnish."

After the resolution of December 27th, and prior to that of December 31st, complainant, "through his representative in Chicago, protested against the acts of said board of directors, and called upon Mitchell and his associates, owners of said majority of stock in said Lake Street Elevated Company, and their representatives, the said board of directors of said Lake Street Elevated Railroad Company, to comply with said contract of July 5, 1894, and contribute, with your orator, a sum necessary to meet and pay said January, 1895, interest coupons, and all obligations then matured, in the proportion of one-sixth ($\frac{1}{6}$) by your orator and five-sixths ($\frac{5}{6}$) by said majority stockholders; and, if the necessity existed, your orator would temporarily advance a sum sufficient to pay such immediately maturing obligations himself, which was not accepted." How much, and upon what security, and for what time, and upon what other terms, Ziegler proposed to lend to the company, is not stated. I may add that the company had no interest in and could not enforce the agreement, or rather proposal, in the contract of July 5, 1894, by the members of the combine with each other to supply the company with money.

It is said in the bill that when complainant Ziegler sold his shares to Mitchell, and agreed to buy other shares and to enter the combine, as made in the paper of July 5, 1894, "it was represented by said Mitchell" that "the reorganization of said the Lake Street Elevated Railroad Company contemplated by the change of ownership would result in a large number of wealthy and influential persons becoming interested in the deal, and a new impetus would be given to said railroad company, its lines of traffic extended, its down town facilities completed and improved, and the value of its stock enhanced, and the parties agreed that they would build the Lake Street road down Lake street as far as Wabash avenue, or give an equally good terminal, and that they would also build what is known as the 'Humboldt Park

Line,' as far north as North avenue, a distance of about two and one-fifth miles, and that no wrecking expedition was to be carried on," etc. It is stated further that in December, 1894, said Lake Street Company "had the means and was able to procure the means, under your orator's said contract of the 5th of July, 1894, aforesaid, to construct and build said eastern extension of said Lake Street Elevated Road from Market street to Wabash avenue"; also, that under the mortgage, the provisions of which are not stated in the bill, there was "power to negotiate and issue additional bonds"; that is to say, bonds in addition to the \$6,500,000 bonded debt already outstanding. It is further declared in the bill that the Lake street extension, "when completed," and "the sole rights" of the Lake Street Company "in said Lake street, was a most valuable acquisition, and one which could be utilized in making combinations with other elevated railroads, to run its trains eventually in any part of the business part of said city of Chicago between said Lake street and a point as far south as it would be feasible for said railroad company to run its trains"; and one matter of complaint is that the two agreements of December 18th and 28th were so far against the interests of the Lake Street Company as to show fraud and treachery on the part of said defendant directors.

By the agreement of December 28th the Lake street extension is to be built without cost to the Lake Street Company, and said company retains complete ownership and possession. If said company shall choose to run its trains around the other three sides of the loop, it must pay for the privilege at a rental to be fixed. Whether it has engaged to use the loop is at least doubtful. But each of the other companies must run its trains around the loop so that every company connecting with the loop becomes a feeder to the Lake street road. These roads are not competitors. The charter purpose—the legitimate and appropriate source of revenue,—is the passenger traffic. It is possible that the "sole rights" of the Lake Street Company in said Lake street might have been used as means for greater exactions from roads seeking terminals in the center of the city. But such "sole rights" were not given to the Lake Street Company as a mere instrumentality of barter with or of advantage over other like corporations. I am not able to say, especially in view of the financial condition of the Lake Street Company, as shown in the bill by matters already spoken of, that the deals of December 18th and 28th indicate fraud or unfairness on the part of the defendant directors toward said company. It is further stated that three of the nine directors of the Lake Street Company were also directors in the Northwestern Company, and that two of said three were directors in the Union Company. Said contracts are not, merely for this reason, fraudulent, or voidable at the instance of the Lake Street Company. *Rolling Stock Co. v. Railroad Co.*, 34 Ohio St. 450. Nor does it make out a case of fraud that the holders of a majority of the stock in the latter company may have held stock in one or more of the other contracting companies. Nor do general unsupported averments that the six directors who are not shown to have held official relation to or interest in any of

the other companies were "controlled by," or were "mere instruments in the hands of," the holders of the majority stock in the Lake Street Company, overcome the legal presumption of fairness and good faith.

On the 21st of February, 1895, certain persons interested in the Lake Street Company organized a plan whereby the bonded debt of said company should be reduced or scaled down 25 per cent., and its mortgage debt 40 per cent. This was to be the voluntary act of the bondholders themselves, and the inducement was the sounder financial footing thus secured for the company, and a guaranty by the Northwestern Company of the mortgage debt when so reduced. But in carrying out this policy the Lake Street Company engages—and this is the point of objection by complainant—that it will not issue any more bonds under the old mortgage except for the purposes of construction. This may have been unwise, but I do not detect fraud on the part of the defendant directors as against the Lake Street Company. It is said in the bill that the construction of the Humboldt Park extension has been abandoned by the defendant directors "in violation of the conditions of the contract entered into by said Mitchell for said majority stockholders." But the company has no interest in said contract; and said Humboldt Park extension may be built later when the company is financially able to build it. Complainant says further that he is "advised and believes that there is a secret understanding and agreement by and between the officers and majority of the board of directors" of the Lake Street Company and the Northwestern Company that a perpetual lease shall be made transferring all the property of the former company to the latter. This unsupported averment, I take it, amounts to nothing. In the supplemental bill complainant says "that he is advised and believes that said Northwestern Company has obtained, or is about to obtain, the consent of the city and of the property owners interested, to build its road south across Lake street, and he avers that it is the intention of Lauderback and those acting with him in the management of said Lake street road to suspend the construction of said Lake street road" till the said cross track of the Northwestern shall have been so built at Fifth avenue across Lake street. He further avers "that said attempt to procure the right of way over and along Fifth avenue is in the interest of and part of the scheme of said Union Elevated Railroad Company to complete its loop line, as contemplated in said contracts of December 18 and 28, 1894, whereby said Union Company is a party to said fraudulent acts recited herein." Since the "contracts" last referred to do not involve fraud against the Lake Street Company, and since in any case the two roads might cross each other and on the same level at Lake and Fifth avenue, I do not see that anything is added to the case by the averments quoted from the supplemental bill—even if it were law that an original bill which shows no cause of action can be made good by a supplemental bill.

On the 30th of January, 1895, the Lake Street Company agreed with the West Chicago Street Railroad Company that the latter, for the operation of its Lake street surface road by electricity, might string wires to, but wholly underneath, the elevated structure of the

former, from Wabash avenue to Forty-Eighth street. The consideration was that no poles, wires, or other things should be placed anywhere on the street alongside or above said elevated railroad structure. It is averred that, as inducement to complainant to enter the combine of July 5, 1894, Mitchell, pretending to control the West Chicago Street Railroad Company in the interest of the Lake Street Company, promised complainant that the trolley system should not be used on said surface road. It is also averred that three of the nine defendant directors were directors in the West Chicago Street Railroad Company. But I am not able to say, even in view of these averments, that the contract of January 30, 1895, was fraudulent as against, or voidable by, the Lake Street Company.

When the contract of July 5, 1894, was made, Ziegler was himself a director in the Lake Street Company. He continued to be a director till the stockholders' meeting in January, 1895, at which meeting Morris, who had actively represented Ziegler in the affairs of the company since July, 1894, was elected. Morris was so elected at Ziegler's instance, and as his representative, and pursuant to the combine contract. Said contract, as shown by the bill, still continues in force, and is still insisted on by Ziegler, and the theory of the bill is that the wrongs complained of have been done by the combine of which Ziegler himself has always been, and continues to be, a member, pursuant to the terms of the writing of July 5, 1894. If a stockholders' meeting should be now had with reference to said alleged wrongs, all the stock in which Ziegler is interested would be voted in affirmance of said alleged wrongful acts, since said stock is part of the holding of the combine, and said holding must, according to the terms of the contract, be voted as a unit. Not only so, but the acts complained of, upon Ziegler's interpretation of the same, seem to fall within the general description of what the combine might do as against the Lake Street Company by said combine agreement. The portions of the agreement here referred to have been quoted, and need not be again repeated. Even if said agreement be void, the fact of assent to the same on Ziegler's part remains, and the point is that he is not in position to maintain a stockholders' bill. It is, however, due to Mr. Ziegler himself, as well as to these defendant directors and to Mitchell, to say that, looking at the ultimate matters shown in this bill, and not to the conclusions drawn therefrom by the pleader, the controversy concerns the policy of the Lake Street Company rather than the integrity of its management; and, notwithstanding the wording of the writing of July 5, 1894, it is not at all probable that any wrong against the Lake Street Company was ever really intended by the parties to that writing. The demurrer is sustained.

ENGLER v. WESTERN UNION TEL. CO.

(Circuit Court, D. Nevada. July 15, 1895.)

No. 592.

PERSONAL INJURIES—EXCESSIVE DAMAGES—NEW TRIAL.

Plaintiff received a compound comminuted fracture of the ankle bones of one leg. The foot was doubled over, and the bones protruded through the flesh. Over 100 pieces of the denuded bones were at various times taken out, and more than 20 months after the injury bones were still working out. During all this time he suffered intense and constant pain. He was confined in bed for six months, and for the first half of that time was obliged to lie on his back. In the opinion of the testifying physician, he would be well and out of pain in three months from the trial. He will always be lame, the ankle will be stiff, and there will be a slight deformity of the foot. His doctors' bills were \$1,545, and expenses for nurses \$800. At the time of the injury he was personally engaged in conducting an hotel, and by reason of the injury was compelled to employ a suitable person to take charge of it. *Held* that, the instructions having been proper, and there having been no attempt at the trial to magnify or exaggerate the injury or pain, and there having been no appeal to the passions, prejudices, or sympathy of the jury, and nothing at the trial to indicate that the jurors were influenced by any such feelings, a verdict for \$15,000 damages was not so great as to make it appear that it had been given under the influence of passion and prejudice.

Action by Louis Engler against the Western Union Telegraph Company for personal injuries. There was a verdict for plaintiff, and defendant moves for a new trial.

E. S. Farrington, for plaintiff.

Evans & Rogers and Torreyson & Summerfield, for defendant.

HAWLEY, District Judge (orally). The defendant moves the court for a new trial upon several grounds, but the only assignment of error urged before the court is that of "excessive damages, appearing to have been given under the influence of passion and prejudice."

The facts bearing upon this question are substantially as follows: The plaintiff is 50 years of age. On the evening of July 28, 1893, while taking a buggy ride on a public highway near the town of Tuscarora, in this district, his horses came in contact with defendant's telegraph wire, which had previously fallen down across the road, and there allowed to remain, in such a manner as to cause the horses to become frightened and unmanageable, and resulted in plaintiff being violently thrown out of the buggy and seriously injured. He received a compound comminuted fracture of the ankle bones of the left leg. His left foot was doubled over, both bones protruded through the flesh, and through his leather shoe, into the ground, and were denuded of the periosteum for a space of $4\frac{1}{2}$ inches. The base bone in the heel of the foot was also denuded of periosteum. Over 100 pieces of the denuded bones, some of them quite large, had been, at various times, taken out. More than 20 months after the injury, pieces of the bones were still working out of the foot and matter running from the cavities. During all this time plaintiff suffered intense and constant bodily pain. He was con-

fined to his bed for a period of six months, and for the first three months was compelled to lay on his back, and could not turn over on either side. At the time of the trial he was compelled to use crutches. The physician testified that in his opinion the plaintiff would be well and free from pain or further treatment in about three months. The effect of the testimony as to the future results of the injury is that plaintiff will always be lame, the ankle joint will always be stiff, and there will be a slight deformity of the foot. From the time of the injury up to the time of the commencement of the suit in January, 1894, the doctors' bill for medical attendance amounted to \$1,545. The expenses, shown to be actually necessary, for nurses, was over \$800. At the time of the injury, plaintiff was personally engaged in conducting and carrying on an hotel and saloon business, and in connection therewith also carried on and conducted a gambling game known as "faro," licensed and sanctioned by the laws of the state. By reason of the injuries, plaintiff was wholly incapacitated from attending to his business for a long period of time, and was compelled to employ a suitable person to take charge of the same. A few months before the trial, plaintiff endeavored to conduct the business himself, but was only able to continue work for about two weeks. The business was shown to be profitable. There was no loss to the business shown, nor was the value or amount of the extra expense incurred in carrying on the business established by any direct evidence. Upon submitting the case to the jury, the court gave the following instructions touching the question of damages:

"If you find for the plaintiff, you should assess his damages at such an amount as, from all the circumstances disclosed by the evidence, would, under your best judgment, be a just, reasonable, and fair compensation to the plaintiff for the injuries sustained by him. And, in determining the amount of damages, you should take into consideration all the facts and circumstances attending the injury, as disclosed by the evidence,—such as the nature and expense of the plaintiff's injuries and bodily pain and suffering he has endured as the result of such injury; any future disability which, from the testimony, you may believe to be the necessary result of, or caused directly by, such injury; and the amount of money necessarily paid by him, or contracted by him to be paid, for medicines or medical attention and services, and for nurses hired in order that he be healed and cured of such injury. The measure and amount of recovery must be confined to what is known in law as 'compensatory damages'; that is, such a fair, reasonable, and just sum as will compensate plaintiff for the injury, expense, and suffering which he has sustained,—no more, and no less. Your attention has been called by counsel to remember, when you go to your jury room, before you have reached a conclusion as to the amount of judgment which plaintiff is entitled to recover, that you must bear in mind the fact that plaintiff is not asking exemplary damages or punitive damages. In cases where the acts of the defendant are malicious, the plaintiff is entitled to recover what is known in law as 'exemplary damages.' Such damages, tending to punish the defendant, you are to avoid taking into consideration. You are to do what is fair, what is right and proper; to look at both sides of this case with reference to the rights of both parties, and to consider what would be fair, what would be just, and what would be a reasonable compensation, which the plaintiff is entitled to recover."

The jury found a verdict in favor of the plaintiff, and assessed the damages at \$15,000.

This court in *Zion v. Southern Pac. Co.*, 67 Fed. 500, announced the general rules which should govern courts in deciding motions upon the question of excessive damages, and it is deemed unnecessary to again repeat them.

The question whether the amount of damages allowed in this case is excessive must be determined by the knowledge, judgment, and sound discretion of the presiding judge. Every case must necessarily depend, to a great extent, upon its own peculiar facts. An examination of the decided cases in actions to recover damages for personal injuries clearly shows that the courts have differed in opinion as much as juries, as to the amount of damages that should be allowed in such cases. Extreme cases are found in the books upon both sides of this vexed question. The tendency of some of the state courts is to allow only small damages. Other states are more liberal. What is considered as proper in one state is deemed excessive in another. The argument that juries in this state are disposed to give heavy damages in actions for personal injuries against corporations is undoubtedly true. But the records of this court will show that it has never hesitated, where the amount was deemed excessive, to set such verdicts aside. The amount allowed by the jury in the present case was large; but the injury was severe, and the bodily pain intense and continued for a long period of time. The plaintiff was present in court. The condition of his foot was plainly to be seen, and, with the testimony of his physician, the nature and extent of the injury and of the bodily pain suffered by the plaintiff was clearly and intelligently presented to the jury. The injury and the pain were real. No attempt was made at the trial to magnify or exaggerate either the injury or the pain, as is sometimes, in bad taste, attempted to be done in cases of this character. No appeal was made to the jurors to arouse either their passions, prejudices, or sympathy. There was nothing at the trial in the acts or conduct of the jury, or of any juror, to indicate in any manner that they were influenced or controlled by any such feeling. In the very nature of the case, there is no precise rule for estimating damages for bodily pain and suffering. The amount cannot be arrived at with any degree of mathematical certainty. Some latitude must be allowed to the sound sense and honest judgment of an impartial jury. It is, perhaps, safe to say that no 12 men could ever be selected, however fair and unprejudiced they may be, who would, at first blush, name the same amount. It requires time for deliberation and the exercise of reason and judgment upon the part of each individual juror, and consultation with others upon the facts, to arrive at a satisfactory verdict.

In *The City of Panama*, 101 U. S. 453, 464, the court said:

"Damages in such a case must depend very much upon the facts and circumstances proved at the trial. When the suit is brought by the party for personal injuries, there cannot be any fixed measure of compensation for the pain and anguish of body and mind, nor for the permanent injury to health and constitution; but the result must be left to turn mainly upon the good sense and deliberate judgment of the tribunal assigned by law to ascertain what is a just compensation for the injury inflicted."

The same general principles have been announced by the supreme court of this state. *Solen v. Railroad Co.*, 13 Nev. 137; *Wedekind v. Railroad Co.*, 20 Nev. 301, 21 Pac. 682.

The jury in the present case must have understood the principles upon which the damages were to be estimated and arrived at. There was no attempt upon the part of counsel to either mislead or confuse the jury upon this question. The instructions of the court upon this point were plain, and unquestionably as favorable to the defendant as the law would warrant. It is well settled that the plaintiff in such an action is entitled to recover for such future suffering and disability as is manifestly the inevitable and necessary result of the injuries received. *Railroad Co. v. Harmon*, 147 U. S. 571, 584, 13 Sup. Ct. 557; *Railroad Co. v. Stoner*, 49 Fed. 209, 1 C. C. A. 231, 4 U. S. App. 109; *Railway Co. v. Jones*, 49 Fed. 343, 1 C. C. A. 282, 4 U. S. App. 115; *Eddy v. Wallace*, 49 Fed. 801, 1 C. C. A. 435. The amount of the verdict, large as it is, when considered in the light of all the facts and circumstances of this case, is not so great as to convince the court that it must have been given under the influence of passion or prejudice. I am of opinion, from my observation at the time of the trial, as well as from an examination of the evidence, that the verdict was the result of the calm and unprejudiced judgment of 12 intelligent and fair-minded jurors, reached, after a careful deliberation of the facts, upon the principles announced by the court, wholly uninfluenced by any other consideration, and that it is not inconsistent with the exercise of an honest, fair, and impartial judgment upon the part of the jury, whose special province it was to determine the amount. The verdict of the jury will not be disturbed.

A review of the authorities cited by counsel would serve no useful purpose. It is enough to say that they have been carefully examined, and that the views herein expressed and the conclusion reached are fully supported and sustained by the following cases: *Solen v. Railroad Co.*, *supra*; *Morgan v. Southern Pac. Co.*, 95 Cal. 508, 30 Pac. 601; *Railroad Co. v. Reese*, 5 C. C. A. 510, 56 Fed. 289; *The City of Panama*, *supra*; *Railroad Co. v. Thompson*, 64 Miss. 585, 1 South. 840; *Rockwell v. Railroad Co.*, 64 Barb. 438, 53 N. Y. 625; *Gale v. Railroad Co.*, 13 Hun, 4, 76 N. Y. 594; *Mitchell v. Railroad Co.*, 70 Hun, 387, 24 N. Y. Supp. 32; *Solarz v. Railway Co.* (Super. N. Y.) 29 N. Y. Supp. 1125; *Railway Co. v. Porfert* (Tex. Sup.) 10 S. W. 213. Motion for new trial denied.

PENNINGTON v. SMITH et al.

(Circuit Court, S. D. New York. June 11, 1895.)

1. TRUSTEES—RIGHT TO SUE IN FOREIGN JURISDICTION.

A trustee appointed by the courts of one state has a right to maintain a suit in relation to the trust property in the courts of another state.

2. TRUSTS—JURISDICTION—RESIDENCE OF TRUSTEE.

The courts of a state do not lose jurisdiction of a trust created by the will of a citizen of such state, and the funds of which have arisen out of

property situated in such state, because the trustee has removed to another state.

8. SAME—EQUITY—FOLLOWING TRUST PROPERTY.

A suit, by a trustee, seeking to impress the trust upon money in the hands of a stranger to the trust, and the bank in which such stranger has deposited it, is within the jurisdiction of equity, as there is no adequate remedy at law.

4. SAME.

Where a trustee, though clothed with wide discretion as to the investment of the trust funds, and not accountable for waste, has turned over part of such funds to his wife, who has notice of the source from which they come, and who retains possession of them, such funds can be followed and reclaimed by the successor of such trustee.

This was a suit by William Pennington, as trustee for Louise Condit Smith and Sallie Barnes Smith, against Emma Condit Smith and the Fifth Avenue Bank of New York, to impress a trust upon certain funds. The cause was heard on the pleadings and proofs.

There is, practically, no dispute regarding the facts. George Condit Smith was the trustee of a fund of \$13,356.87, the beneficiaries being his two infant daughters. This trust was created by the will of his first wife, Sallie L. B. Smith, who died in July, 1890. By the terms of the will the testatrix, after making certain specific bequests, gave one equal undivided half part of the remaining property to her husband and the other half to her children. The children's share, during their minority, was to be held by their father in trust. At the time of her death Mrs. Smith was a resident of New Jersey. Her will was proved before the surrogate of Essex county in that state and letters testamentary were issued to the said George Condit Smith, her husband. In July, 1892, Mr. Smith married the defendant Emma Condit Smith. In January, 1893, the residence at East Orange, N. J., which was the property of the first Mrs. Smith, was duly sold to Thomas B. Crossley, who executed a purchase-money mortgage thereon for \$17,500 to "George Condit Smith, personally, and as special guardian of Louise Condit Smith and Sallie Barnes Smith, infants." The infants' share in said mortgage was the said sum of \$13,356.87 which the trustee duly acknowledged to be a prior lien to the balance of \$4,143.13 due to him as an individual. On the 20th of March, 1894, Crossley paid \$5,000 on the mortgage by check payable to the order of Smith individually and received a receipt signed by Smith "personally and as guardian." This check was sufficient to pay Smith's interest in the mortgage in full and \$856.86 of the infants' interest. George Condit Smith indorsed this check to the order of the defendant, Emma Condit Smith, and it was by her deposited in the Fifth Avenue Bank and collected. On the 25th of September, 12 days before the death of Mr. Smith, Crossley made another payment of \$5,000, the check being made payable to "Geo. Condit Smith, Guardian." The check was indorsed by Mr. Smith as guardian to the order of the defendant Emma Condit Smith and was by her deposited, as before, in the Fifth Avenue Bank. Crossley also paid the interest on the mortgage by checks which were indorsed by Smith as guardian and were in like manner deposited by Mrs. Smith in the defendant bank. On the 7th of October, 1894, George Condit Smith died leaving a last will and testament by which he gave all his property to his widow, the defendant Emma Condit Smith, and appointed her guardian of his children and executrix of his will. On the 16th of the same month the complainant was appointed by the chancellor of New Jersey "trustee for Louise Condit Smith and Sallie Barnes Smith, severally, in the room and stead of George Condit Smith, deceased, late of East Orange, in the state of New Jersey, with all the rights, powers, duties and privileges incident to the appointment." Before entering upon his duties he was required to give bond to the chancellor in the sum of \$60,000 as trustee for each of said infants. By an order, dated October 16, 1894, the complainant was also appointed "special guardian in the place and stead of George Condit Smith, special guardian, deceased, for Louise Condit Smith and Sallie Barnes Smith, severally, with all the rights, powers, duties and privileges incident to the appointment." He

was required to give a bond of \$15,000 as guardian of each infant. George Condit Smith died insolvent. At the time the defendant, Mrs. Smith, received the checks in question she knew of the interest of the infants in the New Jersey property. By stipulation made at the argument the bill was amended by inserting an allegation that the parties are citizens of different states and also that the complainant was on October 16, 1894, appointed special guardian of the said infants. The bank has not answered, but there is a stipulation that it will hold the moneys, mentioned in the bill, subject to the decree of the court.

John Brooks Leavitt, for complainant.

Alexander Thain and Thomas M. Tyng, for defendant Smith.

COXE, District Judge. This action is brought by the complainant, a citizen of New Jersey, as trustee and special guardian appointed by the court of chancery of that state, against the defendants, who are citizens of New York, to impress the trust upon certain funds in their possession and compel the delivery thereof to him. Stated more briefly it is a suit by a trustee to compel a return of property belonging to the trust fund which the defendants improperly withhold therefrom. The right of a trustee appointed by the courts of one state to maintain such an action in the courts of another seems to be established by the decision in *Toronto General Trust Co. v. Chicago, B. & Q. R. Co.*, 123 N. Y. 37, 25 N. E. 198. At page 46, 123 N. Y., and page 198, 25 N. E., the court says:

"Having thus been clothed with the title to the trust estate in Canada by proceedings in the Canadian action, can it, standing upon that title, maintain an action here as trustee? We think this question was erroneously answered in the negative in the court below. It is the general rule that he who is the legal owner of property may maintain an action wherever it may be for its recovery, or for damages for its conversion. Generally, his capacity to sue in such cases grows out of his legal ownership. It is believed that there is no exception to the rule where the legal owner sues in his own right and not in a representative capacity. * * * Its (the trustee's) position is not like that of an executor or administrator, who is simply a representative of a dead person, gathering in and administering upon property for the benefit of others. But it is more like that of the legal owner of property who pursues it or brings suit about it for his own benefit."

Was the complainant properly appointed? Unless some reason not now suggested is brought to its attention the court does not feel justified in declaring the orders of the New Jersey chancellor void. It must be remembered that the trust was created by Mrs. Sallie Smith, who lived and died a citizen and resident of New Jersey. Her will was probated there. The real estate out of which the fund in question arises is situated there. It was sold under the auspices of the court of chancery of New Jersey, which court appointed complainant's predecessor special guardian to protect the interests of the infants. A portion of the trust estate is still secured by the mortgage on this New Jersey real estate. It is argued that the New Jersey court lost all jurisdiction in the premises because the trustee removed to New York and died there. No authority is cited in support of this proposition and none has been found by the court. Unquestionably the surrogate of New York had jurisdiction of the estate of Mr. Smith, but we are dealing here with the estate of Mrs. Sallie Smith. Mr. Smith did not own this property; he could not dispose of it by will or otherwise; he sim-

ply held it in trust for the benefit of his infant children. An application to the surrogate of New York to appoint his successor would probably have been met by a suggestion that the petition should be addressed to the courts of the state where the will was filed, where the real estate was sold, and where the order appointing the special guardian was made. Unquestionably the New Jersey courts, originally, had jurisdiction of this trust, and it is thought that they did not lose jurisdiction because the trustee died in another state. So, then, we have the case of a legally appointed trustee suing in a court that has jurisdiction to recover a part of the trust estate which has been illegally diverted and detained. It cannot for a moment be pretended that either of the defendants has any title to the trust fund. Even though the defendant, Mrs. Smith, were appointed guardian of her husband's children under his will, it would not give her the right to hold funds which his will could not touch and which he held only as trustee. The complainant holds the commission of the chancellor of New Jersey to act as trustee and guardian and has given bonds in the sum of \$150,000 for the faithful discharge of his duty. The defendants, on the contrary, have no shadow of title and do not pretend to have any. Surely they should not be permitted to hold the fund as against the complainant.

No defense on the merits is urged, but the attempt is made to defeat the complainant by defenses in the nature of demurrers. It is said that equity will not take cognizance of the action because there is a perfect remedy at common law. Is there a remedy at law? The action is by a trustee. He seeks to have the trust impressed upon a specific fund in the defendant bank, which, in the ordinary course of business, would be liable to the orders of the depositor. He prays for an injunction restraining the defendants from disposing of said money and for an accounting to ascertain what amount of property belonging to the trust is in the hands of the defendants. All these are matters of equitable cognizance and in view of them the court is unable to see how a full and adequate remedy can be had at law.

Again, it is argued that by the terms of the will Mr. Smith had full discretion as to the management and investment of the trust estate and that he had a right to place the money in the hands of his wife for the benefit of his children. Undoubtedly the will of the first Mrs. Smith gave him large discretion. He might have wasted the entire fund by bad investments and the complainant would be remediless. It is even possible that had he invested the fund with the defendant, Mrs. Smith, taking nothing but her unsecured note in return, the transaction could not be questioned. But there is no pretense of anything of this kind. A trustee cannot despoil the trust by turning the property into money and handing the money to his wife. Putting the property out of his hands is not investing it. The complainant has found a portion of the trust fund in the possession of the defendants and he seeks to reclaim what is his. If they have title it is for them to disclose its nature. So far from asserting ownership Mrs. Smith expressly dis-

claims any title to the fund in question. Paragraph 7 of the answer is as follows:

"And this defendant, further answering said bill, alleges that this defendant has never made any claim of right, title or interest in or to the checks mentioned in the bill, or to the proceeds thereof. On the contrary, this defendant received said checks and deposited the same in her bank, at the request of and for the accommodation of said George Condit Smith in his lifetime and under the belief that they were the property of the said George Condit Smith, as they appeared to be under his absolute control and disposition. After the receipt thereof, and during the lifetime of said George Condit Smith, this defendant repaid out of the proceeds of said checks to him, and disbursed for him at his request, the entire proceeds thereof, and there was not, at the time of the commencement of this action, on deposit with the defendant the Fifth Avenue Bank, to the credit of this defendant, any of the proceeds of said checks or either of them."

There is no proof that the money has been disbursed as alleged, and, upon this record, it must be presumed that a large portion of the trust money is still in the custody of the bank. Should it prove to be, Mrs. Smith, has, by the express averments of her answer, renounced all claim thereto.

As to the \$5,000 payment, made September 25th, it is thought that the defendant, Mrs. Smith, must be charged with notice. That she knew of the trust generally is sufficiently proved by her letter of August 9, 1893, to the complainant, and that the \$5,000 was a part of the trust was sufficiently shown by the fact that the check was made payable to Mr. Smith as guardian and was so indorsed by him. However, she knows now that this \$5,000 belongs to the trust estate. She has parted with no value on account thereof, and, assuming the amount to be still in the bank, she has no right to retain it against the trustee even though she at one time supposed that it was her husband's individual property. In view of Mr. Smith's declaration of trust and the receipt given by him it is thought that the first payment of \$5,000—March 20, 1894—was applied to the extinguishment of his individual interest in the mortgage and that the balance of \$856 was paid to him as trustee and guardian. There was nothing upon this check to indicate that it related to trust funds and if the above amount \$856 was checked out in good faith by Mrs. Smith she cannot be required to account therefor.

It is thought that there should be a reference to determine

First, what amount of money belonging to the trust remains in the bank. Should the master find that the full amount now claimed by the complainant, to wit, \$5,856.87, is there, he need proceed no further. If, however, he finds less than that amount in the bank he should proceed,

Second, to ascertain whether the balance was disbursed by Mrs. Smith with full knowledge that it belonged to the trust estate and report the amount so disbursed by her.

Mrs. Smith should account for the amount belonging to the trust estate which she has used for her own benefit with full knowledge of the trust, but she should not be charged with sums paid to

the deceased trustee or disbursed by his direction for the purposes of the trust. There should be a decree for the complainant in accordance with these views.

MERCANTILE TRUST CO. v. ST. LOUIS & S. F. RY. CO. (OGDEN et al., Interveners).

(Circuit Court, W. D. Arkansas. August 5, 1895.)

1. JUDGMENTS—LIENS—LIMITATIONS—STAY OF EXECUTION.

A stay of execution in the record entry of the judgment stays the running of the statute limiting the duration of the lien of the judgment, and does not extinguish the lien, though the stay be longer than the period during which the statute provides that a judgment shall be a lien.

2. SAME—MORTGAGES—PRIORITIES.

One who takes a mortgage after recovery of judgment by a third person against the mortgagor, the record entry of which contains an agreement that enforcement of the judgment shall be suspended till a certain case be finally decided, takes it subject to the right of the judgment creditor to enforce his judgment after such final determination, within the period limited by statute for lien of a judgment, not counting the time execution was thus stayed.

Suit by the Mercantile Trust Company against the St. Louis & San Francisco Railway Company for foreclosure of mortgage. John B. Ogden and others filed intervening petitions.

By an act of the general assembly of the state of Arkansas, approved April 4, 1887 (Sand. & H. Dig. §§ 6211-6217), the maximum passenger rates on railroads in that state over 75 miles in length was fixed at three cents per mile. By the terms of the act, any traveler who was required by a railroad company to pay for passage on its road a higher rate than the maximum rate fixed by the act was authorized to recover from the railroad company charging such illegal rate not less than \$50, nor more than \$300, together with an attorney's fee, for each violation of the act. The defendant, the St. Louis & San Francisco Railway Company, although its road was more than 75 miles in length, refused to conform to the requirements of the act, and continued after its passage to charge all passengers in that state at the rate of five cents per mile. The interveners were compelled to pay this illegal exaction, and brought separate suits against the defendant company in the circuit court of Crawford county, Ark., to recover the penalty prescribed by the act for its violation in this regard, and recovered judgments at the times and for the sums following, to wit: John B. Ogden, October 6, 1887, for \$85; F. Laurent, October 6, 1887, for \$245; W. W. Stevenson, October 5, 1887, for \$85; D. T. Reynolds, October 5, 1887, for \$85; M. V. Wallace, October 5, 1887, for \$85; John Stevenson, October 5, 1887, for \$85; John Stevenson, October 5, 1887, for \$85; John Stevenson, October 5, 1887, for \$85; James Stevenson, October 5, 1887, for \$85; A. L. Reynolds, October 5, 1887, for \$85; John B. Ogden, October 5, 1887, for \$85; R. P. Allen, October 5, 1887, for \$85; John Stevenson, October 5, 1887, for \$85; F. G. Britt, October 5, 1887, for \$85; Joseph Torrent, July 2, 1889, for \$410; J. F. Copelan, October 6, 1887, for \$85; Charles G. Schneider, October 6, 1887, for \$85; Wiley S. Young, July 29, 1889, for \$85. The record entry of the judgment in each case contained the following provision: "And it is further agreed that the enforcement and execution of the judgment herein, or any part thereof, be suspended until the case of John Stevenson vs. The St. Louis & San Francisco Railway Company, No. 61 on the common-law docket of this term, be finally decided, and, upon affirmance of said cause No. 61, that execution issue herein, and upon the reversal of said cause that this judgment be set aside, and the defendant allowed to plead herein." On the 3d day of January, 1891, the supreme court

of the state of Arkansas affirmed the Stevenson Case (15 S. W. 22), and thereupon the several judgment plaintiffs, conceiving that the case was "finally decided" within the meaning of the record agreement for the stay of execution, sued out executions on their several judgments, and had the same levied on the real estate of the company in Crawford county. Thereupon the railroad company brought its bill to enjoin the issue or enforcement of the executions on the judgments, upon the ground that the final determination of the Stevenson Case mentioned in the record agreement meant the determination of that case by the supreme court of the United States; and the supreme court of the state upheld this contention of the railroad company, and enjoined the judgment plaintiffs from suing out executions on their judgments, or enforcing the collection thereof by execution or otherwise, until the supreme court of the United States should determine the Stevenson Case. On the 11th of June, 1891, the defendant railroad company executed to the complainant, the Mercantile Trust Company, a mortgage on its road and other property to secure an issue of its bonds. The railroad company made default in some of the conditions of the mortgage, and on the 23d day of December, 1893, the complainant filed its bill against the railroad company, praying, among other things, for the appointment of receivers, which was done. The order appointing the receivers contained the following provision: "And it appearing to the court that the defendant company owes debts and has incurred liabilities which the holders thereof could, without any interference with the legal or equitable rights of the complainant under the mortgage set out in the bill, collect by proceedings at law from said defendant by seizing its rents, income, and earnings, and in other lawful modes, if not restrained from so doing by this court, and that it would be inequitable and unjust for the court to deprive said creditors of their legal right to collect their several debts by appointing receivers to take and receive the earnings of said road during the pendency of this suit, as prayed by the complainant, without making suitable provision for the payment of such debts and liabilities, it is therefore declared that this order appointing receivers herein is made upon this express condition, namely, that all just and legal debts, demands, and liabilities due or owing by the defendant company which were contracted, accrued, or were incurred for ticket and freight balances, or for work, labor, materials, machinery, fixtures, and supplies of every kind and character done, performed, or furnished in the construction, repair, equipment, or operation of said road and its branches, and all liabilities incurred by said company in the transportation of freight and passengers, including damages for injuries to employes or other persons, and to property, which have accrued or upon which suit has been brought or was pending or judgment rendered or the evidence of the debt renewed within twelve months last past, and all liability of said company to persons or corporations who may have become sureties for said company on stay, supersedeas, or cost bonds, or bonds in garnishment proceedings, or other bonds of like character, without regard to the date of such bonds, and also all liabilities to persons or corporations who may have become liable by indorsement, guaranty, or otherwise for the debts of said company for money borrowed by said company to pay operating and other expenses and necessary liabilities of said company, together with all just and legal debts and liabilities which said receivers may incur in operating said road, including claims for injury to persons and property, shall constitute a lien on said railroad and its appurtenances paramount to the lien of the mortgage sought to be foreclosed by the bill in this case; and said railroad shall not be released from such liens until such debts and liabilities are paid. The receivers are authorized and directed to pay all such debts and liabilities, as the same shall accrue, out of the earnings of the road, if practicable, or out of any other funds in their hands which may be used for that purpose; and, if not sooner discharged, then the same shall be paid out of the proceeds of the sale of the road." The supreme court of the United States affirmed the judgment of the state court in the Stevenson Case on the 5th day of March, 1895 (156 U. S. 667, 15 Sup. Ct. 484, 491), and immediately thereafter the several judgment creditors heretofore mentioned filed their petitions of intervention in this cause, praying that the receivers might be required to pay their judgments. The receivers filed no

answer to the petitions of the interveners. The answers of the complainant and defendant company denied that the judgments of the interveners had any superior right or equity over the lien created by the mortgage to the complainant. The intervening petitions were referred to the special master, who reported against the payment of the judgments, to which report the interveners duly excepted. The matter now comes before the court on the evidence and the interveners' exceptions to the special master's report.

Joseph M. Hill filed brief for interveners.

W. W. Green and Lee & McKeighan filed brief for complainant.

E. D. Kenna and B. R. Davidson filed brief for respondent.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The interveners recovered their judgments against the railroad company, and they were liens on the company's property, before the mortgage to the complainant was executed. But it is said the lien of all of the judgments except two had expired before the complainant took its mortgage. This contention is grounded on an erroneous view of the law applicable to the facts of the case. In Arkansas, judgments are liens on the real property of the defendant situated in the county in which the judgment is rendered for the period of three years, and when there has been no interruption to the right of the judgment plaintiff to enforce his judgment lien during the period allowed by the law for that purpose, and the judgment has not been revived, the lien expires at the expiration of the three years; but where, as in these cases, a stay of execution on the judgment for a specified time, or until the happening of a certain event, is made part of the record entry of the judgment, the time during which execution is thus stayed is not to be computed as any part of the three-years limitation of the judgment lien. This is the rule, whether the time of the stay of execution is less or more than the period fixed by statute for the expiration of the lien of judgments. The law gives to the judgment plaintiff three years in which to enforce the lien of his judgment by execution. If the plaintiff does not avail himself of his right to enforce the lien during the time allowed for that purpose, he loses his lien. But the lien of a judgment is not lost if, during the period allowed by law for its enforcement, the plaintiff has been restrained from enforcing it by a stay of execution, duly entered of record, in pursuance of the agreement of the parties to the judgment. The stay of execution, when made part of the judgment entry, stays the running of the statute that limits the duration of the lien. The lien consists in the preferred right it gives the judgment plaintiff to seize and appropriate the property of the defendant to the payment of the judgment. The lien, without the right to enforce it, would be of no utility. The railroad contended, and the supreme court of the state decided, that the proper construction of that paragraph of the record entry of these judgments which provided that execution thereon should be stayed until the Stevenson Case had been "finally decided" meant that execution should be stayed until that case had been decided by the supreme court of the United States. It was perfectly well known that the decision of the supreme court

of the United States in the case mentioned could not be had short of four or five years; and the record shows that it took longer. It is now contended that that part of the record entry of the judgment staying execution thereon until the happening of the event therein mentioned had the effect to extinguish the lien of the judgment before the right to have execution thereon ever accrued. If this contention is well founded, it would make the law say to the judgment plaintiffs: "Your judgments shall be liens on the property of the railroad company for three years, but you shall not enforce the lien until it has expired; and if, in the meantime, the railroad company sells or mortgages its property, the opportunity to collect your judgment is forever lost, and your judgments are worthless." The law is neither so unreasonable nor dishonest. The question of the legal effect on the duration of the judgment lien of the stay of execution in pursuance of a private agreement between a judgment plaintiff and judgment defendant, not entered of record, does not arise in these cases, and need not be considered. In these cases the agreement for the stay of execution is incorporated into the judgment entry, and is in legal effect a part of the judgment itself, and the three-years limitation of the lien begins to run from the time when the stay of execution specified in the judgment expired, which was on the 5th day of March, 1895, the day the supreme court of the United States decided the *Stevenson Case*. The grantees and mortgagees of the judgment defendant are as much bound by this rule as the judgment defendant itself. The record of these judgments was notice to all persons of the judgments, and their legal effect in respect of the commencement and duration of their liens. The complainant, therefore, took its mortgage with record notice of the rights of these judgment creditors, and, as against them, is as completely estopped to claim that the lien of the judgments had expired as the defendant itself. As sustaining the views here expressed with more or less directness, the following authorities may be consulted: *Pennock v. Hart*, 8 Serg. & R. 369; *Bombay v. Boyer*, 14 Serg. & R. 254; 1 Black, Judgm. §§ 470, 471; *Work v. Harper*, 31 Miss. 107; *Lindsay v. Norrill*, 36 Ark. 546; *Pindall v. Trevor*, 30 Ark. 271; *Brewster v. Clamfit*, 33 Ark. 72; *Cohn v. Hoffman*, 50 Ark. 108, 6 S. W. 511; *Marshall v. Minter*, 43 Miss. 678; 2 *Freem. Judgm.* (4th Ed.) §§ 382, 394; *Batesville Institute v. Kaufman*, 18 Wall. 151; *Hanger v. Abbott*, 6 Wall. 532, 541; *Montgomery v. Hernandez*, 12 Wheat. 129.

In *Bombay v. Boyer*, supra, the supreme court of Pennsylvania, speaking by Chief Justice Tihlman, said:

"It was decided by this court in *Pennock v. Hart*, 8 Serg. & R. 369, that, where the judgment was entered with a stay of execution on record, the five years should run only from the time when the stay of execution expired. But it was not our opinion that any regard should be paid to a stay of execution agreed on by the parties but not appearing on the record."

And in *Marshall v. Minter*, supra, it was said that enjoining a judgment until a bar of the statute of limitations attaches is an unconscientious advantage which the debtor should not be permitted to take. The lien of the intervenor's judgments is prior in time and

superior to that of the complainant, and the receivers must either pay the judgments or submit to have the property sold to satisfy them.

The conclusion reached on this branch of the cases renders it unnecessary to decide whether these judgments do not fall within the class of debts and liabilities of the railroad company which were required to be paid as a condition of appointing the receivers, though it would probably not be difficult to show that they fall within the letter, as they certainly do within the spirit, of that order.

It is suggested that these are judgments for penalties, and it is intimated that a court of equity will look upon them with disfavor for that reason, and will struggle to find some ground of avoiding their payment. These suggestions are unfortunate for the complainant and the defendant. When the origin of these judgments is looked into, it will be found that they are highly meritorious; no judgments could be more so. The defendant company set at defiance the law of the state, and charged its citizens for transporting them over its road two-fifths more than the law of the state allowed for the service. The suits that resulted in these judgments were brought to put an end to these illegal exactions. Although the interveners recovered judgments in the court of original jurisdiction, the defendant company continued to demand and exact five instead of three cents per mile for the transportation of passengers; and, so far as these interveners are concerned, continued to assert its right to do this until the decision of the *Stevenson Case* by the supreme court of the United States on the 5th day of March, 1895. So far as anything appears in this record, the defendant company would have continued to defy the law of the state, and make these illegal exactions upon its citizens, to the present day, if these interveners had not sought in the mode they did to compel it to respect the law towards themselves as well as all others. The amount of these judgments is infinitesimal compared to the sums charged and received by the railroad company in excess of the legal rate of fare for transporting passengers. Two-fifths of all the money that went into the treasury of the company for fares of passengers represented unlawful and illegal exactions. That money it still has. No portion of it has been returned to the persons who were illegally forced to pay it. The sums illegally exacted from the interveners have never been returned or tendered to them. It required eight years of litigation for the interveners to establish their own and the rights of the public in the premises. The judgments they recovered are very inadequate compensation to them for the service they performed for the public and the long litigation to which they were subjected, and are still being subjected, in a lawful effort to enforce the law of the state and maintain their legal rights. And the amount of these judgments is an absurdly inadequate punishment of the company for its open, gross, and long-continued disregard of the laws of the state and the rights of its citizens. The mass of the people will submit to such illegal exactions rather than incur the trouble, expense, and vexation attending a lawsuit to redress the grievance. Those citizens who take upon themselves the labor, risk,

and expense of prosecuting a lawsuit to vindicate the rights of the public and compel obedience to the law are public benefactors. They are the men who preserve our rights and liberties. They are the John Hampdens of society. A court of equity views with extreme disfavor the action of a railroad company which exacts exorbitant and illegal fares from the traveling public, in violation of the laws of the state from which the company derives its right to operate its road, if not its existence. There would be small safety for the state or its citizens if these artificial creations could with impunity disregard the reasonable and just limitations placed upon their powers by their creator. A court of equity will not under any circumstances set the seal of its approval on such violations of the public rights, but will exercise all its powers and its widest discretion, when the opportunity is afforded it, to encourage every effort of the state or its citizens to put an end to such practices. When a citizen who has paid these unlawful exactions is compelled to sue for a redress of his grievance, he is justly and equitably entitled to something more than the sum of the illegal exactions. That would be no compensation to him and no punishment to the company, and would have no effect in restraining the company from the continued violation of the law. The sum which may be recovered under the statute in such cases is reasonable. It is just to the citizen, and not unduly oppressive on the company. It is compensatory damages for a willful wrong inflicted on the citizen, rather than a penalty. When, as sometimes happens, a railroad company desires to avoid the payment of debts and obligations incurred in the operation of its road, or to reduce the wages of its employes below a fair and reasonable compensation for their services,—there are not many such companies, but occasionally there is one,—it seeks the aid of a friendly creditor, through whose agency it is quickly placed in the hands of a receiver, and immediately a court of equity is asked and expected to do the mean things which the company itself was unable or ashamed to do. But it is believed this is the first instance in which a court of equity has been asked to become, in effect, something bordering very closely on a receiver of stolen goods, and urged to hold the ill-gotten gains in trust for the guilty party, and refuse to make restitution even of the smallest portion of them to the persons from whom they were unlawfully taken. High considerations of public policy, not less than the plainest principles of equity and justice, demand that the property of the defendant company in the custody of the court as a trust fund should be made to respond to the payment of these judgments. And if the lien of the judgments had expired, and the general order relating to the payment of debts did not comprehend them, under the admitted facts of the case, a special order would have to be made for their payment.

The exceptions to the special master's report are sustained, and an order will be entered requiring the receivers to pay to the interveners severally the amount of their respective judgments, with interest thereon from the date of their rendition, and all costs.

OLCOTT v. RICE et al.

(Circuit Court of Appeals, Fifth Circuit. June 25, 1895.)

No. 357.

1. RESULTING OR CONSTRUCTIVE TRUST—EVIDENCE.

Complainant, the purchaser, at a foreclosure sale, of the property, rights, and interests of an insolvent railway company, filed his bill alleging that certain real estate, the title to which had been taken in the names of the predecessors of defendants, was paid for with funds of the railway company, and was held in trust for it, and praying for a conveyance thereof to him. It appeared that the several tracts of land, lying along the line of the railway, were conveyed to certain persons, who were directors and officers of the railway company, by absolute deeds, in consideration of their personal notes; that in some cases such persons were described as "trustees"; that in one case the railway company had agreed to establish a depot on the land, if conveyed to such persons, trustees under a certain agreement; that there were certain entries in the books of the railway company tending to show that some of the notes given by said persons were paid by the railway company, but no evidence of the facts relating to such entries was given by persons familiar with them; that, some years after the purchases, the purchasers conveyed to the railway company certain lands admitted to be held in trust for it, and claimed to be all that were so held. *Held*, that complainant had failed to establish the trust alleged in his bill.

2. EQUITY—LACHES.

From the time of the conveyance to the railway company of the lands which were claimed by the purchasers to be all that belonged to it, no claim was made to other lands until the filing of complainant's bill, 17 years later; the stock having in the meanwhile passed into other hands, and new directors and officers having been elected. It seems that such delay constituted laches, barring the claim of complainant, who stood in no better position than the railway company.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

This was a suit by Frederick P. Olcott against Fred A. Rice, T. W. House, William C. Oliver, Elvira Hutchins, J. W. Jones, M. W. Garnett, E. P. Hill, Presley K. Ewing, Henry Brashear, and William M. Rice to establish a trust in certain lands. The circuit court dismissed the bill. Complainant appealed. Affirmed.

John G. Winter, for appellant.

Presley K. Ewing and Henry F. Ring, for appellees.

Before McCORMICK, Circuit Judge, and BRUCE, District Judge.

BRUCE, District Judge. The bill was filed December 21, 1891. It charges that the Houston & Texas Central Railway Company, a corporation created under and by the laws of the state of Texas, doing business and domiciled in said state, before the year 1888, acquired and became the owners of certain real property, which is described in the bill, and situated in different named counties in the state of Texas. The bill charges that the legal title to said property was taken in the name of A. Groesbeck, W. R. Baker, F. A. Rice, and W. J. Hutchins, who were then, and long thereafter continued to be, officers and directors of said railway company, having the charge, management, and control of its business affairs, and that

they so took the legal title as trustees, holding the property so conveyed in trust for said railway company; that is to say, the said railway company acquired and became the owner of the lands conveyed in trust for its use and benefit to the several trustees mentioned.

It is charged:

"That the Houston & Texas Railway Company heretofore executed several deeds of trust upon certain of its property acquired and to be acquired, embracing and covering the property described in the bill, and all rights and interests growing out of same, to secure the payment of its indebtedness; and thereafter the trustees, representing creditors secured by said deeds of trust, instituted then several suits in the circuit court of the United States holden in said Eastern district of Texas, at Galveston, for the purpose of foreclosing the liens under said trust deeds, which several suits were by order of said court consolidated in one suit upon the equity docket of said court, and entitled and numbered, to wit, 'Nelson A. Easton and James Rintoul, Trustees, and the Farmers' Loan and Trust Company, Trustee, v. The Houston and Texas Central Railroad Company et al.'; * * * that in pursuance of a decree entered by said court in said consolidated cause on, to wit, the 4th day of May, 1888, foreclosing the liens of the several trust deeds, and decreeing and ordering a sale of the property, rights, titles, and interests of said railway company embraced therein, Charles Dillingham, as special master commissioner, for that purpose by said court appointed, did on, to wit, 8th day of September, 1888, in accordance with the directions of said decree, sell all the property, rights, titles, and interests, both at law and in equity, of said railroad company in and to the lands hereinbefore described; * * * that at said sale your orator became the purchaser of said lands, and all the rights, titles, and interests, in law and equity, of said railroad company, in and to the same, * * * for the sum of ten million five hundred and eighty thousand dollars; and that the commissioner was directed to execute and deliver a deed of the property sold to the purchaser, which was done."

It is perhaps not necessary to state further the averments of the bill, but section 5 states the case with clearness and brevity, thus:

"Your orator further represents and avers that the lands held by said trustees as aforesaid were donations made to said railway company, or were paid for by and with moneys, credits, and properties of said railway company, and the accretions thereof, in the hands of said trustees, and by them held to be accounted for and conveyed to said railway company when thereunto demanded; and that by reason of the purchase by your orator of the interests therein of said company, as aforesaid, he is entitled to have said property conveyed to him, and to have an accounting of and concerning the management of the same, and the fruits, income, accretions, and profits thereof."

He avers that the value of the aforesaid lands, and of orator's rights and interests therein, and growing out of same, exceeds the sum of one million dollars, and in the thirteenth paragraph he states that he has demanded of said respondents, and each of them, that they account to him for the trust property received and held by them as aforesaid, and concludes with prayer for relief, general or special, as may accord with equity and good conscience.

The bill is answered by all of the defendants, and the denials are full and specific of the facts charged in the bill. The case stated in brief is, the complainant charges a trust upon the defendants, and prays for an execution of the trust. The defendants deny, and complainant is put upon his proof. It is not deemed necessary to discuss the question as to what kind or designation of trust is claimed here, whether a resulting or constructive trust. The fact

to be established is that the property in question was paid for by or out of the funds and credits of the railway company, or that it was acquired as donations to the company. The railroad was projected and built in part before the war, but not completed until afterwards. The Bryan tract is treated as the initial point in the inquiry, and is emphasized by the complainant as giving color to the after transactions of the officers of the railway company and certain named trustees to whom conveyances were made of the title to the property the subject of this litigation. The deed in the matter of what is called the "Bryan Tract" is for 640 acres of land, dated 9th April, 1860, and is for an expressed consideration "of thirty-two hundred dollars, to me in hand paid by A. Groesbeck and W. R. Baker." It appears from the testimony of Bryan that he took note of Groesbeck and Baker for the \$3,200, which he says he turned over to Wm. Hendley & Co., to pay them a debt which he owed them. The evidence shows that the note was afterwards paid. The testimony of Bryan shows that he was desirous of having a depot upon the land. He says: "I won't be positive, but am satisfied that I offered to give them 320 acres of land; and I would have given them if they had not taken the 640 acres, and paid me five dollars an acre for it." It is quite clear that the testimony of Bryan does not go far to sustain the complainant's case that this Bryan tract was paid for by the means of the railroad company. It shows a purpose to have established upon the line of the railway a depot upon the tract of land, and this rendered the acquisition of depot grounds necessary for the conduct of the business of the railroad company. And it may be that this scheme was to make this tract of land the site of a town for which the establishment of a depot would be an important initial step; but it does not appear that the railroad company was going into the business of building towns or of doing aught other than the legitimate business of a railway company. In any view of this evidence, it does not sustain the complainant's contention, but rather the contrary.

Certain book entries upon the books of the railway company are relied on to show that the \$3,200 note of Groesbeck and Baker was paid out of the treasury of the railroad company; but evidence of this character, apart from testimony as to the facts to which these entries relate, by witnesses who have some knowledge of the transactions other than the entries themselves upon the books of evidence at all, is not satisfactory to establish a proposition such as claimed here. Item 2 is a deed of J. J. Jackson, dated August 2, 1869, for and in consideration of the sum of \$3,804, "to be paid me on the 6th day of July, 1870," by Abraham Groesbeck, W. R. Baker, W. J. Hutchins, and F. A. Rice, trustees, for which sum of money the parties named "delivered to me their joint and several promissory notes, dated August 2, 1869." This, upon the face of it, shows a straight deed of conveyance and joint notes of the grantees given for the purchase money; and the same thing, in substance, is shown in a number of the other items noted in the brief of counsel for the complainant.

Some stress is laid upon the Corsicana transaction, which shows a tract of 640 acres of land, upon which the company obligated

itself to establish a depot on the line of the road on the land, provided good and sufficient deeds of conveyance are first made and delivered to W. J. Hutchins, W. R. Baker, F. A. Rice, and A. Groesbeck, trustees, appointed by an agreement dated March 22, 1868, for the lands and lots of ground. Attention is here called to the facts that at this time (June 17, 1871) Hutchins, Baker, and Groesbeck were directors of the railway corporation; that Baker was also president, Groesbeck, vice president, and F. A. Rice, one of the trustees, was treasurer, of the railway corporation company. It appears, however, that this property, by deed of May 13, 1874, was conveyed by the trustees to the railway company for the same named consideration as is recited in deed to them in 1871. The conveyances of property except the Bryan tract were made after the 22d of March, 1868; and, with few exceptions, the deeds recited that they were made to the persons named as trustees, appointed under an agreement dated March 22, 1868. Many of these conveyances were made more than 20 years before the bill was filed; none of them later than 1875, which was 17 years before the filing of the bill. It is conceded that some of the lands of the railway company were conveyed to the trustees. It is in testimony that Groesbeck remarked on one occasion that the company did not want the title to the lands clouded by the bonds of the railway company; but it is also in testimony that these lands were all reconveyed to the railroad company,—that is, as witness Rice states, “all that the trustees conceded to belong to the railroad.” It is not deemed necessary to comment upon the items in detail. They are numbered from 1 to 90, inclusive. The conveyances are all in terms of the same general character, and the book entries from the books of the railroad company are like those referred to in the case of the Bryan tract.

What, then, does such a review of the evidence disclose? It shows a railroad enterprise projected, and the road built in part before 1861, in which the actors are now, and when the bill was filed were, nearly all dead. They were the stockholders of the railroad company, formed its board of directors, and were the officers of the company. The Bryan tract transaction, in connection with what was afterwards done, and the execution of the trust agreement of March 22, 1868, and other papers in evidence, show that there was a syndicate formed to buy lands and lots along the line of the railroad, the purpose of which was to organize towns, promote their growth, and profit by the increase in the value of property resulting from the building and operation of the railroad. During the time of these transactions, from March 22, 1868, to 1874-75, the same persons largely were interested in operating the railroad, and were officers and directors of the railroad corporation, and at the same time were parties in interest in the land syndicate. It is true, the law regards with jealousy the occupying of double relations by the same persons. It was long since said, and the experience of mankind only adds force to the truth, “that no man can serve two masters.” And yet, in the practical affairs of life, these double relations are frequently found to exist often from necessity, and the law does not pronounce transactions of persons in such relations void,

but only voidable, and courts will subject such transactions to greater scrutiny to see that they are honest and free from the taint of fraud. Doubtless, there is much danger in relations of this character, and it may be that the parties complained of in these transactions did sacrifice the interests of the railroad company to that of their private syndicate. But courts cannot be governed by suspicions of what parties may have done in the presence of opportunities for fraud; but the general presumption must be indulged that men charged with high and important trusts perform their duties with fidelity to these trusts, and such must be presumed until the contrary is shown by proper proof.

In 1877 one Morgan bought the main body of the stock of the road, and a new directory and management came into control of the road. In 1882 the road and its property passed into the hands of receivers appointed by the circuit court of the United States for the Eastern district of Texas, at the suit of certain bondholders, which suit resulted in a decree and sale of the railroad and property, under which complainant makes claim to the property in suit.

The result of this review is that the main proposition of the complainant is not made out by the proof, and the trust charged in the bill upon the defendants is not established under any rule on the doctrine of trusts found in the opinions of courts of last resort. Pom. Eq. Jur. § 1040; Perry, Trusts, § 137; *Olcott v. Bynum*, 17 Wall. 64. If this were otherwise, it would still be difficult to free this case from the rule of laches and staleness of demand. Complainant stands on no higher ground in this respect than the railroad company to the rights of which he claims to have succeeded. In 1875, the trustees conveyed to the company certain lands admitted by them to be held in trust for the company, and claiming that it was all that was so held; and from that time to the filing of the bill (December 21, 1892) is such lapse of time as does not show a case of reasonable diligence in the assertion of rights in good faith believed to exist. *Oil Co. v. Marbury*, 91 U. S. 587, and cases there cited.

Again, as to the comparative equities of the parties complainant and the defendants to the bill. Complainant is a purchaser at a sale under decree of the court of a large amount of property described in the mortgages which were foreclosed, and the property sold under decree of the court. The property described in this bill was not described in the mortgages which were foreclosed. But, conceding that the case falls within the rule of an equitable title to real estate subject to sale under the decree of the court, and was in fact sold, the facts show that complainant stands on no high and controlling ground in a court of equity. The defendants are successors in interest to the trustees under agreement of March 22, 1868. Some of them paid value for the interest they hold; others hold as succeeding to the rights of those who are dead; and it seems to us that the defendants not only have the title, but the equities are also in their favor.

The result is that the decree of the court below is affirmed.

SNIVELY v. LOOMIS COAL CO. (PHOENIX POWDER MANUF'G CO., Intervener).

(Circuit Court, E. D. Missouri, N. D. June 15, 1895.)

No. 169.

EQUITY—PRIVATE CORPORATIONS—CLAIMS FOR SUPPLIES.

Claims for labor and materials or supplies furnished to a merely private corporation, such as a mining company, are not entitled to priority over the mortgage bonds of such corporation, or over a vendor's lien on its property.

This was a suit by Ezra V. Snively against the Loomis Coal Company to foreclose a vendor's lien. The Phoenix Powder Manufacturing Company intervened, seeking payment for certain supplies furnished.

Mr. Huston, for complainant.

Mr. Harkless, for respondent.

Mr. Kinealy, for intervener.

Rombauer & Rombauer, for receiver.

ADAMS, District Judge. The Loomis Coal Company, defendant herein, was a manufacturing and business corporation engaged in the business of mining coal and buying and selling merchandise. Suit was instituted by Snively against the defendant to foreclose a vendor's lien existing in his favor upon certain real estate of the defendant. By appropriate intervention, the Merchants' Bank of St. Joseph and the First National Bank of Hannibal became parties to the suit, and, by the interlocutory decree heretofore entered in the case, said banks are found and decreed to have mortgage liens against the real estate and property of the defendant, given to secure the payment of large sums of money due from the defendant to them, respectively, and said Snively was found and decreed to have a valid vendor's lien also. At the institution of the suit, the court, at the instance of the plaintiff, appointed a receiver to take charge of the property pending the litigation; and for special reasons, satisfactory to the court, the receiver was directed to continue the operation of defendant's mines, and also the transaction of its mercantile business. Within three months prior to the appointment of the receiver, the intervener here sold powder to defendant, which was placed in its store as part of its stock of merchandise, for sale to the public and for use by it, as occasion might require, in its mining operations. About one-half of the purchase price of this powder was paid by defendant before the receiver was appointed, and the balance, amounting to \$448.50, remained at that time unpaid. The intervener, in its petition, claims that, under the general doctrine recognized in suits for the foreclosure of railroad mortgages, the court ought to order said balance paid to it out of funds in the hands of the receiver, as a claim, in equity, superior to the mortgage and vendor's liens. The special master to whom this petition was referred reported adversely to the claim so made, and the question is now before the court on exceptions to the master's report.

The equitable doctrine invoked in this case rests upon the assump-

tion that the income has been diverted from its primary use to meet current expenses, and been appropriated by the debtor either to pay interest on the mortgage indebtedness, or to improve the mortgage security. *Fosdick v. Schall*, 99 U. S. 235; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675; *Wood v. Safe-Deposit Co.*, 128 U. S. 416, 9 Sup. Ct. 131. There is no evidence before the court in this case either of current earnings prior to the appointment of the receiver, or of any diversion of such earnings for the benefit of the secured creditors. If, therefore, the doctrine invoked can be made applicable to a manufacturing and business company like the defendant, no case has been made by the proof. The court cannot assume the existence of facts necessary to create the equity. *Seventh Nat. Bank v. Shenandoah Iron Co.*, 35 Fed. 436. But, as there are several other intervening petitions of like character to that under consideration now pending in this court, I have examined the case in hand with a view of determining whether the equitable doctrine invoked ought to apply to a business company situated like the defendant. Hitherto, as I understand, it has not been applied by the supreme court in any case except that of a railroad. A railroad, being a quasi public corporation, is charged with the performance of duties at the demand of the public. To cease operation, after having once opened up a country, encouraged settlement along its route, and accustomed the public to its facilities of transportation, would be attended with great inconvenience, hardship, and injury to the public. For these reasons, a railroad must be constantly operated, even pending foreclosure proceedings. To do so, laborers and other persons who furnish material and supplies must have an assurance that their demands will be paid. The value of railroad securities, too, is largely dependent upon keeping a railroad a "going concern." It is in consideration of these necessities and the peculiar relations of a railroad company to the public, as well as a consideration of the interests of lien creditors themselves, that the courts have lent their aid to operate a railroad pending litigation. As a necessary prerequisite to these ends, the courts, acting upon the assumption above named, have recognized the claims of laborers and material men, accrued a short time before the appointment of receivers, as entitled to a preference in equity over the mortgage liens. In the case of *Wood v. Safe-Deposit Co.*, supra, the supreme court, while not passing on the point in question, recognizes a broad distinction between a railroad case and that of a purely private corporation. In the case of *Seventh Nat. Bank of Philadelphia v. Shenandoah Iron Co.*, 35 Fed. 436, it is held that an incorporated iron manufacturing company does not come within the equity principles that give the employés of a railroad corporation a prior lien upon its current earnings for the payment of their wages. In the case of *Fidelity Ins. & Safe-Deposit Co. v. Shenandoah Iron Co.*, 42 Fed. 372, it is held that, by the principles of equity, claims for materials, supplies, and labor furnished to a mining and manufacturing company are not entitled to priority over the mortgage bonds thereof. To the same general effect is the case of *Farmers' Loan & Trust Co. v. Grape Creek Coal Co.*, 50 Fed. 481.

The reasons, therefore, why a railroad company or other quasi public corporation should be constantly kept in operation as a going concern do not apply to a private corporation like the Loomis Coal Company. The public has no special interest in such a corporation. It is therefore immaterial to it whether it is kept in operation or whether it is closed down during the foreclosure proceedings. In cases of this kind it seems to me that the contracts of the parties ought not to be interfered with by the courts. In this case, the Loomis Coal Company entered into a contract with Snively and the two banks, whereby it agreed to pay certain money to them; and, by the execution of the mortgages referred to, it agreed that its property should be bound with the first lien for the payment of said money. I fail to see any equity in depriving them of such liens at the instance of the intervener in this case. If the court can decree that the intervener's simple contract claim for goods sold within three months prior to the appointment of the receiver should take precedence over the above-mentioned lienor's claims, it is not apparent where the limit of such action could be. The entire mortgage property may be consumed in the payment of simple contract debts, which the creditors, when selling the goods, never expected, and which the lien creditors, on taking the solemn obligation of the coal company, never contemplated as possible. I am not willing to extend the reasonable equitable doctrine applicable to railroads and other quasi public corporations to such corporations as the defendant in this case. I see no reason for making any special exception in favor of the intervener, for the small amount of powder which remained on hand at the time of the appointment of the receiver, and which, the evidence shows, the receiver has used or disposed of. In fact, no relief of this kind can be granted on the intervening petition as filed.

Inasmuch as each and all of the exceptions taken to the master's report challenge his final conclusion only, there is no occasion to refer to any one of them separately. The exceptions are overruled.

GRANNIS v. QUINTARD.¹

(Circuit Court, N. D. Illinois. July 24, 1895.)

CONTRACTS—INTERPRETATION—SALE OF BONDS.

A. agreed to deliver to B. a certain number of state bonds. At that time the bonds were not issued, but an act authorizing the issuance of such bonds, to bear interest at a rate not exceeding 4 per cent., had been passed, and both parties supposed that the bonds would bear that rate of interest, though the agreement said nothing about the interest. Afterwards the bonds were issued, bearing interest at 3½ per cent. *Held*, that a delivery of such bonds was a compliance with the agreement.

Bill of interpleader by William C. D. Grannis against William L. Quintard and Joseph M. Bailey, Jr. The latter defendant having died pending suit, his executors, Joseph M. Bailey and James H.

¹ Reported by Louis Boisot, Jr., Esq., of the Chicago bar.

Stearns, were substituted as parties defendant in his stead. There was an interlocutory decree allowing interpleader, and thereupon an issue was made up between the defendants.

Henry M. Bacon, for W. I. Quintard.

F. W. S. Brawley, for J. M. Bailey, Jr.

SHOWALTER, Circuit Judge. By a statute of the state of South Dakota approved January 15, 1890, provision was made for an ascertainment and division between the states of North Dakota and South Dakota of the floating debt of the territory of Dakota. Section 3 of said statute is in words as follows:

"When the amount of the floating indebtedness of the territory of Dakota which the state of South Dakota is to assume shall be determined and approved, as above provided, then the state treasurer shall be, and he is hereby authorized and empowered to refund such portion thereof as is evidenced by funding warrants of the territory of Dakota, by exchanging therefor bonds of the state of South Dakota bearing interest at a rate not to exceed four per cent. per annum, payable semi-annually in the city of New York, such bonds to be executed by the governor and state treasurer, and attested by the secretary of state, under the great seal of the state, and running not to exceed twenty years. Any premium received by the state treasurer in making such exchange shall be covered into the general fund of the state of South Dakota."

In the fall of 1889, J. M. Bailey, Jr., who died pending this litigation, and who is now represented by the defendant executors, Joseph M. Bailey and James H. Stearns, had become the owner of three funding warrants issued by the territory of Dakota, each for \$50,000, and each then payable and drawing interest at 7 per cent. per annum. This \$150,000 constituted the portion of the floating debt "evidenced by funding warrants of the territory of Dakota," as expressed in the above statute. On April 28, 1890, the following writings between J. M. Bailey, Jr., who then lived in South Dakota, and defendant, Quintard, a New York bond dealer, were made at Chicago:

"Chicago, April 28, 1890.

"I hereby agree to pay draft of J. M. Bailey, Jr., for amount of face and accrued interest of funding warrants, numbered three (3), four (4), and five (5), respectively, of the territory of Dakota (face of said warrants being \$50,000 each), provided such warrants, duly assigned to me, are attached to said draft, and provided, further, that said Bailey shall furnish certificates of a responsible bank or banks that, if bonds of the state of South Dakota are not delivered to me on or before August 1, 1890, in accordance with bond of said Bailey to me of even date herewith, then said bank or banks will furnish money to buy from me said warrants, at their face and accrued interest, on August 1, 1890.

"[Signed]

W. I. Quintard.

"I hereby agree to sell said warrants to said Quintard at face and accrued interest, in consideration of twelve thousand dollars (\$12,000) paid this day to W. C. D. Grannis, president, in escrow, under certain conditions.

"[Signed]

J. M. Bailey, Jr.

"Know all men by these presents that I, J. M. Bailey, Jr., of Minnehaha county, state of South Dakota, am bound and firmly held unto W. I. Quintard, of the city of New York, in the penal sum of twelve thousand and two hundred and ten (\$12,210) dollars, good and lawful money of the United States, for the payment of which I bind myself, my heirs, executors, and administrators, firmly by these presents. Witness my hand this 28th day of April, A. D.

1890. The condition of the above obligation is such that whereas the above-bounden J. M. Bailey, Jr., has this day sold to said W. I. Quintard three funding warrants of the territory of Dakota, of fifty thousand (\$50,000) dollars each, numbered respectively three (3), four (4), five (5); and whereas, said funding warrants are exchangeable for bonds of the state of South Dakota under and by virtue of an act of the legislature of said state, entitled 'An act to provide for the funding of the outstanding indebtedness of the state of South Dakota, approved January 15, 1890,' such exchange to be made upon conditions more specifically set forth in said act: Now, therefore, if the said bounden J. M. Bailey, Jr., shall deliver or cause to be delivered to said W. I. Quintard, or his assigns, on or before the first day of August, A. D. 1890, bonds of the state of South Dakota, issued in accordance with the said act of the legislature, and conforming thereto in form, manner of execution, date, and payment of interest and principal, rate of interest, and duration of bonds, together with papers showing the legality of bonds, then this obligation to be void, otherwise to remain in full force and effect. Provided, however, that in case the said bounden J. M. Bailey, Jr., shall deliver to the said W. I. Quintard bonds in a less amount than one hundred and fifty thousand (\$150,000) dollars (it being expressly understood that he shall deliver all of the bonds of the state of South Dakota issued under the provisions of this act), then the above obligation shall be binding in such proportion of said twelve thousand two hundred and ten dollars (\$12,210) as the portion of said one hundred and fifty thousand (\$150,000) dollars of bonds which said J. M. Bailey, Jr., does not deliver bears to the whole one hundred and fifty thousand (\$150,000) dollars of bonds.

"[Signed]

J. M. Bailey, Jr."

Bailey and Quintard then made and delivered to complainant Grannis, together with a copy of the bond last recited, a paper in words following:

"Chicago, April 28, 1890.

"W. C. D. Grannis, Esq., President Atlas Nat'l Bank, Chicago—Dear Sir: We hand you herewith copy of bond this day made by J. M. Bailey, Jr., to W. I. Quintard, also check for twelve thousand (\$12,000) dollars of said W. I. Quintard, payable to the order of said J. M. Bailey, Jr. Said check is to be turned over to said J. M. Bailey, Jr., upon the furnishing to you of satisfactory evidence that said W. I. Quintard has paid or caused to be paid to the Illinois Trust and Savings Bank, of Chicago, the face value and accrued interest of three funding warrants of the territory of Dakota for fifty thousand (\$50,000) dollars each, numbered, respectively, three (3), four (4), and five (5); and said check is to be delivered only upon the deposit with you of bank stock or mortgages, or both, which shall be fairly worth not less than twelve thousand (\$12,000) dollars. Said mortgages or bank stock, or both, are to be held by you in escrow until the conditions of bond of said J. M. Bailey, Jr. (a copy of which is hereto attached) are fulfilled; and, when said conditions are fulfilled as aforesaid, said mortgages or bank stock, or both, are to be returned to said J. M. Bailey, Jr. It is expressly understood, as a condition precedent of said escrow, that said check of \$12,000 shall be duly honored by bank upon which it is drawn, upon presentation thereto.

"[Signed]

J. M. Bailey, Jr.
"W. I. Quintard."

The officials of South Dakota at first construed the statute above quoted to mean that they could issue bonds and sell them at auction, and out of the proceeds pay the above-mentioned warrants. Following out this idea, the first intention on the part of said officials, or some of them, appears to have been to issue 4 per cent. 20-year bonds, and sell the same at public auction. This plan was carried out to the extent of making a draft of the proposed bonds and putting the same into the hands of a printer, and in advertising the proposed sale. But no such issue or sale of bonds was ever made.

Bailey, or some one on his behalf, insisted that within the sense of the statute the bonds ought not to be sold, but should be turned over to the holder of said warrants in exchange therefor. The state officials apparently inclined to this view of the statute. At all events, they issued bonds applicable to these warrants,—to the extent of only \$125,000, however, instead of \$150,000,—payable in 20 years, and drawing interest at $3\frac{1}{2}$ per cent. per annum, instead of 4 per cent. per annum. On July 22, 1890, and within due time after the issue of said bonds, Bailey, who, upon satisfactory voucher, had obtained possession of said bonds from the state authorities, tendered the same to Quintard at New York City, together with \$2,035 cash, that being the appropriate rebate on the \$12,210, as mentioned in the final paragraph of the bond. Quintard, who then held the three warrants pursuant to the writings above recited, refused this offer, and thenceforward persisted in refusing, insisting that the bonds should have been for 4 per cent. per annum, instead of $3\frac{1}{2}$ per cent. On January 2, 1891, by writing sent and duly received, the treasurer of South Dakota gave notice to Quintard that warrants 3 and 4 were to be paid on presentation, and that \$15,141.61 would be paid on warrant number 5 on presentation, and that all interest on the moneys so to be paid would cease on and after February 24, 1891. On March 19, 1891, Quintard surrendered the warrants 3 and 4, and received payment, to wit, \$122,438.38, specified in the notice above mentioned. On September 16, 1891, another notice was sent to Quintard by the state treasurer advising him that the balance of warrant 5 would be paid on presentation, and shortly thereafter Quintard surrendered said warrant 5 and received the said balance, to wit, \$43,627.95. On May 5, 1890, and pursuant to the joint writing of April 28, 1890, above quoted, delivered by Bailey and Quintard to complainant, Grannis, Bailey deposited with said Grannis 110 shares of the capital stock of the Minnehaha National Bank. Afterwards, and in said month of May, 1890, Quintard paid to Bailey, for said warrants, pursuant to said writings of April 28, 1890, above quoted, the sum of \$168,300. This sum included the \$12,000 mentioned in the second of said writings. After the tender of the bonds, as already mentioned, Bailey requested Grannis to redeliver the 110 shares of bank stock. Quintard objected to this, and Grannis filed his bill of interpleader. On January 21, 1892, a decree was entered in favor of complainant on this bill, finding that a case for an interpleader was made out, etc. The subsequent proceedings culminating in this hearing were to determine to which of said parties said bank stock belonged.

Quintard assumes the affirmative, and undertakes to make it appear that the real contract between himself and Bailey was that the bonds in question should be 4 per cent. bonds, and not $3\frac{1}{2}$ per cents. His insistence is that such a term was omitted from the writings by a mutual mistake on the part of the contracting parties. He says that the state officials were at the time of the contract between himself and Bailey contemplating the issue of 4 per cent. bonds, and not $3\frac{1}{2}$ per cent. bonds, and that such 4 per cent. bonds were, in reality, the subject-matter of the contract. The parties,

Bailey and Quintard, at the time of making their treaty in the city of Chicago, had before them the statute of South Dakota under which the bonds were to issue. It is not claimed that Bailey made any misrepresentation upon any point of fact or law which could have affected in any manner whatever Quintard's judgment or disposition to contract. Nor is it claimed that Bailey unfairly concealed or took advantage of any matter material to the transaction not brought to the notice of Quintard. I find that both Bailey and Quintard, when they made their contract of April 28th, expected, that is to say, predicted or judged, that the officials of South Dakota would issue 4 per cent. bonds, and not $3\frac{1}{2}$ per cents. Four per cents would command a higher premium, and Quintard's profit in reselling the same would have been very much greater than in the case of the $3\frac{1}{2}$ per cents. But the state officials had control of the matter. It was for them to fix the form of the bonds and the rate of interest. The chance that they might issue $3\frac{1}{2}$ per cent. bonds was not covered by any provision in the writings. An expectation or anticipation on Bailey's part that the bonds would be 4 per cents is a very different matter from a contract by him insuring or guarantying that they would be 4 per cents. The evidence consists in large part of conversations, letters, telegrams, and memoranda, which I shall not review in detail. It is clear from such evidence that Bailey was disappointed and chagrined at the outcome, and that he anticipated trouble with Quintard. But there is no direct proof, and I cannot agree with the learned counsel for Quintard that any inference can be rightly drawn from the matters in evidence, to the effect that either Quintard or Bailey ever for a moment thought of a stipulation whereby Bailey was to insure or guaranty that the bonds should be 4 per cents.

It is urged, further, that the subject-matter of the contract was 4 per cent. bonds, that no such bonds ever issued, and hence that the contract was void. But the subject-matter of the contract was not 4 per cent bonds. The contract concerned the bonds to be issued under the statute. The mere assumption by the parties, with the statute before them, that the officials would issue 4 per cents rather than $3\frac{1}{2}$ per cent. bonds, and the absence of any stipulation covering the contingency, does not make this case analogous to cases of that class wherein the parties make their agreement on the common mistake that the thing or subject-matter contracted about is still extant, when, in fact, but without the knowledge of either contracting party, said subject-matter has already been destroyed or extinguished. Nor is this a case where the consideration moving to Quintard can be said to have failed either in whole or in part. He was to receive the bonds issued pursuant to the statute. The possibility, evidently regarded by him as very slight, that the bonds might be $3\frac{1}{2}$ per cents, instead of 4 per cents, was still incidental to the case. He bargained, in fact, for the chance, among other things, that the bonds would be 4 per cents. However unexpected and disappointing the event, it cannot be said that there has been any failure or partial failure of consideration. I may add that, if in the contract of April 28th there had been inserted an express

stipulation whereby Bailey guarantied or insured that the bonds should be 4 per cents, it is doubtful if such stipulation could have been enforced. A contract whereby a private person engages to control the acts of public officials, or even a wager with reference to such public acts, as I recollect the law, is usually held void as against public policy.

One feature of the case remains to be noticed. While the shares of stock in controversy have been in the hands of complainant, Quintard has paid an assessment of \$1,127 thereon. I do not think he can be treated as a volunteer in doing this. I think the \$2,035 tendered by Bailey, together with the \$1,127, and interest on the latter sum, should be paid to Quintard. After making this payment, the stock in controversy should be turned over to the executors. A decree in accordance with this view of the case may, therefore, be prepared.

SAWYER v. CLEVELAND IRON MIN. CO.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

BILL OF LADING—DEFICIENCY IN CARGO.

Defendant's vessel was chartered to carry a cargo of grain in bulk from S. to B. The grain was weighed into the vessel at S. from an elevator, under the supervision of a weighmaster for the elevator, an assistant state weighmaster, and a tally keeper for the vessel; and defendant gave a bill of lading, in accordance with their count, for 81,000 bushels, such bill of lading providing: "All the deficiency in cargo to be paid for by the carrier, * * * and deducted from the freight, and any excess in cargo to be paid for to the carrier by the consignee." Upon arrival at B., it was ascertained that only 79,498 bushels were on board, the difference being due to a mistake in the weighing at S. *Held*, in an action by the assignee of the consignor, that the carrier was liable for the shortage in the cargo, though the grain had never actually been loaded on board the vessel.

In Error to the Circuit Court of the United States for the Northern District of New York.

This was an action by Franklin J. Sawyer against the Cleveland Iron Mining Company upon a bill of lading. Upon the trial in the circuit court a verdict was directed for the plaintiff for \$67.03, and judgment was entered accordingly. Plaintiff brings error, claiming a larger sum. Reversed.

Benj. H. Williams, for plaintiff in error.

Franklin D. Locke, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges

LACOMBE, Circuit Judge. The firm of A. J. Sawyer & Co., of Duluth, Minn., in April, 1890, were the owners of a large quantity of wheat lying in the Great Northern elevator at West Superior, a port close to Duluth. On the 28th of that month, the propeller Frontenac, belonging to the defendant, was chartered by said firm to transport a cargo of wheat from Duluth to Buffalo, N. Y., at a freight of 3¼ cents per bushel of 60 pounds. On the same date, agreeably to instructions, the Frontenac presented herself at the elevator to receive her cargo. The grain was weighed, as it was

loaded, under the superintendence of a weighmaster for the elevator, of the assistant state weighmaster of the state of Minnesota, and of a tally keeper on behalf of the vessel. According to their account, 81,000 bushels were weighed into the vessel, and, believing such count to be correct, A. J. Sawyer & Co. surrendered to the elevator certificates for that quantity of wheat; and the defendant, by its agents, signed three bills of lading, for 40,000, 40,000, and 1,000 bushels, respectively. The bill for 1,000 bushels was to "order A. J. Sawyer & Co., care F. J. Sawyer, Buffalo." The other two were to like order, with the addition, in one case, "Notify H. O. Armour & Co., New York," and, in the other, "Notify Wm. H. Wallace & Co., New York." Upon arrival at Buffalo the cargo of the Frontenac was delivered into Elevator Niagara A, and was found to contain only 79,498 bushels. The referee finds as a fact, and upon sufficient evidence, that the difference—1,502 bushels—was not in fact put on board at West Superior, the weighers there having made a mistake in tallying 81,000 bushels, when there were in fact only 79,498 on board. On a delivery of the cargo to the elevator at Buffalo, the captain of the Frontenac took out warehouse receipts for the 79,498 bushels, and delivered to F. J. Sawyer receipts for 77,773 bushels. The balance—1,725 bushels—was retained and sold to pay an unpaid balance due on account of the freight. The amount so sold overpaid such freight, and it was for the surplus that the circuit court gave plaintiff judgment for \$67.03. As no argument has been made upon any assignment of error touching this part of the case, it need not be considered. The only question is as to plaintiff's right to recover for the shortage of 1,502 bushels. One lot, of 40,000 bushels, was to be reshipped at Buffalo by F. J. Sawyer to H. O. Armour & Co., at New York, and was eventually delivered to them. The other lot, of 40,000 bushels, was to be reshipped by F. J. Sawyer to William H. Wallace & Co. at New York, but only 32,000 were delivered to that firm; the matter being adjusted through the medium of a sale by that firm of 8,000 bushels to F. J. Sawyer, acting for and on behalf of A. J. Sawyer & Co. The lot of 1,000 bushels was shipped by A. J. Sawyer & Co. to the plaintiff on consignment to sell the same on their account. Before commencement of the action, plaintiff secured assignments from all three firms, but we concur in the conclusion of the referee that plaintiff thereby acquired no better right to recovery than A. J. Sawyer & Co. had when the shortage was discovered. The wheat was at that time still theirs, and neither of the New York firms had, so far as the evidence shows, advanced anything on the faith of the bills of lading.

The following is the form of bill of lading issued by defendant, the names of consignees and the quantities being as stated above.

"Duluth, Minn., April 28, 1890.

"Shipped in good order and condition by A. J. Sawyer & Co., as agents and forwarders for account and at the risk of whom it may concern, on board the propeller Frontenac, whereof — is master, now in the port of West Superior, Wisconsin, and bound for Buffalo, New York, the following property, as here described, to be delivered in like good order and condition as consigned in the margin (the dangers of navigation only excepted), subject to freight

and charges as below. All the deficiency in cargo to be paid by the carrier (except when grain is heated, or heats in transit), and deducted from the freight, and any excess in cargo to be paid for to the carrier by the consignee. In witness whereof, the master, owner, or agent of the said propeller Frontenac hath affirmed to one bill of lading and copies thereof, the original bill of lading being alone negotiable, and the said copies being marked on their face as follows: 'Copy not negotiable.' [Then follow the name of consignee, the statement of the number of bushels, and of the rate of freight, and the signature of defendant's agent.]"

Variances between the amount stated in the bill of lading and the amount actually delivered are not uncommon when the cargo is grain in bulk. The evidence shows that in the 32 instances testified to the shortages ranged from one bushel to 255 bushels, and in still another case the shortage was 827 bushels. In 11 other cases the excess ranged from 2 bushels to 82 bushels.

The only clause in this document which is to be construed is the following:

"All the deficiency in cargo to be paid by the carrier (except when grain is heated, or heats in transit), and deducted from the freight, and any excess in cargo to be paid for to the carrier by the consignee."

Does this mean that deficiency in cargo, however caused, shall be paid by the carrier? Or that such deficiency, be it small or great, shall not be paid by the carrier when it arises from the circumstance that, by mistake in weighing when put on board, the total quantity is stated in the bills of lading as greater than the total quantity actually laden? An ordinary bill of lading is not conclusive between the parties as to quantity shipped. It is open to explanation, like any other receipt. A carrier may, however, agree that he will be bound by the quantity specified, or that the bill of lading shall furnish the only evidence of the quantity. The bill of lading in this case is not in the ordinary form. Probably because of the usual and ordinary variations in quantity, which experience has shown are most frequently to be expected with cargoes of this character between these ports, a clause is added which plainly provides for an adjustment of such deficiency or excess without going back of the face of the bill. Save for the excepted case of grain which is heated or heats in transit, there is nothing in the language used which limits the deficiency or excess so to be adjusted, by the specification of any particular cause. Whether some of it be lost in transit, or whether a change of atmospheric condition increases or diminishes the size of the individual grains, or whether the shape of the measuring receptacles or the individual peculiarities of different weighers produces discrepancies, or whether the carrier drops part of it overboard in the process of lading, or leaves it behind him after delivery from the elevator, or whether the elevator overdelivers to him,—in short, whether the deficiency or excess occurs from the carrier's neglect or without his fault,—the language of this bill of lading equally applies to it. Whatever excess he delivers the carrier is to be paid for by the consignee; i. e. he is to be paid for the excess of grain, not merely for freight on the excess. Whatever deficiency there may be he is to pay for and deduct from the freight; i. e. he is to pay the value of the grain which is not delivered, not merely to deduct the freight on the

undelivered grain. There is nothing in the bill to indicate that this special agreement shall not apply to mistakes in weighing arising, as this one apparently did, between the warehouseman and the carrier. Neither authority nor the nature of the business calls for any different construction. Similar clauses in bills of lading for similar cargoes have been before the state and federal courts.

In *Meyer v. Peck*, 28 N. Y. 590, and *Abbe v. Eaton*, 51 N. Y. 410, it was held that the words "deficiency in cargo" meant "deficiency in cargo actually received on board," and that the clause did not conclude the carrier from showing that he did not in fact take on board the full quantity stated in the bill of lading. But these cases are shorn of all authority by the later decision of the court of appeals in *Rhodes v. Newhall*, 126 N. Y. 574, 27 N. E. 947. The clause in that case read as follows:

"All the deficiency in cargo to be paid by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee."

The court says:

"Here the parties have provided by express language for the particular contingency arising under this contract, and we can evade its operation only by disregarding one of the most imperative rules in the interpretation of contracts. * * * It seems reasonable that parties should agree upon the quantity of grain shipped when it is designed for transportation to distant markets, with a view of avoiding controversies between carrier and consignee upon the subject. The cargo was here weighed into the vessel under the supervision and control of the carriers, and they had every opportunity to learn the actual quantity of grain received by them. They thereupon entered into a contract with the consignor, whereby it was agreed that any deficiency in the cargo should be paid for by them, and deducted from the freight, and any excess in quantity should be paid to them by the consignee. The deficiency and excess referred to could have related only to a variation from the quantity specified in the bills of lading, as there was no other standard furnished by which a variation could be estimated. This was a contract which the parties were competent to make, and a consideration for the promise to pay for any deficiency was secured by the right to collect the value of any excess. These were mutual obligations, and were obviously incurred for the purpose of avoiding disputes over the quantity actually received by the carrier, and to estop him from disputing the correctness of his acknowledgment. The parties plainly contemplated the contingency of a variance in the course of transportation between the quantity of grain admitted to have been received by them and that subsequently delivered, and provided in express terms the mode by which their respective rights should be adjusted in that event. The language of the contract is plain and unambiguous, and the right of the parties to make it is indisputable."

In *Merrick v. Certain Wheat*, 3 Fed. 340 (a case decided subsequently to *Abbe v. Eaton*, supra, and prior to *Rhodes v. Newhall*, supra), the United States circuit court in the Northern district of New York, Judge Wallace writing the opinion, reached the same conclusion as that expressed in the above quotation. The clause under discussion was identical with that in *Rhodes v. Newhall*. Of it the circuit court says:

"On first impression, it would certainly seem that the bill of lading would not contain any such stipulation if it was not intended that the deficiency provided for should be that arising from the cargo as represented by the carrier. Otherwise there would be no necessity for inserting the stipulation at all, because the consignee, without any express stipulation, has the right to deduct from the freight a deficiency in the cargo actually received by the carrier, and

arising from his fault (*Davidson v. Gwynne*, 12 East, 381; *Sheels v. Davies*, 4 Camp. 119; *Edwards v. Todd*, 1 Scam. 462; *Leech v. Baldwin*, 5 Watts, 446); and it is not reasonable to suppose that the parties meant to insert a useless condition in a contract."

Of the contract itself the court adds:

"It was a contract well calculated to prevent the constant disputes and litigation arising with reference to shortage between carrier and consignee. The carrier has an ample opportunity to guard against mistakes, and so has the shipper; but the consignee is entirely in the dark as to whether the cargo agreed to be delivered has been actually laden, or whether it has disappeared on the trip. It is just that the consignee should pay for what he actually receives, whether more or less in quantity than is expressed in the bill of lading, and it is just that the carrier should be held concluded by his admission as to facts completely within his knowledge, and of which the consignee is ignorant."

In this expression of opinion we entirely concur, and the only question left to be determined is whether the circumstance that in the cases above quoted the controversy was one between carrier and consignee, while in the case at bar it is practically between carrier and consignor, calls for a different disposition of the case. It was upon the strength of this distinction that the referee decided against the plaintiff on his claim for deficiency, holding that the contract expressed in the bill of lading did not "estop the carrier from showing that the principal [the consignor] made a mistake in which the carrier shared." There is no evidence in the record before this court tending to show that the consignor made any mistake. So far as appears, he was entirely unrepresented, except by the carrier, at the weighing from elevator to propeller at West Superior. Accepting the receipts of the carrier on the bills of lading as correctly representing the cargo laden on board under the carrier's supervision, relying upon their accuracy and on the clause in the contract, he gave up to the warehouseman, at the elevator, receipts of the latter for a quantity of grain equal to that which the carrier represented that he had received on board. All that is said in the opinion quoted from as to consignee's ignorance as to the actual quantity applies, in such a case as this, to the shipper as well. It seems reasonable that parties should agree upon the quantity of grain shipped when the grain is actually delivered to the carrier, not by the shipper out of his own storehouse, but by an independent warehouseman in another port, who delivers it on the shipper's order, and under the supervision and control of the carrier, in the absence of the shipper or his personal representative. As the language of the contract is broad enough to protect the shipper as well as the consignee against the carrier's mistake, there seems to be no good reason for restricting it as the defendant in error contends. The manner in which the carrier is to respond for such deficiency is plainly stated in the clause, "All the deficiency in cargo to be paid by the carrier, and deducted from the freight;" that is, the carrier shall pay cash for the deficiency of grain, and shall deduct from the total freight, as it appears on the bill of lading, the freight of cargo not delivered.

The judgment of the circuit court is reversed, and the cause remitted for a new trial, with costs of this court.

Application for Rehearing.

(July 30, 1895.)

Benj. H. Williams, for plaintiff in error.

John G. Milburn, for defendant in error.

LACOMBE, Circuit Judge. The point presented on this application was not overlooked. The questions whether or not there was a mistake made in weighing or tallying the grain at Superior city, and whether or not Hendry, weighmaster for the elevator, Eva, assistant state weighmaster, and Nesbitt, who tallied on behalf of the vessel, participated in that mistake, were questions of fact, and the referee's findings thereon were taken as true. Whether or not the mistake of any one of these three individuals was a mistake imputable to the owner of the grain was a conclusion of law, and if not supported by the findings of fact, nor by any evidence in the record, was properly reversed. The finding that "A. J. Sawyer & Co., the owners of the cargo, * * * honestly believed at the time the cargo was put on board * * * that there was actually on board 81,000 bushels of wheat," is not sufficient to sustain that conclusion, where the contract provides, as this does, that a deficiency between the stated quantity and that actually on board will be paid for by the vessel, and it does not appear affirmatively that the cargo owner participated in the miscount. Motion for rehearing denied.

ORR et al. v. BROWN et al.

(Circuit Court of Appeals, Fifth Circuit. June 17, 1895.)

No. 380.

ATTORNEY AND CLIENT—CONTRACT.

Plaintiff, an attorney at law, who had formerly been retained by defendants and others to enforce payment of certain coupons on municipal bonds, and had done so successfully, wrote defendants, informing them that an officer of the city issuing the bonds had proposed to retain him to resist their final payment, recalling his former connection with defendants, and requesting defendants to confer with the bondholders, and notify plaintiff if they desired to retain him. Defendants replied that they would see the bondholders as soon as they could, and learn their wishes, but that they entertained no doubt the bondholders would desire plaintiff's services, and requested him to hold himself in readiness to represent them. Plaintiff replied that he had notified the city authorities that he declined representing them, because of defendants' retainer. No reply was sent to this letter. *Held*, that the correspondence showed a contract of retainer between the parties.

In Error to the Circuit Court of the United States for the Northern District of Mississippi.

This was an action by J. A. Orr and W. G. Orr against J. Wilcox Brown, C. D. Lowndes, and Frank T. Redwood, for professional services as attorneys. The defendants demurred to the declaration, and the circuit court sustained the demurrer. Plaintiffs bring error. Reversed.

J. A. Orr, for plaintiffs in error.

E. H. Bristow, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

BRUCE, District Judge. There is but a single assignment of error in the cause, and that is that the court sustained the demurrer, and dismissed the suit at the cost of the plaintiffs. The demurrer was to the declaration of the plaintiffs, alleging for cause that it did not disclose a contract between Orr & Orr and Brown & Lowndes which renders them liable for the demand sued on in this action. The declaration sets out the following correspondence between plaintiffs and defendants, to wit:

"Columbus, Miss., September 6th, 1893.

"Brown & Lowndes, P. O. Box 854, Baltimore, Md.—Gentlemen: Mr. Dashiell, a member of the city government, has just applied to us, to retain us, if terms were agreeable, to resist the final payment of the coupons and bonds of the city of Columbus, paid to the Columbus, Fayette and Decatur R. R. Co.,—the same on which I brought suit for you and for Messrs. Wilson, Colston & Co. some years ago. Mr. D. informs us that the mayor and aldermen had determined to pay nothing more, and would test the legality of the bonds by suit. Since your Mr. Brown was in Columbus, the writer has severed his connection with the Georgia Pacific, now the Richmond and Danville, and bears a free lance against it. His junior, Sims, is now the assistant secretary of the interior. You perceive the object of this letter. We do not know who the holders of the bonds are, and we desire to communicate with them, so far, at least, to ascertain their wishes as to the attitude they desire us to assume. Will you do us the kindness to confer with them, and notify us if they desire to retain us? With most pleasant recollections of your Mr. Brown, I am, very truly yours,

J. A. Orr,

"For the firm of Orr & Orr."

"J. Wilcox Brown, }
"C. D. Lowndes, } All Members of Baltimore Stock Exchange.
"Frank T. Redwood. }

P. O. Box 65, Telephone Call 547.

"Office of Brown & Lowndes, Bankers & Brokers.

"Stock Exchange Building.

208 E. German Street.

"Baltimore, Sept. 11th, 1893.

"J. A. Orr, Esqr., Columbus, Miss.—Dear Sir: Yours of the 6th inst. rec'd, and our Mr. Brown recalls with pleasure the agreeable relations between himself and your firm. It is a surprise to us to learn that the city proposes to resist the payment of the coupons upon its bonds, and we are obliged to you for giving us the information. We will see the bondholders as soon as we can, and obtain their expression of wish in the matter; but we entertain no doubt of their desiring to have your services, and we shall be obliged if you will kindly hold yourselves ready to represent them. Please be so kind as to let us know what kind of action the city proposes to take, and when. The August coupons were duly paid, and none will be due until February next. This seems a curious time to bring suit, if that is what they propose. Our recollection is that you entertained very positive convictions of the legality of the issue, and we also recall the fact that under your management the citizens, with great unanimity, called on the city officials to pay the coupons. Has there been a change of sentiment?

"Yours, very truly,

Brown & Lowndes."

"Messrs. Brown & Lowndes—Gentlemen: Yours of the 11th inst. received, and we thank you for continued confidence. We have notified our city au-

thorities that we decline representing them, because of your retainer. They passed a resolution declining to pay any more interest on the bonds. So they force the alternative on the bondholders to sue, and suit must be brought on the coupons. You know of the old hostility to the bonds. That has been fanned into life by the panic, and the chances are now better in the courts, than in changing public sentiment, as was done at the time referred to by you.

"Very truly,

Orr & Orr."

It is averred that the defendants and their principals, most of whom lived in the city of Baltimore, were the owners of bonds at the time of this correspondence. The letters are made part of the declaration, and the question is, do they show a contract of retainer between the parties? The nature of a contract such as is claimed here should be borne in mind. The relation of client and lawyer is of a highly confidential character, and the parties had heretofore sustained such relation to each other, with satisfactory results. The plaintiffs were attorneys at law engaged in the active practice of their profession, and ready to be retained by persons who might desire their services. Defendants were informed by the letter of September 6, 1893, "that a member of the city government has just applied to us, to retain us, if terms were agreeable, to resist the final payment of the coupons and bonds of the city." The reply to this letter of September 11, 1893, is not, in terms, a contract of retainer: "We will see the bondholders as soon as we can, and obtain their expression of wish in the matter, but we entertain no doubt of their desiring to have your services, and we shall be obliged if you will kindly hold yourselves ready to represent them." With this letter in their possession, it is difficult to see how they could do otherwise than decline to represent the city. And when, by letter of the 14th, Brown & Lowndes were notified that plaintiffs had declined to represent the city, because of their retainer, to which letter there was no reply, we think they should be estopped to deny the contract. The judgment of the court below is reversed, and a new trial is ordered in accordance with the views expressed in this opinion.

MERCHANTS' & PLANTERS' OIL CO. v. KENTUCKY REFINING CO.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 349.

TRIAL—PROVINCE OF COURT AND JURY—ACTUAL AND EXEMPLARY DAMAGES.

In an action to recover possession of certain railroad cars, and damages for the detention thereof, where both actual and exemplary damages were prayed for, but, under the proofs, no case was made for exemplary damages, *held*, that it was the duty of the judge, when so requested, to withdraw the matter of exemplary damages from the jury, and that his refusal to do so was reversible error, although the verdict was in terms for actual damages; it appearing that there was not sufficient evidence, exclusive of that admitted upon the question of exemplary damages, to sustain the amount of the judgment.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This suit was brought in the court below by the Kentucky Refining Company, a Kentucky corporation, against the Merchants' &

Planters' Oil Company, a Texas corporation, domiciled at Austin, Tex. The suit was instituted May 1, 1893, to recover eight oil-tank cars, of the alleged value of \$625 each, and of the total value of \$5,000, and for the rental of the cars at \$40 per day each. Sequestration of the cars was prayed for, and writ executed May 4, 1893. On the 16th day of May the Kentucky Refining Company executed a forthcoming bond for the property, and the cars were released by the United States marshal to the plaintiff company May 20, 1893. To this claim the defendant in the court below set up a counterclaim and plea in reconvention, in which it was alleged in substance that about the 28th day of February, 1893, the plaintiff refining company, in the usual course of business, purchased from the defendant, the Merchants' & Planters' Oil Company, through Benjamin McLean & Co., acting as brokers, 1,000 barrels of 40 gallons each of yellow prime cotton-seed oil, to be delivered by defendant at its mills in Houston, Tex., in tank cars to be furnished by plaintiff for that purpose, at the price of 50 cents per gallon, amounting to the sum of \$25,000. Defendant (plaintiff in error) alleged that it stood ready at all times to comply with its part of the contract, and to furnish the 1,000 barrels of yellow prime cotton-seed oil; and that, although plaintiff agreed in the contract of sale with defendant to promptly forward tank cars in accordance with agreement, plaintiff neglected, refused, and failed to forward said cars until the expiration of three weeks after the sale was made. Defendant further charged that plaintiff violated his contract of sale and refused to pay as he had agreed, and notified the defendant not to ship the oil; and alleged that soon after making the contract at 50 cents per gallon on the 28th day of February, 1893, the oil market declined to 40 cents a gallon; and charged that by reason of the decline in the price of oil, and for no other reason, the plaintiff refused to accept the oil tendered by the defendant, in accordance with his contract. Amended petitions were afterwards filed by plaintiff, and the claim made by plaintiff was that the defendant had withheld the possession of its oil-tank cars from March 12, 1893, to May 20, 1893, and that the rental value of each car was five dollars a day; that the freight paid upon the cars from Louisville, Ky., to Houston, Tex., and from Houston, Tex., to Louisville, Ky., was \$78.75 per car, or a total of \$1,460. And plaintiff alleged he had been further damaged in the sum of \$500; for executing three bonds, \$50; for telegraphing, \$150; for watching the cars, \$150; attorney's fees, \$1,000; that he had been bound to pay to secure the attendance of J. J. Coffey, of Louisville, Ky., and H. M. Alexander, of Chicago, Ill., as witnesses; and he prayed judgment for \$8,000 actual, and \$50,000 for vindictive or exemplary, damages. The defendant demurred separately to each part and claim set out in the petition, and the demurrers were each and all overruled. Plaintiff's exception to defendant's plea in reconvention was also overruled.

R. S. Lovett, for plaintiff in error.

Samuel R. Perriman, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

BRUCE, District Judge, after stating the facts, delivered the opinion of the court.

Special charge No. 1 asked by defendant, and refused by the court, should have been given. Whether the demurrer and exception taken to the claim made should have been sustained or not, it would seem clear that after the introduction of the evidence no case was made for exemplary damages, and this claim and the evidence in support of it should have been withdrawn by the trial judge from consideration by the jury. It is said in reply to this that, the verdict of the jury being in terms for actual damages, it operated no prejudice to the defendant, but who can say that which was admitted to go to the jury on this subject did not tend to swell the verdict? The charge was at least misleading, and the theory of fraud and deceit, which seemed to be the basis upon which both actual and exemplary damages were claimed, was not sustained by the evidence. The action of the court on the motion for a new trial and the remittitur filed by plaintiff of \$760 must have resulted from a consideration of the evidence in support of the claim of actual damages, and by leaving out of view the evidence introduced and allowed to go to the jury on the question of exemplary damages, there does not seem to be evidence in the record to support the verdict for \$4,260 actual damages, as the jury found it, or \$3,500, the amount to which it was reduced, because the claim for the rental for the time the cars were detained by the defendant was substantially all that was left of the plaintiff's claim. To this there was the plea in reconvention that the oil contracted for was not strictly prime summer yellow, but only prime summer yellow cotton-seed oil, and that the sample furnished was not up to the quality of oil contracted for, by which the defendant became liable for damages in breach of its contract. No complaint, however, is made of the charge of the court in this branch of the case. The judgment should be reversed, with costs, and it is so ordered.

BOOTH v. LIMITED PARTNERSHIP OF J. L. S. HUNT.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 356.

ADMISSIBILITY OF EVIDENCE—ADVERSE CLAIM TO PROPERTY SEIZED IN EXECUTION.

Certain property seized in execution against a partnership was claimed in the name of a limited partnership of which one of the members of the debtor firm was the active member, and the right of property was tried by jury according to the Texas statute. The claimant put in evidence a published notice of the formation of the limited partnership, dated but little over a month before the seizure on execution. Certain questions were then asked by the execution creditor tending to elicit evidence that the person named as special partner had not put any money into the limited partnership. *Held*, that the exclusion of these questions was erroneous, as the execution creditor had a right to show that the alleged limited partnership had no existence in fact, but was a mere cover to save the property from the execution.

In Error to the Circuit Court of the United States for the Western District of Texas.

H. P. Drought, for plaintiff in error.

Thomas H. Franklin, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

BRUCE, District Judge. C. D. Booth obtained a judgment against the partnership of Hunt & Booth and against J. L. S. Hunt and W. H. Booth, the persons comprising the firm of Hunt & Booth. Plaintiff in that judgment had execution dated June 26, 1894, and the marshal executed it by a levy upon the property in controversy in this suit and took it into his possession. The limited partnership of J. L. S. Hunt filed affidavit and bond for trial of the right of property under the statute and law of the state of Texas, and issue was joined between claimant and C. D. Booth, the creditor in execution, and the cause was docketed and came on for trial at the December term of the court. The case was tried by a jury, and the verdict was, "We find at the date of the levy of the execution by the marshal the hay levied on was the property of the limited partnership acting under the firm name of J. L. S. Hunt," and judgment was rendered for the defendant.

The errors assigned are the sustaining of the objection made by the counsel for defendant Hunt to the following question: "Is it not a fact that said J. A. Gray never contributed any actual cash to the limited partnership of Hunt & Gray, and is it not a fact that this \$4,700 alleged to have been contributed by the said J. A. Gray at the time his son (your brother-in-law) was engaged with you in the business was not drawn out at the time the said Lucian Gray left the business, but continued in it?" The second assignment of error is that the court erred in sustaining the objection of counsel for defendant Hunt, by counsel for plaintiff Booth, and in instructing the jury to disregard the answer of the defendant Hunt to said question, the question and answer being as follows: "Is it not a fact that you formed this limited partnership with your father-in-law, J. A. Gray, for the purpose of defeating the claim of C. D. Booth?" The answer to the question was that it was not a fact, but that he formed said partnership for the purpose of protecting the money of J. A. Gray which he had in his business. To which question and answer counsel for the said Hunt then and there objected, for the reason that the court had already ruled that the purposes of the partnership were not to be inquired into in this case, and the court sustained said objection, and held that the purpose of the limited partnership was not and could not be an issue in this case, and instructed the jury to disregard the answer. To which ruling of the court the plaintiff excepted at the time, and assigns the ruling for error here.

It was a trial of the right of property under the law of Texas. The plaintiff sought to show that the property levied on was the individual property of Hunt, and therefore subject to levy under his

execution. The claimant, on the contrary, sought to show that such was not the fact, but that it was the property of the limited partnership, which had been formed and did business under the name of J. L. S. Hunt. Claimant had put in evidence a paper called a "Notice of Partnership," dated San Antonio, May 19, 1894, which stated among other things that the capital contributed by the said J. A. Gray, special partner, is \$4,700 in cash; that the period at which said partnership is to commence is the 19th day of May, 1894, and that it will terminate on the 1st day of June, 1895. The question asked was as to whether Gray had contributed any actual cash to the partnership, and whether the \$4,700 was not contributed to another partnership in which one Lucian Gray had been a partner and had retired. The objection to the question was sustained, and it was not answered. The inquiry was a proper one on the issue being tried at the time, for the answer must have tended either to show the fact of the limited partnership as claimed or to show that in fact, whatever the notice of partnership might state, the facts were otherwise, and, in short, that there was no such partnership as claimed. This is perhaps made clearer when we come to the second question, which was answered, but the objection was sustained by the court and the jury instructed to disregard the answer, and the court held that the purpose of the limited partnership was not and could not be an issue in this case. The facts, however, touching the formation of the alleged partnership were fair matter for inquiry upon the issue made. It was not a mere inquiry as to purposes, but facts were sought, and the facts should have gone to the jury, and the jury, under the direction of the court, could have found partnership as claimed or no partnership, as they should find the facts from the testimony. It is not very clear what was meant by the statement that the purpose of the limited partnership was not and could not be an issue in this case, but it was at least misleading, because it assumed as a fact the existence of the limited partnership, which was the matter which the plaintiff in execution contested, and had a right to contest, in the case. The issue was not merely if there was a limited partnership on paper, but one in fact and law, which owned the property in question, and the ruling of the court narrowed the inquiry, and in fact took from the jury the question which the plaintiff in execution and the claimant, under the law of Texas, had a right to have tried, and upon which both sides tendered evidence. This was not a question of the settlement of a partnership account, but the inquiry was to the question whether the limited partnership existed as claimed or whether it did not, and whether the claim was not in point of fact a mere cover to protect Gray in fraud of the rights of the plaintiff in execution. The judgment of the circuit court should be reversed, and the cause remanded for further proceedings in conformity with this opinion.

ALABAMA GREAT SOUTHERN R. CO. v. O'BRIEN.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 363.

1. TRIAL—INSTRUCTIONS—REQUESTED CHARGES.

The court is not bound to give requested charges the substance of which has been accurately and soundly stated in the general charge.

2. SAME—REFUSAL TO GIVE GENERAL CHARGE.

Refusal to give a general charge for defendant is not erroneous where there is proof tending to support plaintiff's case, although the preponderance of proof may appear to be against him.

In Error to the Circuit Court of the United States for the Northern District of Georgia.

This was an action by Pat O'Brien against the Alabama Great Southern Railroad Company to recover damages for personal injuries sustained while in its employ as an engineer by jumping from his engine in order to avoid a collision. The jury returned a verdict for plaintiff in the sum of \$4,500, and judgment was entered thereon by the court. Defendant brings error.

Albert Howell, Jr., for plaintiff in error.

Burton Smith, for defendant in error.

Before McCORMICK, Circuit Judge, and BRUCE, District Judge.

PER CURIAM. The assignment of errors points out 12 grounds of alleged error in the action of the trial court, 11 of which relate to the refusal to charge the jury as requested by the defendant. Most of the requested charges are substantially embraced and more accurately and soundly stated in the court's charge. The others, when reduced to their essential extract, make a request for the general charge for the defendant. While there is possibly a preponderance of proof against plaintiff's contention on the single vital issue of fact joined by the parties, it is clear to us that there was proof tending to support the case of the plaintiff. There was, therefore, an issue for the jury. As we have already said, the matter of the requested charges, as far as it was proper for any of them to have been given, was embraced in the charge of the court, and therefore should not have been repeated in the language of counsel, colored, more or less, as such language always is, by the bias of advocacy. The judgment of the circuit court is affirmed.

GROVES et al. v. SENTELL.

(Circuit Court of Appeals, Fifth Circuit. June 4, 1895.)

No. 383.

1. WRIT OF ERROR—REVIEW WHERE JURY IS WAIVED—PLEA OF RES JUDICATA.

A judgment recited that the case was heard on an exception of res judicata, and that, a trial by jury being waived, the same was submitted to the court, "whereupon, considering the law and the evidence to be in favor of

the defendant and against the plaintiffs, the court finds that the exception of *res judicata* is sustained." And the judgment accordingly sustained the exception and dismissed the action. *Held*, that it was at least doubtful, in view of Rev. St. § 700, whether there was anything in this action of the court which could be reviewed on writ of error.

2. *RES JUDICATA*.

An action at law having been instituted to recover a sum of money, the defendant filed a bill in the nature of a bill of interpleader, deposited in court a sum of money, and obtained an injunction pendente lite against the prosecution of the action at law. The decree which was finally entered in the chancery suit was reversed by the supreme court, which gave specific directions as to the decree to be entered below, requiring payment out of the fund in court of the amount demanded in the action at law, and directing personal judgment for costs alone, although the fund was insufficient to pay full interest to date. A decree was entered accordingly in the circuit court, ordering the fund to be paid over to defendants. From this decree they took an appeal to the circuit court of appeals on the ground that it failed to order complainant to pay into court an additional amount to meet the full interest. The decree, however, was affirmed, whereupon defendants filed a supplemental petition in their action at law, asking judgment for an additional amount of interest. *Held*, that the decree in the equity suit was a complete bar to this demand.

In Error to the Circuit Court of the United States for the Eastern District of Louisiana.

This was an action at law by Martha Groves and William J. Groves against George W. Sentell to recover \$4,873, with interest at 8 per cent. from March 5, 1884. Shortly after the institution of the action, the defendant, G. W. Sentell, filed a bill in the nature of a bill of interpleader against the plaintiffs and certain third persons, and at the same time deposited in the registry of the court \$5,743.46, being the entire amount sued for in the action at law, with interest to date. Subsequently an injunction pendente lite was issued restraining defendants from prosecuting this action at law. Afterwards such proceedings were had that a decree was entered adjudging most of the fund in court to be paid to one of the other parties brought in by the bill of interpleader. From this decree an appeal was taken by Martha Groves and others to the supreme court of the United States. That court reversed the decree, and entered a decree as follows: "The decree is reversed, and a decree is rendered in favor of Martha Groves and William J. Groves, directing the payment out of the fund of \$4,873, with interest at 8 per cent. from March 5, 1884, until paid, and costs of this and the court below." 153 U. S. 465, 14 Sup. Ct. 898. The decree entered in the court below pursuant to the mandate, adjudged that the whole amount in the registry should be paid to Martha Groves and William J. Groves, and that the complainant and other parties named should pay the costs. The amount in the registry was insufficient to pay the original demand with all the interest thereon to the date of the decree; and, therefore, from the decree so entered, Martha and William J. Groves took an appeal to the circuit court of appeals, assigning as error that complainant was not adjudged to fill up the registry with an amount sufficient to satisfy the balance of interest and to pay counsel fees. The circuit court of appeals held, however, affirming the decree, that, in view of the specific nature of the supreme court's directions, the circuit court could do nothing but enter the decree which had been entered, and that it must be presumed that the supreme court had passed upon all the issues, for which reason the circuit court had no power to order complainant to pay additional money into court. 66 Fed. 179.¹ The decree was accordingly ordered to be executed, which was done, and the money in the registry was paid to the Groves. Thereafter they filed a supplemental petition in their action at law, praying judgment for \$3,494.60, as interest still due on the original demand. This petition was met by the defendant in that action by exceptions, which were based upon the ground that the injunction pendente lite was still pend-

¹ 13 C. C. A. 586.

ing, and, if it was not, that the decree in chancery determined all the issues in the action at law, and that the question of interest was, therefore, res judicata. A jury was waived, and the cause was heard by the court on the issue of res judicata. The court, upon consideration, sustained the exception, and entered a judgment to that effect, and dismissing the action. To review this judgment, complainants have sued out this writ of error.

W. S. Benedict, for plaintiffs in error.

E. M. Hudson, for defendant in error.

Before McCORMICK, Circuit Judge, and BRUCE, District Judge.

PER CURIAM. The errors assigned are: "(1) The court erred in maintaining the plea of res judicata herein filed to the supplemental petition of plaintiffs. (2) The court erred in rendering judgment dismissing the plaintiffs' suit." It is manifest that, if the first is not well taken, the second falls with it. The judgment sought to be reviewed is in these words:

"This cause came on to be heard on the exception of res judicata, and, a trial by jury being waived, the same was submitted to the court; whereupon, considering the law and the evidence to be in favor of the defendant and against the plaintiffs, the court finds that the exception of res judicata is sustained; and it is therefore ordered, adjudged, and decreed that the said exception of res judicata be sustained, and the plaintiffs' suit dismissed, with costs."

It is at least doubtful whether there is anything in this action of the court subject to review by an appellate court. Rev. St. § 700; *Norris v. Jackson*, 9 Wall. 125; *Dirst v. Morris*, 14 Wall. 484; *Cooper v. Omohundru*, 19 Wall. 65; *Tyng v. Grinnell*, 92 U. S. 467; *City of Key West v. Baer*, 13 C. C. A. 572, 66 Fed. 440. If, however, this case does not come under the authority of the cases just cited, and we are authorized and required to review the action of the circuit court sought to be reversed, an inspection of the record and of the opinion of the supreme court in *Groves v. Sentell*, 153 U. S. 465, 14 Sup. Ct. 898, and of this court in *Groves v. Sentell*, 13 C. C. A. 386, 66 Fed. 179, shows that the circuit court found correctly on the plea of res adjudicata, and the judgment is therefore affirmed.

BRIDGEPORT ELECTRIC & ICE CO. v. MEADER.

(Circuit Court of Appeals, Fifth Circuit. May 21, 1895.)

No. 358.

SALE—CONSTRUCTION OF CONTRACT—LIEN FOR PURCHASE PRICE—JUDGMENT LIEN—JUDGMENT AFFIRMED BY DIVIDED COURT.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

This was a bill by A. B. Meader, trustee of the Blymyer Ice Machine Company, a corporation of Ohio, against the Bridgeport Electric & Ice Company, an Alabama corporation, to compel defendant to give a mortgage, pursuant to the terms of a contract, for a balance due upon the purchase price of an ice machine sold to defendant by the Blymyer Ice Machine Company; and, in case such mortgage was not given, to declare and establish a lien and have

the same foreclosed. The circuit court entered a decree for complainant, from which defendant has taken this appeal. The facts were in substance as follows: On May 7, 1891, a contract was made between the Blymyer Ice Machine Company, and one A. L. Soulard for the sale of an ice machine. The defendant corporation was not then organized, nor was it organized until September of the same year. Soulard, however, was one of its promoters, and afterwards became its president, and he signed the contract by his own name "for Bridgeport Electric & Ice Co." The stipulated price of the machine was \$23,200, to be paid as follows: "\$5,750 on arrival at Bridgeport, Ala., of the machine (of not less than three car loads); \$5,750 when the machine is in successful working order and has stood a fifteen days test, which test shall be considered successful only in the event that the machine shall produce thirty thousand pounds of good merchantable ice per day for fifteen days, said machinery then to be accepted by the party of the second part; the remainder in negotiable notes with interest at 6 per cent. per annum from date of delivery, to be secured by mortgage on the machine, buildings, and real estate on which the machine is erected, or with personal indorsement satisfactory to the party of the first part, payable as follows: one for \$5,850 at four months, and one for \$5,850 at eight months." The ice machine was put in according to the contract, and, after a test, was accepted in April, 1892, and the purchase money was paid, excepting deferred payments amounting to \$10,950. On October 10, 1892, a resolution was passed by the directors of the defendant company to provide for this balance by giving five promissory notes of \$2,190 each, payable in three, five, seven, nine, and eleven months, respectively, to be secured by \$12,500 of 6 per cent. mortgage bonds of defendant company, being part of a proposed issue of \$25,000 in bonds. In the meantime the Blymyer Ice Machine Company had made an assignment for the benefit of creditors; and the assignees having resigned their trust, the complainant, A. B. Meader, was appointed trustee. The notes thus authorized were received by complainant, but the bonds to secure them were never delivered, nor was the personal security contemplated by the original contract ever given.

The bill was filed on January 27, 1893, and in it complainant alleged that he accepted the notes just referred to upon the express condition that the mortgage bonds to secure their payment should be delivered to him on or before November 5, 1892, and that on December 14, 1892 he notified defendant that he refused to accept the notes. In the bill itself the notes were tendered back to defendant. The bill further alleged that defendant company now proposes to issue \$25,000 of bonds, to be secured by a first mortgage upon its entire property, and to give complainant \$12,500 of such bonds as security, but that complainant declined to receive the same, and that the issuance of such bonds, secured as stated, would be in violation of defendant's contract with the Blymyer Ice Machine Company, whereby a first mortgage was agreed to be given to it. The prayer of the bill was as follows: "And your orator prays that said defendant be required to execute to it a first mortgage upon its said plant as of the date when the balance of purchase price of said ice-making machine was due, and, in the event of failure to execute said mortgage, that your orator be decreed to have a lien for the said balance, with interest thereon, upon the said plant prior to all others, and that said plant be sold under the order and decree of this court for the payment of said balance due, as aforesaid, for the said ice-making machine. And your orator further prays an injunction restraining and enjoining the defendant from incumbering its said property with any mortgage or other lien or incumbrance whereby the mortgage hereby claimed in favor of your orator may be in any wise impaired, defeated, hindered, or delayed. And your orator further prays for such other and further relief as the equities of the case may entitle him to."

Pursuant to the prayer of the bill, a restraining order was granted to prevent defendant from executing the bonds and mortgage, and was continued, from time to time, as a preliminary injunction. On the 28th of January, 1893, the day after filing the bill, complainant also filed, on the law side of the court, a complaint for the recovery of the balance due under the contract, and on April 26, 1893, a judgment was obtained by consent. Afterwards, a supplemental bill was filed in this suit, averring the recovery of the judgment and alleging that a certificate thereof had been filed in the office of the probate

judge of Jackson county, Ala., whereby complainant acquired a lien upon the defendant's property.

On March 18, 1893, a bill was filed in the state chancery court of Jackson county by the Bridgeport Land & Improvement Company against the defendant, the Bridgeport Electric & Ice Company, praying the appointment of a receiver, and a receiver was accordingly appointed by that court. Subsequently, Meader obtained leave of the state court to enforce his judgment at law by execution, notwithstanding the existence of the receivership. An execution sale was accordingly had, but, on application to the supreme court of Alabama for a writ of mandamus, that court ordered the sale to be vacated and annulled. Such further proceedings were had in the present cause that on December 18, 1894, a final decree was entered, by which it was declared, among other things, "that the complainant is entitled to a lien for the balance that is due him, as shown by the judgment, copy of which is made an exhibit to the supplemental bill in the case, upon the property, real and personal, hereinafter particularly described. Said liens relate back to and commence from the date when the original contract was made, on May 7, 1891." The decree ordered that, in case the amount of the indebtedness, as shown by the judgment, with interests and costs, was not paid within 30 days from enrollment of the decree, the property should be sold. From this decree the present appeal was taken by the Bridgeport Electric & Ice Company, with the following assignment of errors: "(1) The court erred in deciding and decreeing that the said complainant has a lien on the said property described in the said decree. (2) In holding that the contract signed by Soulard was an equitable mortgage on the property described in the decree. (3) In holding and decreeing that the complainant was entitled to relief, and in not dismissing the bill. (4) In not holding and deciding that the complainant had abandoned the contract sought to be enforced in this suit. (5) In not deciding that the complainant had waived his right, if he had any, to enforce said contract. (6) In not holding that the said bill was one for the specific performance of a contract, or that the said contract was so uncertain that it could not be enforced. (7) In not decreeing that the defendant have leave instead of giving a lien or mortgage to give 'satisfactory security.' (8) In holding that an agreement to give a mortgage made by the alleged agent of an intended corporation was binding on the corporation when formed, before its stockholders had authorized it or ratified it at a meeting called for that purpose. (9) In holding that the contract sued on was a contract that bound the defendant as a valid mortgage."

D. D. Shelby and W. L. Martin, for appellant.

Milton Humes, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.

BRUCE, District Judge, sat on the argument, but finding that in the course of the case in the circuit court he had from time to time made important orders, recused himself. The other judges divided in opinion. The decree appealed from is affirmed.

INTERSTATE COMMERCE COMMISSION v. ALABAMA MIDLAND RY. CO. et al.

(Circuit Court, M. D. Alabama. July 9, 1895.)

No. 153.

1. REGULATION OF INTERSTATE COMMERCE—LONG AND SHORT HAUL.

The prohibition against charging a greater compensation, in the aggregate, for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance, over the same line, in the same direction, the shorter being included in the longer distance, does not apply, ex-

cept where the charge for transportation is made under substantially similar circumstances and conditions for the shorter as for the longer distance.

2. SAME.

The courts are left to decide what are "substantially similar circumstances and conditions." Neither the congress, in making the law, nor the courts, in construing it, can fail to note the element of competition as it enters into the industrial life of the people, and perhaps in no department is it more important than in the carrying trade of the country. It could not have been the purpose of congress to ignore or to regard with disfavor the competing forces and interests, which, in many cases, result in so much benefit to so many classes of people.

3. SAME.

In the presence of competing lines of transportation from and to distant points, the circumstances and conditions are not the same as in cases where there are no questions of competing lines, and no questions of reduced rates of transportation between different and distant points, to be considered.

4. SAME—"BASING POINTS" OR "TRADE CENTERS."

While there may be cases where "basing points" or "trade centers" are fixed and determined arbitrarily, for the purpose of building up one locality at the expense of another, in violation of the spirit and provisions of the act of congress, it is common knowledge that Montgomery, Ala., was a distributing point before the railroad system was known, and when there were no trunk lines of railroad such as are now competing for a share of her business.

5. SAME.

Such basing points or trade centers as Montgomery, Ala., and Columbus, Ga., are necessarily determined by competition between lines engaged in, and seeking a share in, the carrying trade of the country. Water transportation is doubtless a large factor in the determination of such basing points. Other considerations may enter into the matter, but the real source of it must chiefly be found in the competition between the great lines of transportation, reaching out, as they do, for a share in the commerce of the country, and, as a general rule, cheapening the necessities of life brought to every man's door.

6. SAME—"COMBINATION RATES."

A "combination rate" (made by adding to a competitive through rate, charged between a point of shipment and a basing point, a noncompetitive local rate charged between such basing point and a local station beyond) is not violative of the act to regulate commerce. In this case, to compel a reduction of the local rate to the same rate per ton per mile as the through rate would not pay operating expenses, and would be ruinous to the Alabama Midland Railway Company.

7. SAME—"UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE."

The words "undue or unreasonable preference or advantage," contained in the third section of the act to regulate commerce, plainly imply that every preference or advantage is not condemned, but such, only, as are undue or unreasonable.

W. C. Oates, L. A. Shaver, and H. D. Clayton, U. S. Dist. Atty., for complainants.

Roquemore & White, for Central Railroad & Banking Co. of Georgia and others.

A. A. Wiley, for Alabama Midland Ry. Co. and others.

Ed. Baxter, for Louisville & N. R. Co.

BRUCE, District Judge. The complaint of the Board of Trade of Troy, Ala., against the Alabama Midland Railway Company and the Georgia Central Railroad Company and their connections, is that there is in the rates charged for transportation of property

by the railroad companies mentioned, and their connecting railroads, a discrimination against the town of Troy, in violation of the terms and provisions of the interstate commerce act of congress of 1887. It is specified that the Alabama Midland and the Georgia Central and their connecting roads discriminate against Troy, and in favor of Montgomery, in charging and collecting \$3.22 per ton on phosphate rock shipped from the South Carolina and Florida fields to Troy, and only \$3 per ton on such shipments to Montgomery, the longer distance point; and that the rock carried from such fields to Montgomery is hauled through Troy, so that the shorter distance is included in the longer distance. To the same purport is the next specification, which is as to cotton, viz.: That the rates on cotton established by said two roads and their connections on shipments to the Atlantic seaports, Brunswick, Savannah, and Charleston unjustly discriminate against Troy, and in favor of Montgomery, in that the rate per hundred pounds from Troy to points east is 47 cents; that the rate from Montgomery to same points east, the longer distance point, is only 40 cents; and that such shipments from Montgomery, over the road of the Alabama Midland, pass through Troy. Specification 4 is that the Alabama Midland and the defendant carriers connecting and forming lines with it from Baltimore, New York, and the East, to Troy and Montgomery, charge and collect a higher rate on shipments of class goods from those cities to Troy than on such shipments through Troy to Montgomery; the latter being the longer distance point by 52 miles. Again, that the rates on class goods from western and north-western points, established by the defendants forming lines from those points to Troy (stating it as the complainants do), are relatively unjust and discriminating, as against Troy, when compared with the rates on such lines to Montgomery and Columbus; that Troy is unjustly discriminated against in being charged on shipments of cotton, via Montgomery, to New Orleans, the full local rate to Montgomery, by both the Alabama Midland and the Georgia Central. There are other specifications, but these are deemed sufficient for the consideration of the questions in the cause.

These specifications bring under consideration what is known as the "long and short haul clause," as well as other clauses of the act; and the claim and argument is that the difference in the charge for the transportation of property from points east or west to Montgomery and Troy is discrimination against Troy, and in violation of section 4 of the act, which provides:

"That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included in the longer distance."

It may be conceded that the defendant railroad companies, the Midland and the Georgia Central, in cases of the transportation of property from eastern points, through Troy, to Montgomery, or from Montgomery to points east, as claimed, fall within the specifi-

cation of the complaint, and bring the case within the inhibition of the fourth section just quoted, if the charge for transportation is made "under substantially similar circumstances and conditions" for the shorter as for the longer distance. In the case of transportation of property from eastern or northeastern points (New York, Philadelphia, Baltimore, etc.), whether it is all rail, or by water to Savannah, and then by rail to Montgomery, through Troy, on the Midland, or from northwestern points (such as Cincinnati, Louisville, St. Louis, etc.), through Montgomery, to Troy, there is what may be called a "long haul"; and for this haul there are competing lines, all rail or all water, in some cases, or part by rail and part by water, and this gives rise to through rates, and through rates give rise to "basing points" or "trade centers," which, in the very nature of things, are determined by questions of competition between lines engaged in, and seeking a share in, the carrying trade of the country. Water transportation is, doubtless, a large factor in the determination of these basing points. Other considerations may enter into the matter, but the real source of it must chiefly be found in the competition between our great lines of transportation, reaching out, as they do, for a share in the commerce of the country, and, as a general rule, cheapening the necessities of life brought to every man's door. Doubtless, there may be cases where these basing points or trade centers are fixed and determined arbitrarily, and where the motive for it may be a purpose to build up one locality at the expense of another, in violation of the spirit and provisions of the act of congress; but is that the case we are dealing with here? It is common knowledge—it is history—that Montgomery was a distributing point before the railroad system was known, and when there were no trunk lines of railroad, such as we now have, competing for a share of her business. Troy is a city of about 4,000 or 5,000 population, with two railroads, one of which has been but recently constructed. It is not a large distributing point; and it is not on any navigable water course. The complaint would almost seem to be that the railroad companies had not made her a basing point; and that Montgomery, west of her, on the Alabama river, and Columbus, east of her, on the Chattahoochee river, being basing points, this operated to her prejudice as a business point, which it no doubt does; and this is, perhaps, her real cause of complaint.

But the question is, has the act of congress been violated, and what is meant by the words "under similar circumstances and conditions"? These words are first used in the statute in section 2, which provides:

"That if any common carrier subject to the provisions of this act shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this act, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful."

This section of the statute is directed against special rates, rebates, drawbacks, or other devices, and has no application, directly at least, to the case at bar; but it shows the care and caution of the congress when it was dealing with such objectionable devices, calculated to favor particular persons or localities, and which might put almost every merchant or business locality at the mercy of corrupt management of the transportation lines. It may be that the caution used in framing the statute is on account of the inherent difficulty there is in the establishment of rules to govern all cases; and the courts are left to say what are "substantially similar circumstances and conditions" in any given case.

Neither the congress, in making the law, nor the courts, in construing the law, can fail to note the element of competition as it enters into the industrial life of the people; and, perhaps, in no department is it more important and controlling than in the carrying trade of the country. It could not have been the purpose of congress to ignore, or even to regard with disfavor, the competing forces and interests, which, in many cases, result in so much benefit to so many classes of the people. It has long since passed into a trite saying that "competition is the life of trade"; and, in the presence of competing lines of transportation from and to different points, the courts must see that the circumstances and conditions are not the same, as in cases where there are no questions of competing lines and reduced rates of transportation between different and distant points to be considered. In the case at bar there are questions of competing lines; and the proposition of the complainant is that, notwithstanding this, the circumstances and conditions are substantially the same; and that it is in violation of the fourth section of the statute to charge more for the short haul to Troy, the shorter distance, than to Montgomery, the longer distance point. This argument proceeds upon the view that distance is the controlling factor on a question of rate for transportation of property; and yet these other matters may be, and often are, more controlling than even distance itself. The long haul rate, as a rule, is favorable to shippers, and for an obvious reason: It involves less handling of the property transported, and rates per ton per mile for long hauls may be, and often are, inadequate for the shorter hauls. The purpose of congress could not have been to disregard this distinction, which is well understood and accepted, in questions of transportation.

It may be observed that the third section of the act does not contain the words "under substantially similar circumstances and conditions," and declares it to be unlawful "to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." The words "any undue or unreasonable preference or advantage" plainly imply that every preference or advantage is not condemned, but such, only, as

are undue or unreasonable. In cases where there are no questions of through rates to basing points or trade centers, it might not be difficult to apply the law to what might clearly appear to be unjust and unreasonable preference and advantage, and so leave a wide field for the operation of the statute.

The evidence shows that in cases of transportation of property from northwestern points (such as St. Louis, Cincinnati, or Louisville) to Troy, Ala., the shipments come to Montgomery, and from there to Troy; that the rate is so much from such shipping points to Montgomery; that the Alabama Midland Railroad charges what is called the "local rate" from Montgomery to Troy; and this is complained of. The Troy parties claim that they shall not only have the advantage of the reduced rates between the shipping points and Montgomery, but that they are entitled to such reduced rates from Montgomery to Troy. The same thing is claimed on cotton shipped from Troy to New Orleans, via Montgomery, which is a combination of a through rate to New Orleans from Montgomery, plus the local rate from Troy to Montgomery. The evidence shows that such a rate would be absolutely ruinous to the Midland; that it would not pay operating expenses; and, besides, there is no section of the law under which such contention can be maintained.

Again, in this connection, and by way of illustration, it may be asked, by what right or by what rule shall a common carrier, whose duty it is to serve the public impartially, be required to carry the goods shipped by a Cincinnati merchant, via Montgomery, to his customer at Troy, Ala., for a less rate than is charged upon goods of the same class shipped by a Montgomery merchant to his customer at Troy, Ala.? And does not the contention here that Troy parties are entitled to the same rates per ton per mile from Montgomery to Troy that they get from the shipping points in the Northwest to Montgomery invoke a violation of the spirit, if not the letter, of the law itself, and show that such contention cannot be sustained? There is a suggestion, however, that because the transportation is under a common control or arrangement for a continuous carriage or shipment, and under a through bill of lading, this operates, under the act, upon the rates that the roads participating in the carriage shall charge. Such a view as that cannot be maintained under any section of the act. By the first section of the act, it (the act) is made applicable to cases where the transportation is under a common control or management,—a point which has not and could not be questioned. But that such clause eliminates from the fourth section the words "under substantially similar circumstances and conditions" cannot be and is not contended.

In any aspect of the case, it seems impossible to consider this complaint of the Board of Trade of Troy against the defendant railroad companies, particularly the Midland and Georgia Central Railroads, in the matter of the charge upon property transported on their roads to or from points east or west of Troy, as specified and complained of, obnoxious to the fourth or any other section of the interstate commerce act. The conditions are not substantially the

same, and the circumstances are dissimilar, so that the case is not within the statute.

The case made here is not the case as it was made before the commission. New testimony has been taken; and the conclusion reached is that the bill is not sustained; that it should be dismissed; and it is so ordered.

In re MINOR.

(Circuit Court, D. West Virginia. July 10, 1895.)

CIGARETTES—LICENSE TO SELL—INTERSTATE COMMERCE—POLICE REGULATION.

Act W. Va. Feb. 21, 1895, amending and re-enacting Code, c. 32, § 66, so as to provide that a certain license fee shall be paid for selling cigarettes at retail, so far as it applies to cigarettes imported from another state and sold by the importer in West Virginia in the original package, and to cigarettes manufactured in another state and by the manufacturer sent into West Virginia in the original package, for sale by the agent of the manufacturer, and so sold in such package by such agent, is not an exercise of the police power of the state, but a regulation of interstate commerce, and therefore void.

Petition by Frank A. Minor for writ of habeas corpus.

W. W. Fuller, for petitioner.

U. S. G. Pitzer, for the State.

GOFF, Circuit Judge. The petitioner, Frank A. Minor, claims that he is illegally deprived of his liberty, and prays that he may be discharged from custody. The facts, as agreed by counsel, are as follows: The petitioner, a citizen of the United States, residing at Martinsburg, in the state of West Virginia, has been for some years past engaged in the business of selling, in said city, cigarettes at retail. On the 21st day of February, 1895, the legislature of the state of West Virginia passed an act entitled "An act to amend and re-enact sections one, two, sixty-six and eighty-four of chapter thirty-two of the Code," which act requires license fees or taxes to be paid for carrying on the different trades, acts, and occupations mentioned therein. Section 66 of said act, so amended, is as follows: "On every license to sell at retail, domestic wines, ale, beer, or drinks of like nature, one hundred dollars, or to sell at retail cigarettes or cigarette paper, five hundred dollars." On the 23d day of May, 1895, petitioner purchased in the state of New York, from the American Tobacco Company, a corporation organized under the laws of the state of New Jersey, and doing business in the city and state of New York, 50 packages, each containing 10 cigarettes, and directed that the same be shipped to him at Martinsburg, in the state of West Virginia. The cigarettes so purchased were manufactured by said company at its factory in New York, and packed by it, in said factory, in pasteboard boxes, each box containing 10 cigarettes. Upon each of said packages was printed the name of the manufacturer, the brand of the cigarettes contained therein, the number of the internal revenue collection district, and the name of the state where the factory was located, the number of

cigarettes contained in the box; the caution notice required by the laws of the United States, and all the other requirements of the laws and regulations of the United States relating thereto, and, also, to each box was attached the internal revenue stamp required for 10 cigarettes. The said company shipped said cigarettes to the petitioner at Martinsburg, from its factory in New York, in the original packages, without case or covering of any kind about any of the packages, each being loose and separate from every other, and petitioner so received them, and offered them for sale at his place of business in Martinsburg, from which he on the 23d day of May, 1895, sold one of such packages to L. D. Gearhardt. The said American Tobacco Company, also, on the 23d day of May, 1895, shipped from its factory in New York to the petitioner in Martinsburg, at his request, on consignment to be sold at retail by him, as the agent of said company, 50 boxes or packages, each containing 10 cigarettes, which had been manufactured at such factory in New York, and so packed therein as before mentioned. The cigarettes so shipped on consignment were received by petitioner at Martinsburg, exposed to sale by him in said city, and one package sold by him as such agent, on said 23d day of May, to said customer Gearhardt. The cigarettes so sold by petitioner—those owned by him and those held by him as the agent of said company—were sold in the original packages as received from the factory in New York. The petitioner had no state license to sell cigarettes at retail, nor had he paid or tendered any fee or tax for such license. On the 23d day of May, 1895, petitioner was, upon complaint of said Gearhardt, on a warrant issued thereon by P. R. Harrison, a justice, arrested by one William M. Hollis, the officer to whom said warrant was directed, and by him taken before said justice, by whose direction said petitioner is held in custody, charged with the violation of said section 66, in so making sale of said two packages of cigarettes. On due application the writ of habeas corpus was issued, to which proper return has been made, the body of the petitioner produced in court, and full argument submitted on the questions involved.

It is insisted that Minor is unlawfully detained in custody by said officers, because that the said act of the legislature of the state of West Virginia under which he was arrested and is now held is, so far as it applies to the sales of the cigarettes so made by him, in violation of clause 3 of section 8 of article 1 of the constitution of the United States; and that it, so far as said sales are concerned, is in contravention of clause 2 of section 10 of article 1 of said constitution; and that said legislation, so far as it concerns the business of selling and dealing in cigarettes in the original packages as imported by him into the state of West Virginia from another state, is unconstitutional and void. The questions raised by the petition and return thereto, so fully and ably discussed by counsel, and now to be disposed of by the court, while of great interest and importance, are not new, and their disposition has been plainly indicated by the decisions of the supreme court of the United States, in cases involving transactions similar in character to those now presented.

From the earliest cases on this subject to those recently decided it has been held that legislation by the states of the Union, relating to the regulation of commerce, is not allowable, and that where a uniform system is necessary between the states the congress of the United States has the exclusive power to regulate it. Interstate commerce, being the purchase, exchange, transportation, and sale of commodities in and between the different states, is national in character, and can only be carried on successfully when conducted by and under a uniform system of laws and regulations. The power of the congress over such commerce is as complete as it is over foreign commerce. Where congress has not legislated concerning a particular subject-matter of interstate commerce, or has not authorized the states to do so, it thereby indicates that its intention is that such commerce shall be free, untrammelled by either federal or state laws. This subject was again fully discussed and explained in the case of *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, in which the case of *Peirce v. New Hampshire*, 5 How. 504, theretofore cited to the contrary of the opinion then announced, was expressly overruled. The rule now well established is clearly stated by Mr. Justice Field in *Bowman v. Railway Co.*, 125 U. S. 465, 507, 8 Sup. Ct. 689, 1062, in these words: "Where the subject upon which congress can act under its commercial power is local in its nature or sphere of operation, such as harbor pilotage, the improvement of harbors, the establishment of beacons and buoys to guide vessels in and out of port, the construction of bridges over navigable rivers, the erection of wharves, piers, and docks, and the like, which can be properly regulated only by special provisions adapted to their localities, the state can act until congress interferes and supercedes its authority; but where the subject is national in its character, and admits and requires uniformity of regulation, affecting alike all the states, such as transportation between the states, including the importation of goods from one state into another, congress can alone act upon it and provide the needed regulations." It follows that if congress has not legislated on any special subject relating to commerce, and the enactments of a state regarding the same are questioned, the only matter to be determined by the courts is, does the state legislation complained of amount to a regulation of commerce? If so, it is unconstitutional and void. This result is clearly demonstrated by the following cases: *Cooley v. Board*, 12 How. 299; *State Freight Tax Case*, 15 Wall. 232; *Welton v. Missouri*, 91 U. S. 275; *Henderson v. Mayor*, 92 U. S. 259; *Railroad Co. v. Husen*, 95 U. S. 465; *Cook v. Pennsylvania*, 97 U. S. 566; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Lyng v. Michigan*, 135 U. S. 161, 10 Sup. Ct. 725. That the power of congress over the entire subject of interstate commerce is supreme and exclusive is now without question, and, so far as that matter is concerned, state lines are obliterated and state laws inoperative. The reason for this is evident, and its imperative necessity was shown by the condition of affairs relating to commerce, existing when the convention that framed the constitution of the United States assembled, as all familiar with our history well know.

The argument submitted by counsel for the state, that the legislation by virtue of which petitioner was arrested is but the proper exercise by the state of its police power, is, I think, without merit. That which does not belong to commerce may be regulated by the state under its police power, but that which does belong to commerce falls within the exclusive control of the United States. This act of the West Virginia legislature inhibits the sale by the petitioner (unless he first pays a tax for the privilege so to do) of the original packages of cigarettes imported by him into the state of West Virginia from the state of New York, while they are still articles of commerce, and this demonstrates, by the authorities I have referred to, that it is not a proper use of the police power. The right to purchase in one state carries with it the right to sell the article, so purchased, in another state, regardless of state laws, and independent of local interests and jealousies. Were this not so, the commerce between the states could be, and in many instances would be, entirely destroyed. It is only by the sale of the imported article that it becomes mingled with the other property within the state. The right of the state to enact police laws is not questioned, has always been conceded, and the necessity for the same is apparent. The police power extends to such legislation as is required to protect the comfort, health, and lives of all persons within the jurisdiction of the state, and also to care for the property located within the same. It justifies the adoption of regulations to prevent the commission of crime, and the spreading of disease. It authorizes rules for the suppression of vice and of the various kinds of social evils, for the prohibition of lotteries, gambling, and nuisances. Whatever this power may include, I think it is clear that it does not embrace a subject confided by the constitution exclusively to congress. *Railroad Co. v. Husen*, 95 U. S. 465; *Passenger Cases*, 7 How. 283; *Henderson v. Mayor*, 92 U. S. 259; *Crutcher v. Kentucky*, 141 U. S. 47, 11 Sup. Ct. 851.

The suggestion that it was the intention of the legislature to restrict the sale of cigarettes within the state of West Virginia is foreign to the case before me. The state makes no effort to prevent the importation or to prohibit the sale of cigarettes; on the contrary, it invites the one and protects the other, claiming from those who accept the privilege tendered the payment of revenue for its own purposes. If the congress should legislate concerning cigarettes as it has about liquors, in connection with the police laws of the states, and the legislature of West Virginia should then, regarding the use of cigarettes as injurious to the health of the citizens of the state, prohibit their sale within its limits, the question then presented would be in the line of the argument of counsel, and very different from the one I now consider. After the decision in *Leisy v. Hardin*, supra, in which a statute of the state of Iowa prohibiting the sale of intoxicating liquors except as provided therein was, as to a sale of liquors in the original packages by the importer, held to be inoperative, because in effect a regulation of commerce, the congress passed the act of August 8, 1890, by virtue of which all liquors imported into a state come within the provisions of the police laws

enacted by the state. But this legislation by congress applies only to liquors, and as to all other commodities the exclusive right of the United States to legislate concerning them in their relation to commerce is retained. It will be kept in mind that the state, by this legislation, is not taxing the property, imported by the petitioner, as it does other property within its limits, by a general and uniform tax rate, but that this tax is imposed for the privilege of selling the imported articles, and is, as to them, special and additional. A tax imposed on the assessed value of the cigarettes, after they have commingled with and become part of the common property within the state, would not be a regulation of commerce, and would not be subject to the objections alluded to; but a tax on a license to sell goods is simply a special tax on the goods so authorized to be sold. I reach the conclusion that said section 66, as amended in the act of the legislature of the state of West Virginia, passed February 21, 1895, entitled "An act to amend and re-enact sections one, two, sixty-six and eighty-four of chapter thirty-two of the Code," so far as it applies to cigarettes imported from another state into the state of West Virginia, and sold by the importer within said last-named state, in the original packages, is a burden upon commerce among the states, and to that extent in violation of the commercial clause of the constitution of the United States; and also that, so far as it relates to cigarettes manufactured in another state and by the manufacturer sent into West Virginia in the original packages, for sale by the agent of the manufacturer, and so sold in such packages by such agent, it is for the same reason inoperative and void.

It follows that petitioner must be discharged from the custody of the officers now detaining him, and it is so ordered.

In re MYERS et al.

(Circuit Court, N. D. New York. July 1, 1895.)

CUSTOMS DUTIES—ACT OF AUGUST 27, 1894—CEDAR.

Lumber manufactured from the tree botanically known as "*Thuja gigantea*," and commonly called "red cedar," or "canoe cedar," is not within the exception of "cedar * * * and all other cabinet woods," in paragraph 676 of the tariff act of August 27, 1894, but is entitled to free entry under that paragraph.

This is an appeal by the importers from a decision of the board of United States general appraisers overruling a protest against the decision of the collector at Plattsburgh, N. Y., subjecting to duty certain importations of lumber popularly known as "red cedar."

Stephen G. Clarke, for importers.

W. F. Mackey, Asst. U. S. Atty., for collector.

COXE, District Judge. The collector classified the merchandise in question under paragraph 181 of the act of August 27, 1894, which is as follows:

"House or cabinet furniture, of wood, wholly or partly finished, manufactures of wood, or of which wood is the component material of chief value, not specially provided for in this act, twenty-five per centum ad valorem."

The importers protested, insisting that it should have been admitted free of duty under paragraph 676 of the same act, which is as follows:

"Sawed boards, plank, deals, and other lumber, rough or dressed, except boards, plank, deals and other lumber of cedar, *lignum vitae*, lancewood, ebony, box, granadilla, mahogany, rosewood, satinwood, and all other cabinet woods."

The board found that the imported lumber is from the wood of a tree known botanically as "*thuja gigantea*" and that it is popularly known as "red cedar," or "canoe cedar." It is soft, light and but slightly fragrant. It does not take a polish. It is not of the class of woods known as cabinet woods. The other woods mentioned in the exception are hard, expensive cabinet woods used in fine finishing work. If the exception to paragraph 676 refers to cabinet woods and only to cabinet woods it is manifest that the importation, not being a cabinet wood, is not within the exception. The board were inclined to sustain the protest upon this ground, but reached a different conclusion after construing the paragraph in the light of paragraph 219 of the act of October 1, 1890, the argument being that because in the prior act the word "cedar" included rough lumber such as railroad ties and telegraph poles, a similar meaning must be given to the paragraph in hand, and that it cannot be restricted to that species of cedar used as a cabinet wood. The clause in question is certainly ambiguous, and although much may be said in favor of the view taken by the board it is thought that the construction contended for by the importer is supported by more cogent and consistent reasoning. In arriving at the legislative intent it is not altogether safe to rely for guidance upon the act of 1890, it being common knowledge that its object was very different from that of the present act. An examination of the former act will show that practically the entire wood schedule has been transferred to the free list in the present act. It seems clear that it was the intent of congress to exempt from duty all the cheaper grades of woods, when rough, unmanufactured, or partially manufactured, and to levy duty only upon the boards, etc., of the finer and more expensive woods used in cabinet work. This was the broad scheme of the act of 1894. The construction of the board ignores this intent and levies a higher duty upon cedar boards than the act of 1890 and this, too, when similar boards of spruce and pine, used for the same purpose, are admitted duty free. It discriminates against the boards of one particular softwood tree without the suggestion of a motive for such legislation. When boards used for sidings, etc., are free, what possible reason could congress have had in singling out and laying duty upon these boards when sawed from one particular variety of tree? It is as difficult to find a plausible motive, as if congress had discriminated against the boards cut from coniferous trees. Again, two pieces of wood are cut from the same tree; the one pays 25 per cent. duty, the other enters free; one—a shingle—is used to protect the roof, the other the side of a dwelling house. The construction of the importers makes such a result impossible, gives force to every part of the paragraph and is in harmony with the general purpose of the law. It is proved without dispute that all the other varieties mentioned

in the exception are cabinet woods—the products of foreign countries—and the board finds that the cedar known as “cedrela odorata,” which is imported from the tropics, is a cabinet wood of the mahogany group and is capable of taking a high polish. It is a very significant fact that this cedrela, besides being a cabinet wood, is the only wood in the United States which is known as “cedar” pure and simple. All the other varieties have some qualifying term placed before them, such as white-cedar, Spanish-cedar, red-cedar, etc. Finding “cedar” thus associated with eight well-known cabinet woods the rule of ejusdem generis requires that the word should be construed as applying to that variety of cedar which is a cabinet wood. So construed the exception applies to hard, expensive, foreign cabinet woods and to these alone. That this is the true reading of the paragraph is made still more apparent by the use of the word “other.” When the lawmakers at the end of the paragraph refer to “all other cabinet woods” is it not clear that they supposed all the preceding varieties were cabinet woods and that they did not intend to include in this enumeration a wood that is no more a cabinet wood than is white pine or hemlock? Again, it is apparent from the act (paragraph 683) and similar provisions in the Canadian act of the same year (section 13, paragraph 739 of customs tariff, Canada) as well as from contemporaneous history, that the legislation of 1894 on this subject was entered into on both sides in a spirit of reciprocity. Neither country was to impose duty upon the coarser woods imported from the other. The construction of the board is at variance with this obvious intention. The importers’ contention is further strengthened by the construction placed upon a similar provision in the act of 1883 by the treasury department. It was held “that the provision for wood, namely, ‘cedar, lignum vitae, lancewood, ebony, box, granadilla, mahogany, rosewood, satin-wood, and all cabinet woods, unmanufactured,’ is construed as exempting from duty only such cedar as is fitted or intended for use as cabinet wood.” It will be noted that the paragraph quoted is not so explicit as the paragraph in controversy, in that it omits the word “other.” It was said at the argument that this construction of the treasury was acted upon for many years. In conclusion it is thought that the decision of the board is based upon a strict construction which leaves out of view the true intent and purpose of the law. To say the least, the construction which makes the word “cedar” include all the varieties of soft, coarse wood known by that name is a doubtful one. In such cases the doubt should be resolved in favor of the importer “as duties are never imposed on the citizen upon vague or doubtful interpretations.” *Hartranft v. Wiegmann*, 121 U. S. 609, 616, 7 Sup. Ct. 1240. The construction asked for by the importers makes the paragraph consistent in all its parts, is in harmony with the general purpose of the act and with the principles of international fair dealing. The decision of the board is reversed.

BRUSH ELECTRIC CO. v. WESTERN ELECTRIC CO. (two cases).

(Circuit Court, N. D. Illinois. July 24, 1895.)

Nos. 21,545 and 22,211.

PATENTS FOR INVENTIONS—INFRINGEMENT—ELECTRIC LIGHTS.

Letters patent No. 219,208, issued September 2, 1879, to Charles F. Brush, for an electric light regulator, consisting of two or more pairs or sets of carbons in an electric lamp in combination with mechanism to separate such pairs dissimultaneously or successively, are not infringed by lamps made under patents No. 418,758, No. 502,535, and No. 502,538, issued to Charles E. Scribner, since such lamps do not contain mechanism constructed to cause the dissimultaneous initial separation of the carbons.

Suits by the Brush Electric Company against the Western Electric Company to restrain the alleged infringement of a patent.

Henry A. Seymour, Offield, Towle & Linthicum, and Wm. B. Bolton, for complainant.

Barton & Brown, for defendant.

SHOWALTER, Circuit Judge. In each of these causes the ground of action is an alleged infringement of patent No. 219,208, for an electric lamp or light regulator, issued September 2, 1879, to Charles F. Brush; said patent being the property of complainant company. In cause No. 21,545, it is insisted that electric lamps made by defendant company pursuant to patent No. 418,758, issued to Charles E. Scribner January 7, 1890, and afterwards assigned to defendant company, infringe the said Brush patent. In cause No. 22,211, it is insisted that lamps made by defendant company pursuant to patent No. 502,535, and lamps made by defendant company pursuant to patent No. 502,538,—each of said last-named patents having been issued to said Charles E. Scribner August 1, 1893, and afterwards assigned to said defendant company,—also infringe said Brush patent. Prior to the first of these suits, the complainant commenced a suit in the federal circuit court at Toledo, Ohio, for an alleged infringement of said Brush patent by lamps made by this defendant company under said patent No. 418,758, and used or dealt in by the defendants in that suit. 43 Fed. 533. It appears that this defendant assisted the defendants in that suit by paying the expenses, or some part thereof, incurred therein by or on behalf of said defendants. But this defendant was not a party to the record in the Ohio litigation. The jurisdiction of that court did not extend to, nor could its decree in favor of complainant rendered pending the first of the causes in this court in any way conclude, this defendant company. The records here—even that in the first of the causes—contain a mass of evidence which was not before the court at Toledo. But I do not understand complainant's counsel to insist that either of these causes can be determined on the theory of a prior adjudication. He merely insists that the opinion of the court in the Ohio case may be determinative, not only of one, but of both the present causes.

There are seven claims in the said Brush patent. On the contention of complainant, an infringement of each of these numbered

from 1 to 6 is shown in each of the present causes. But this contention rests upon a construction of the Brush patent, extending in common to each of said claims, which is earnestly disputed by the defendant. The controversy, so far as it involves in common each of the six claims, as contested in each suit, hinges upon this one point of construction.

If two carbon pencils, placed so that their points touch, and thus being part of an electrical circuit, be slightly parted at their points, the current will continue to flow over the open space, burning said points, and forming between them an arc of brilliant white light. This arc will persist while the current continues to flow, till, owing to the consumption of the pencil points, the distance spanned becomes so great that the current, unable to overcome the resistance, ceases, the carbon points stop burning, and the light disappears. If two parallel pairs of carbon pencils, with the points of each pair touching, are placed in an electrical circuit, so that in case either pair were removed the current would still pass through the other, such current will divide between the pairs. If such pairs be now separated at once, and by a common and uniform movement, the arc will appear between the points of but one pair. It is not practical to make the points of the carbons impinge so that the resistances through each pair shall be mathematically equal, nor is it practical to separate the points so that the parting on one side shall be identical in time with that on the other. The reason why the arc forms between one pair only may be said to be that the other pair in fact parts first, thus throwing the entire current through the pair between which the arc forms. While the partings may be, in appearance, simultaneous, they are not so in reality; or, if we say the partings are in fact simultaneous, then the resistance, being accidentally greater on one side, determines the formation of the arc on the other.

On May 7, 1878, complainant's assignor, Brush, patented a contrivance for feeding one carbon pencil towards the other, so as to preserve a practically uniform distance or length of arc between the burning points till the carbons should be consumed. In this invention the carbons were arranged in a vertical line, with their points touching. The lower carbon was fastened by a clamp in a holder projecting from the base of the lamp frame. The upper carbon was held in a clamp on the lower extremity of a holder which extended downward from the upper portion of the lamp frame through a tubular, soft-iron core of a solenoid, the helix of which was included in the main electric circuit, whereby the lamp was actuated; thence through a flattened, loosely-fitting ring, D; thence through a horizontal platform or floor on which said ring rested when the lamp was not in operation. To the lower extremity of this core was attached a lifter, C', a projection at the lower end of which extended under one side of said ring, D. When the current passed through the carbons, the lifter engaging said ring tilted the same so that it clamped, and lifted the upper carbon rod, thus separating the carbon points so that the arc was formed. As the resistance grew greater, by the shortening of

the carbon rods in burning, the current became less energetic, and the upward pull of the lifter on the edge of the ring clamp, D, relaxed so that the upper carbon rod was permitted to pass imperceptibly downward, whereupon the upward pull became more energetic, the increasing energy of the current causing the said ring clamp, D, to tighten, and hold the upper carbon in the new position. Thus the process went on until the upper carbon was so far consumed that the holder could descend no further, the further descent of the rod being stopped by an enlargement at its upper end which at that period in the operation of the lamp engaged with the upper portion of the lamp frame. The space between the carbon stumps then increased without further feeding until the current could no longer overcome the resistance, and the lamp ceased to burn.

On September 2, 1879, Brush secured, as before stated, the patent in suit. To his invention as above described, he added a second pair of carbons, a second pair of carbon holders, and a second movable or feeding carbon rod. Each carbon rod passed down through its ring clamp marked, the one, C, and the other, C', in the new patent. The lifter marked D in the new patent, was triangular in form, with a stirrup at the top, in which was fastened a lever which was to be operated by magnetic attraction. At each lower corner of said lifter, D, was an opening formed by two short projections, one above the other, each opening inclosing the edge of its appropriate ring clamp, C, or C'. The lower arm or projection of one of these openings was below the plane of the corresponding part of the opposite opening, so that, when the current passed through the carbons, as the lifter, D, was pulled up, it first engaged the ring clamp of the added carbon rod separating the added pair of carbons, and after an interval of continuous movement the ring clamp of the other carbon rod was engaged by the other corner of said lifter, D. The two rods continued thence to move together until the lifter, D, stopped, and the arc was formed between the carbons which were last separated. The latter pair of carbons being fed together, and continuing to burn until consumed, the added pair of carbons then part, and form the arc, and continue to burn until consumed in manner as stated in said first patent to Brush. After the first pair of carbons have been consumed, and have ceased to burn, the lamp, in parting and burning the remaining pair, is substantially identical with the invention described in said prior patent.

In 1874 one Mathias Day, acting on the observed fact above stated,—that when two parallel pairs of carbons, disposed in the same circuit so that the current divides between them, are separated simultaneously, an arc forms between but one pair,—constructed his lamp, wherein he consumed two pairs of carbons in alternate or reciprocal succession. This lamp, however, failed of commercial success, because, in such parallel carbons, so equally and simultaneously separated, the arc persists but a short time in one pair before alternating to the other.

The ideas of the Brush invention in suit were apparently these: (1) By separating the added pair of carbons first, he threw the entire current down the other pair, and thus determined that the arc should

form between said other pair, or pair last separated. (2) By separating the added pair at a greater distance apart than the other pair, he avoided accidental alternation in the arc between the two pairs. (3) By permanently holding the added pair in such separated relation, the first pair could be fed together, and consumed without stop.

In his specification, Brush says:

"My invention comprehends, broadly, any lamp or light regulator where more than one set of carbons are employed, wherein—say in a lamp having two sets of carbons—one set of carbons will separate before the other."

Again:

"The operation of my device, as thus far specified, is as follows: When the current is not passing through the lamp, the positive and negative carbons of each set, A, A', are in actual contact. When, now, a current is passed through the lamp, the magnetic attraction of the helices, E, will operate to raise the lifter, D. This lifter, operating upon the clamps, C and C', tilts them, and causes them to clamp, and lift the carbon holders, B, B', and thus separate the carbons, and produce the voltaic arc light. But it will be especially noticed that the lifting and separation of these carbons is not simultaneous. One pair is separated before the other, it matters not how little nor how short a time before. This separation breaks the circuit at that point, and the entire current is now passing through the unseparated pair of carbons, A'; and now, when the lifter, continuing to rise, separates these points, the voltaic arc will be established between them, and the light thus produced."

As already stated, after the first pair of carbons has been consumed, so that the first carbon rod holding the stump of the burned carbon ceases to feed, and the added pair of carbons thereupon part and burn, the lamp of the new patent, the special features of the new invention being now superfluous, is substantially identical with the lamp of said first patent. In the new patent (that in suit), Brush does not, in the specifications, describe, or, in the claims, refer to, the manner of burning the added pair, as being a part of his new invention. During the burning of the added pair, the lamp has become substantially the invention protected by the said first patent.

The patentee says, further, in the specification of the patent in suit:

"The lifter, D, in the present instance, is so formed that when it is raised it shall not operate upon the clamps, C, C', simultaneously, but shall lift first one and then the other (preferably the clamp, C, first, and C', second, for reasons which will hereafter appear). This function of dissimultaneous action upon the carbons or their holders, whereby one set of carbons shall be separated in advance of the other, constitutes the principal and most important feature of my present invention."

In his drawings, and in describing the mechanism and the action thereof of the patent in suit, Brush shows only two pairs of carbons; but in other places in his specifications, and in his claims quoted below, he speaks of two or more pairs of carbons. It will be seen that by affixing additional arms to the lifter, D, additional clamp rings, holding additional carbon rods and pairs of carbons, might be operated. In such case the clamp rings would be engaged in rapid succession by the upward movement of the lifter, D, and the arc would form, as before, between the pair of carbons last separated. So that in such case, as Brush puts it in his claims, the separations would take place "dissimultaneously or successively." The word "successively" is here synonymous with "dissimultaneously"; the lat-

ter term having been coined to imply more definitely the unity of movement which characterizes the separations, whether between the members of two pairs, or between the members of more pairs than two. I have said that the clutch lever, D, might be made to effect separations between the members of more than two pairs; but, for the purpose of thinking and reasoning about the case, we do not go astray if we think of one pair to be last separated, and then burned, and of one added pair to be more widely separated, and thereupon maintained in such separated relation pending the burning of the other pair. The claims in controversy are as follows:

"(1) In an electric lamp, two or more pairs or sets of carbons in combination with mechanism constructed to separate said pairs dissimultaneously, or successively, substantially as and for the purpose specified. (2) In an electric lamp, two or more pairs or sets of carbons in combination with mechanism constructed to separate said pairs dissimultaneously, or successively, and establish the electric lights between the members of but one pair, to wit, the pair last separated, while the members of the remaining pair or pairs are maintained in a separate relation, substantially as shown. (3) In an electric lamp having more than one pair or set of carbons, the combination, with said carbon sets or pairs, of mechanism constructed to impart to them independent and dissimultaneous separating and feeding movements, whereby the electric light will be established between the members of but one of said pairs or sets at a time, while the members of the remaining pair or pairs are maintained in a separated relation, substantially as shown. (4) In a single electric lamp, two or more pairs or sets of carbons, all placed in circuit, so that when their members are in contact the current may pass freely through all said pairs alike, in combination with mechanism constructed to separate said pairs dissimultaneously, or successively, substantially as and for the purpose shown. (5) In an electric lamp wherein more than one set or pair of carbons are employed, the lifter, D, or its equivalent, moved by any suitable means, and constructed to act upon said carbons or carbon holders dissimultaneously, or successively, substantially as and for the purpose shown. (6) In an electric lamp, wherein more than one pair or set of carbons are employed, a clamp, C, or its equivalent, for each said pair or set; said clamps, C, adapted to grasp and move said carbons or carbon holders dissimultaneously, or successively, substantially as and for the purpose shown."

The observable interval between the point of time at which the separation between the added pair of carbons takes place, and the point of time at which the separation of the other pair takes place,—the purpose being to determine the arc between the pair last separated,—is the dissimultaneousness found in each of said six claims.

With all respect for the learned writer of the opinion in the Toledo case, and for the learned counsel for complainant, the formula of words "dissimultaneous arc-forming separation," does not carry any definite meaning. The adjectives "simultaneous" or "dissimultaneous" are words of comparison. The former means that two or more occurrences or happenings are identical in time; the latter, that they are successive,—that is to say, with an interval between each two in succession. The arc-forming separation which takes place between the first pair of carbons to burn, and the arc-forming separation which takes place several hours later between the added pair of carbons, are certainly successive, and, loosely speaking, dissimultaneous, but these separations lack the unity or continuity of movement implied in the term "dissimultaneous" when used in this patent. As already said, Brush coined the word "dissimultaneous"

to express the momentary but observable interval—the slight but noticeable noncoincidence in time—between the separation of the added pair of carbons and the separation of the other pair in a unitary and continuous movement due to mechanism as invented by him and described in the patent in suit, in contrast with an apparently simultaneous separation due to any mechanism appropriate for the latter purpose. The patentee said, further, in his specification:

“I do not, in any degree, limit myself to any specific method or mechanism for lifting, moving, or separating the carbon points, or their holders, so long as the peculiar functions and results hereinafter to be specified shall be accomplished.”

The specification and claims were evidently prepared with the idea that the mode of movement, to wit, the rapid, successive, and continuous separations between the pairs of carbons terminating in the arc between the pair last separated, could be secured to Brush, regardless of the mechanism by which this mode of movement should be produced. In *Brush Electric Co. v. Ft. Wayne Electric Light Co.*, 40 Fed. 826, Judge Gresham held—answering the contention that the first, second, third, and fourth claims were for functions or results, and hence void—that mechanism such as described in the drawings and specifications, or a substantial equivalent, was an essential element in each of said claims. I am not called on to determine as between these constructions, but the conclusion reached, apparently, in the Toledo case, that no one of these claims contains the element of dissimultaneous, or successive, separations between the members of each pair of carbons for the purpose of forming the arc between the pair last separated, seems to me unsound. The patentee says:

“In the lamp, as shown in the drawings, the support, K, is in the form of a tube surrounding the carbon holder, B, and this support, K, is made of such a length that when the carbons, A', shall have been sufficiently consumed, a head upon the carbon holder, B, will rest upon the top of the support, K, whereby the weight of the carbon holder, B, and its support, K, shall at all times, and under any circumstances, be supported by the lifter, D.”

In other words, and without going again over the mechanism, the lamp is constructed so that the carbons, A, shall first burn. By reason of the support, K, being carried on the upper carbon holder of the first pair of carbons to burn, and of the greater distance between the two carbons of the added pair, said added pair could not be burned first. It is, in other words, the characteristic feature of this lamp—the very purpose signified by its construction—that the position of the first arc shall be determined before lighting, as between the two pairs of carbons. Yet, in the opinion in the Toledo case, this is declared to be “a wholly immaterial and useless feature.” Even if it were in fact immaterial which pair of carbons burned first,—supposing it to be true that if the carbons were separated simultaneously, instead of dissimultaneously, the lamp would still operate,—the fact remains that the patentee took from the government claims in which the dissimultaneous separations are the special feature. Moreover, the feature of dissimultaneous arc-forming separations—referring here to the interval of hours between the arc-forming sep-

aration of the first pair to burn and the arc-forming separation between the added pair—is not in any one of the claims. In order to make out a case of infringement, the former element must be gotten out of, and the latter must be gotten into, each claim. This, in my judgment, cannot be done. The lamps made under patent No. 418,758 do not contain mechanism constructed to cause the dissimultaneous initial separations of the carbons, nor do the lamps made under patent No. 502,535, nor do the lamps made under patent No. 502,538. I hold, therefore, that no infringement is made out in either suit. The order will be, in each case, that the bill be dismissed for want of equity.

EXCELSIOR COAL CO. v. OREGON IMP. CO.¹

(Circuit Court of Appeals, Ninth Circuit. June 27, 1895.)

No. 196.

INFRINGEMENT OF PATENTS—COAL SCREENS AND CHUTES.

The Roberts reissue, No. 7,341, for an improvement in coal screens and chutes, consisting principally in a reservoir between the receiving hopper and the delivery chute, *held* not infringed by an apparatus which has no reservoir, but uses a gate near the end of the chute by which the flow of the coal can be controlled. *Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, 15 Sup. Ct. 482, 156 U. S. 611, followed.

Appeal from the Circuit Court of the United States for the Northern District of California.

This was a bill in equity by the Excelsior Coal Company against the Oregon Improvement Company for alleged infringement of re-issued patent No. 7,341, dated October 10, 1876, to Martin R. Roberts, for an "improvement in coal screens and chutes." The circuit court dismissed the bill, and complainant appeals.

John L. Boone, for appellant.

Sydney V. Smith, for appellee.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

BELLINGER, District Judge. This is a suit to enjoin the infringement of a patent for an improvement in coal screens and chutes. The court, in the decree appealed from, refused to grant the relief prayed for and dismissed the bill of complaint. The improvement, styled by the parties an "apparatus," consists of a receiving hopper, a reservoir, a screen, and a chute, so arranged in a portable machine that coal can be continuously dumped into the hopper from a swinging tub, while at the same time it is delivered screened into carts from the chute. The especial feature of the apparatus, which permits this to be done, is the interposition of a reservoir between the receiving hopper and the delivery chute. It is the employment of this reservoir that enables the machine to "accomplish the new operation, mode, result, and effect." The respondent's apparatus is a large, stationary machine, composed of long V-shaped hoppers, with gates at the lower side at intervals,

¹ Rehearing pending.

which open into chutes with screen bottoms. About six feet from the ends of the chutes a board is inserted, forming a gate which can be raised and lowered at either end, and by means of which the flow of coal through the chutes is checked and controlled.

Since the arguments of this case, the supreme court of the United States, in *Black Diamond Coal Min. Co. v. Excelsior Coal Co.*, 156 U. S. 611, 15 Sup. Ct. 482, held that the use of the respondent's hopper and screening device did not involve an infringement of the Excelsior Company's patent, "if for no other reason, because it lacked the reservoir" of that patent. That decision in effect disposes of this case. The decree appealed from, dismissing the complainant's bill of complaint, is affirmed.

AMERICAN FIBER-CHAMOIS CO. v. WILLIAMSON et al.

SAME v. BUCKSKIN-FIBER CO. et al.

(Circuit Court, N. D. Ohio, E. D. June 5, 1895.)

1. PATENTS—INFRINGEMENT SUITS—JURISDICTION AND PRACTICE.

The power of the courts to declare, on demurrer to the bill, that a patent sued on is invalid on its face for want of novelty and utility, is well settled; but such power should not be exercised except in a very plain case, and where the conduct of the complainant shows that the suit is brought to harass mere dealers, and not manufacturers.

2. SAME—FLEXIBLE PAPER.

The McLauchlin patent, No. 511,789, and the Scott patent, No. 216,108, relating to processes of manufacturing flexible paper, are void for want of novelty and invention.

These were suits for infringement of two patents relating to the process of manufacturing flexible paper.

Thos. J. Johnston and Phillip, Munson & Phelps, for complainant.
M. D. Leggett and A. E. Lynch, for respondents.

RICKS, District Judge. These are two bills filed by the complainant to sustain the validity of letters patent No. 511,789, dated January 2, 1894, issued to John C. McLauchlin. They were filed, one in March and the other in April last. Answers were filed to the same, denying the validity of the patent and denying infringement. The defendants sought to speed these cases as rapidly as possible, and waived the usual time for answer, and served the complainant with notice to file its replication, or they would move to dismiss the bills for want of prosecution. Thereupon the complainant asked leave to dismiss the bills without prejudice, and at the same time file two new bills against the same defendants, the new bills differing from the old ones in the respect that letters patent No. 216,108, dated June 3, 1879, issued to T. Seymour Scott, for an improvement in the manufacture of flexible paper, had since the filing of the former bills been assigned to the complainant, and the new bills were therefore based upon both the McLauchlin and the Scott patents. The defendants, in view of the action of the plaintiff in asking for leave to dismiss its original bills without prejudice, prayed leave of

the court to withdraw their answers to the original bills, and filed a demurrer to both the original and new bills upon the ground that the patents were void upon their face for want of novelty and utility. Counsel for the complainant contend that this is a very summary and new method of disposing of patent cases, and insist upon the court's overruling the demurrers and allowing the cases to take their usual course, in order that the rights of the plaintiff may be determined after evidence has been filed and the usual time for preparation given.

In the first place, the right of the court to dispose of such cases upon demurrer seems to be well settled. In the case of *West v. Rae*, 33 Fed. 45, Judge Blodgett said:

In the light of these authorities, I cannot see why, in a suit for infringement of a patent so clearly and baldly void as this, the court ought not to save the defendant from the vexation and expense of a trial upon proofs by sustaining a demurrer to the bill. If, after a case reaches the supreme court, that court can, from its common knowledge, without reference to the pleadings and proofs, but merely from an examination of the patent itself, say that the patent is void, I see no reason why the court of original jurisdiction cannot do the same. The demurrer is therefore sustained, and the bill dismissed for want of equity.

In *Studebaker Bros. Manuf'g Co. v. Illinois Iron & Bolt Co.*, 42 Fed. 52, Judge Blodgett again says:

This is a bill in equity charging defendant with the infringement of patent No. 256,744, granted by the United States to Joshua Sandage, April 18, 1882, for a "wagon-axle skein," and praying an accounting. Defendants have demurred to the bill on the ground that the patent in question on its face shows no patentable novelty in the device covered by the specification and claims.

The court, after comparing the patented device with the state of the art at the time the patent was granted, reached the conclusion that the patentee "had not gone out of the domain of common mechanical knowledge," and sustained the demurrer in the following language:

Therefore, while I am averse to sustaining demurrers in this class of cases, which shall, in effect, say that the patent office has issued a patent which is obviously, and from common knowledge, void for want of invention, yet, when a case is as plain as this seems to me to be, I think it the duty of the court to do so, and thus save the parties the extraordinary expenses and delay which almost uniformly attend patent litigation. The demurrer is sustained, and the bill dismissed for want of equity.

This practice is further clearly sustained by a decision of the supreme court of April 22, 1895, the title of which is not now before me. In considering the case the supreme court ignored the record of the court below entirely, and decided the case upon the faces of the patents, holding that the patents were invalid for want of patentable invention. The case came from the circuit court of the United States for the Northern district of California. The supreme court said:

For the reasons above given, we think all these patents are invalid, and that the demurrer to the bill should have been sustained in the court below. *Locomotive Works v. Medart*, 15 Sup. Ct. 745.

I agree fully with Judge Blodgett that patent cases should not be disposed of upon demurrers to the bill for the reason that the pat-

ents are void upon their face, unless the cases are very plain, and the conduct of the parties in litigation shows that they are brought for the purpose of harassing those who are simply dealers and not manufacturers. The process covered by the patent sued upon is for making a flexible paper lining, a large demand for which has lately grown up out of the new style of making ladies' dresses. The great demand will probably be of short duration, because when the style of dress changes the use of the paper will be dispensed with. It is for this reason that the complainant is bringing a large number of suits throughout the United States, and they are directed mainly against dealers who are handling this article as a matter of trade.

Some years ago, when the inventor of a patent hay fork instituted a large number of suits in this court against farmers who were mere users, Judge Baxter stayed the proceedings until the complainant should have time to proceed against the manufacturer, it appearing by affidavit that the manufacturer was perfectly solvent, and within the reach of a court of competent jurisdiction. He did this upon the theory that, while the statute gave the complainant the right to sue the user, when suits of that kind were instituted in great numbers it was evident that the complainant's purpose was to force the defendants to settle because of the expenses of making a defense. If the patent was valid, and the users were infringers, the judge contended that the suit ought to be brought against the manufacturer, who had both the means to respond in damages and the means and opportunity for making a full defense and testing the merits of the patent upon a fair trial. In this case the application of the complainant to dismiss the suits first instituted without prejudice, and immediately filing the new bills, shows a disposition to annoy the defendants by vexatious litigation. The bills in the original suits could have been amended, or supplemental bills could have been filed. The defendants' desire to speed the cases, as shown by the course of their defense, would have waived any possible ground of demurrer, and the cases would have been brought to a speedy hearing upon the merits.

But it is obvious to my mind that these patents are absolutely void. The process covered by the patents is old, and was well known and described by scientific works long before the complainant's patent was applied for. For example, in the Polytechnic Review, published as early as 1877, a process for making paper to be used as a substitute for cloth for umbrellas, rain coats, and even for dress cloth, was recognized. The process is described as follows:

This cloth is generally made of paper alone, by beating it to make it soft, and impregnating it with gummy substances to make it more resistant to the action of water.

Again, in the Encyclopædia of Chemistry published in 1879, the mode of making paper cloth, warranted to wash, as made in Japan, is described. The paper is made out of vegetable substance, and it describes a process very similar to that set forth in the patent. Knight's American Mechanical Dictionary, published in 1875, by illustration and description shows machines used for rolling leather

similar to the machine used in rolling the paper pulp or Manilla paper as described in the complainant's patent.

There is no patent claimed on the substance used in making this flexible paper; there is no patent claimed on the machinery used for rolling the pulp or moistened paper; there is no patent claimed for using the machine and paper together. The patents have not gone out of the domain of common mechanical knowledge, which is within the judicial knowledge of the court, and I think, therefore, they are absolutely void upon their face. The demurrer to the four bills will be sustained, and the suits dismissed.

DUPLEX PRINTING-PRESS CO. v. CAMPBELL PRINTING-PRESS & MANUF'G CO.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1895.)

No. 298.

1. JURISDICTION OF CIRCUIT COURT OF APPEALS—APPEALS FROM PRELIMINARY INJUNCTIONS.

On appeal from an order granting a preliminary injunction, the circuit court of appeals cannot, by reason of any action of the circuit court, be enabled to finally determine the matters in controversy. Its power is limited to a consideration of the correctness of the order from the same standpoint as that occupied by the court below; and the order will not be disturbed unless the discretion of the circuit court was improvidently exercised. *Blount v. Societe Anonyme, etc.*, 3 C. C. A. 455, 53 Fed. 98, 6 U. S. App. 335, followed.

2. SAME—ADJUDICATIONS IN OTHER CIRCUITS.

On an appeal from an order granting a preliminary injunction in a patent case, a prior adjudication by the circuit court of another circuit sustaining the patent and finding infringement is entitled to the same consideration as in the court below, and is sufficient ground for affirming the order. *Blount v. Societe Anonyme, etc.*, 3 C. C. A. 455, 53 Fed. 98, 6 U. S. App. 335; *American Paper Pail & Box Co. v. National Folding Box & Paper Co.*, 2 C. C. A. 165, 51 Fed. 229, 1 U. S. App. 283; *Electric Manuf'g Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834,—followed.

3. PATENTS—PRINTING PRESSES.

The Kidder patent, No. 291,521, for a printing machine, and the Stone-metz patent, No. 376,053, for a web printing machine (being an improvement on the Kidder machine), construed, on appeal from an order granting a preliminary injunction, and *held* valid and infringed,—the former as to claims 1, 2, and 7, and the latter as to claim 12. *Campbell Printing-Press & Manuf'g Co. v. Marden*, 64 Fed. 782, followed.

4. SAME—PRELIMINARY INJUNCTION—BOND FOR DAMAGES.

Where complainant was not operating under the patent sued on, and an injunction would break up defendant's business, and it also appearing that defendant had already given chattel mortgages on its property, to secure creditors, *held*, that an injunction would be granted unless, within 10 days from the going down of the mandate, defendant should give bond with sureties conditioned for payment of all damages which might be awarded.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

This was a bill by the Campbell Printing-Press & Manufacturing Company against the Duplex Printing-Press Company for infringe-

ment of two patents relating to printing presses. The circuit court granted a preliminary injunction restraining infringement of certain claims, and the defendant appeals.

Alexander & Dowell (Frederic H. Betts, of counsel), for appellant.
Louis W. Southgate and George H. Lothrop, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, delivered the opinion of the court.

This is an appeal by the defendant below from an order granting a preliminary injunction pending the hearing of a bill in equity to restrain the infringement of letters patent. The Campbell Printing-Press & Manufacturing Company owns letters patent No. 291,521, issued January 8, 1884, to Wellington P. Kidder for a printing machine, and No. 376,053, issued in January, 1888, to John H. Stonemetz, for a web printing machine. The averment of the bill was that the Duplex Printing-Press Company, the defendant, of Battle Creek, Mich., was manufacturing a printing press which infringed three of the claims of the Kidder patent and six of the claims of the Stonemetz patent. In an equity suit brought by the same complainant against Marden and Rowell in the United States circuit court for the district of Massachusetts, that court held that a printing press which had been sold by the Duplex Printing-Press Company to the defendants therein infringed the first, second, and seventh claims of the Kidder patent and the twelfth claim of the Stonemetz patent, on a full hearing of the issues raised. 64 Fed. 782. The Duplex Printing-Press Company had charge of the litigation for the defendant therein, and conducted it by its counsel. The record and evidence in that cause accompanied one of the affidavits filed in support of the motion for a preliminary injunction in the court below. The injunction was resisted below by counter affidavits, and the exhibition of patents, two English and one French, for printing presses, which were not introduced in the Massachusetts case, and were only discovered after the decree in that court had been rendered. As soon as the Massachusetts decree was entered, the defendant company, which was engaged in manufacturing the alleged infringement, made a mortgage of all its assets, real and personal, of whatever kind, to secure an indebtedness aggregating more than \$100,000, to its directors and other persons intimately associated with its management. The action of the court below is shown in the following order and memorandum filed by the court at the same time.

"This cause coming on to be heard upon the bill of complaint, affidavits on the part of complainant, the exhibits referred to therein, and on the record of pleadings, proceedings, and printed record of evidence and exhibits in the case of the same complainant against Marden and Rowell in the United States circuit court for the district of Massachusetts, and upon the order to show cause why an injunction should not be granted, and affidavits, and patents and exhibits and models referred to therein, on the part of the defendant, and after hearing counsel for the respective parties, it is ordered (for the reasons set forth in the memorandum filed by the court) that an injunction issue restraining the defendant from infringement of the first, second, and seventh claims of the Kidder patent in suit, and the twelfth claim of the Stonemetz

patent in suit, or either of them, until the further order of the court, but that the said injunction be stayed pending an appeal to the circuit court of appeals, but only so far as the same would affect the making, shipping, or selling of the two completed and five uncompleted machines now at the defendant's works, or in process of construction by the defendant, upon the filing of a bond by the defendant in the penal sum of \$7,000 to answer to the complainant for any damages or profits accruing by reason of the making or sale of said seven machines."

The memorandum filed by the court below is as follows:

"The injunction is granted in this case on the record in the Massachusetts case, and the newly-discovered evidence submitted on both sides, and after hearing counsel for both parties, and the exhibits submitted on behalf of the defendant. This disposition of the motion for the injunction is made with a view of enabling the court of appeals to review and finally determine on their merits all the questions between the parties before this court, unembarrassed by the question of the exercise of the discretion of the circuit court, and the injunction is suspended so far as the sale of the two machines already completed and the five now in process of construction is concerned, on the defendant giving bond of \$7,000."

We do not fully understand the meaning of the learned judge's memorandum in the court below. The motion for a preliminary injunction necessarily involved the exercise by him of a sound judicial discretion in granting or withholding it. By no action of his could he enable this court finally to determine all the questions between the parties to the action, because it is not within the proper province of this court to do so on an appeal from an order granting a preliminary injunction. This is settled by the decision in *Blount v. Societe Anonyme, etc.*, 6 U. S. App. 335, 3 C. C. A. 455, 53 Fed. 98, where Mr. Justice Jackson, speaking for this court, discusses the proper scope of action by a circuit court of appeals upon an appeal from a preliminary injunction under the seventh section of the circuit court of appeals act. We are to consider the correctness of the order from the same standpoint as that occupied by the court granting it, and if we find, after a consideration of the grounds presented to that court for its action, that its legal discretion to grant or withhold the order was not improvidently exercised, we should not disturb its action. The judgment of the circuit court of Massachusetts is entitled to the same consideration in this court, as a reason for granting the preliminary injunction, as it had in the court below. *American Paper Pail & Box Co. v. National Folding Box & Paper Co.*, 1 U. S. App. 283, 2 C. C. A. 165, 51 Fed. 229. Upon a final hearing upon the merits, it would be different; for then considerations of comity might properly have weight with the court below, which we should not hesitate, as an appellate court, to disregard in finally settling the rights of the parties. The language of the memorandum leads us to suppose that the order made by the court was with the expectation that this court would on the present hearing render such a judgment as to make a further hearing on the merits below unnecessary, and was, therefore, made to provide a status quo for the parties during the six months within which it was hoped the judgment of this court could be secured. This erroneous view of the power and duty of this court, upon which the order was based, makes it necessary for us in this particular case to

consider the motion for preliminary injunction *de novo*, and, because of the failure of the court below to exercise the proper discretion, to exercise it ourselves, and make the order which should have been made. The patent of Kidder was for a printing press in which the printing is done directly from type set in a flat bed, as distinguished from those presses in which curved stereotyped plates are used, taken from the type. In flat-bed presses, either the bed may move with the paper under the impression cylinder, or the bed may be stationary, and the cylinder be movable or locomotive. Flat-bed presses are better for newspapers with small editions, because such newspapers do not need the great rapidity of the stereotype presses, and may thus avoid the additional expense incident thereto. A press is said to be a perfecting press when, at the same time, it prints on both sides of the paper. It is a web press when it receives and prints upon a continuous web or roll of paper as it is unwound, and not upon cut sheets. Before Kidder, there were web perfecting stereotyped presses. There were flat-bed web presses. But Judge Carpenter, considering this patent in the case referred to above, held that until Kidder's invention there never had been a web perfecting stationary flat-bed press with a locomotive cylinder. He held, moreover, that, while the past art showed web presses with movable flat beds and stationary cylinders, Kidder's was the first web press that showed a locomotive cylinder with a stationary flat bed. There had been sheet presses with such a combination, but none adapted to the printing of a web. In the Kidder press, the beds of type for the two sets of paper were placed opposite to each other in a vertical position, and parallel. Between them two compression cylinders in the same horizontal plane were arranged to move up and down. Accompanying each cylinder, on the carriage with it, was a guide roller. The web was passed from the spool between clamp rollers, over the first guide roller, round the first cylinder, between it and the corresponding type bed, thence around the second cylinder, and between it and its type bed to its guide roller. The upward movement of the two impression cylinders while the end of the web was held stationary by the clamp rollers brought each cylinder into contact with its type bed, pressing the web against the type, or nipping it, as the phrase is. Each cylinder moved in a moving fold or wave of the paper, and printed the whole length of the bed. On the downward return of the cylinders, they were drawn inward, nearer to each other, so that they did not contact with the type beds. During the backward stroke, the web was slipped round the cylinders and fed far enough so that, at the next upward movement of the cylinders, that part of the web which had been printed on one side by the first cylinder was now round the second cylinder, where its other side could be printed. The Kidder drawings also show a press with but one cylinder, and therefore nonperfecting, in which the type bed is in a horizontal position. The vertical position of the two type beds is made necessary in Kidder's co-operation of the two impression cylinders, because if the two beds were placed in a horizontal and parallel position, the type of the upper bed must fall out.

The first claim of the Kidder patent, which presents the chief subject of controversy in this cause, was as follows:

"In combination with a stationary bed and an impression cylinder traveling over it, guides for the web, one at each side of the impression cylinder, and a feeding device which feeds the proper length of web while the impression is thrown off, all substantially as described."

The machine of the defendant company, which is manufactured under a patent issued to one Joseph L. Cox, of later date than the patents sued upon, has in it the combination of a stationary bed and an impression cylinder traveling over it, guides for the web, one at each side of the impression cylinder, and the feed device, which feeds the proper length of the web, while the impression is thrown off. A stationary bed and the impression cylinder traveling over it, together with the guides for the web, one at each side of the impression cylinder, used by the defendant in its machines, are substantially reproductions of the same forms shown by Kidder in his patent. The feeding device of Cox, used by the defendant, is different from that used by Kidder, but feeding devices for measuring the proper length of web, and at the proper time, were old, so that the substitution of Cox's feeding device for that of Kidder might be an improvement, but would hardly relieve Cox from the charge of infringement. The real question in the case, as presented to the Massachusetts court, as presented to the court below, and as presented to us here, is whether the Kidder patent was void with respect to this first claim, for want of novelty. The history of the art showed that a printing press with a stationary bed and an impression cylinder traveling over it was old, and that the combination of these elements with guides for sheets, instead of guides for the continuous web of paper, one at each side of the impression cylinder, was also old. The same art showed that the combination of a moving bed and a stationary impression cylinder with guides for the web, one at each side of the impression cylinder, and a feeding device, which fed the proper length of web, while the impression was off, was also old. Judge Carpenter, in his opinion in the Massachusetts case, said:

"The substance of the Kidder invention in the original patent and in the improvement of Stonemetz seems to me to be the production of a device which shall print a web of paper, stationary at the two ends thereof, by means of an impression cylinder moving in a moving fold of that web. Such a device I do not find in any prior structure. The patent to R. Cummings, No. 83,472, issued October 27, 1868, shows a web of paper, and a fold and an impression cylinder. If this mechanism were reversed in action, and the necessary resultant change made in the mode of operation, so that the web of paper should be held stationary during the operation of printing, then, indeed, the function of the Kidder invention would appear. But this cannot be done without a change in the essential operation of that press. The devices, in substance, of the Kidder invention are there, but the mode of operation is not there."

Of the three patents produced in the court below, which were not shown to the Massachusetts court, the only one we need to notice is the Tannahill patent. This is a patent which, if it is operative, will print a web of paper stationary at the two ends thereof, so far, at least as the stationary type bed is concerned, by means of an im-

pression cylinder moving in the moving fold of that web. The guides mentioned in the first claim of the Kidder patent, however, are not present in the Tannahill patent in such a way as to be effective as such. One end of the web, instead of being exactly stationary, is wound around a take-up spool as the cylinder progresses in printing the stationary part of the web between it and the stationary bed. The fold of the web moves with the moving cylinder. We are inclined to think that the Tannahill patent would confine the scope of the Kidder invention to the particular form therein shown, of moving a cylinder in a moving fold of the web, but that particular form seems to be shown also in the defendant's machine. We do not think, therefore, that, on a hearing for a preliminary injunction, the fact that the Massachusetts court did not have before it the Tannahill patent ought to affect materially its decree as a basis for preserving the status quo pending the hearing in the court below. It has been decided in this court, and in the courts of appeals of the Second and Seventh circuits, that an adjudication of another circuit court than that whose action is being considered, finding the validity of the patent and its infringement, is a sufficient ground, not only in the circuit court for an order granting a preliminary injunction, but also in the appellate court for affirming such an order. *Blount v. Societe Anonyme, etc.*, 6 U. S. App. 335, 344, 3 C. C. A. 455, 53 Fed. 98; *American Paper Pail & Box Co. v. National Folding Box & Paper Co.*, 1 U. S. App. 283, 2 C. C. A. 165, 51 Fed. 229; *Electric Manuf'g Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834.

The same conclusion must be reached with respect to the second and seventh claims of the Kidder patent and the twelfth claim of the Stonemetz patent. The second claim of the Kidder patent is as follows:

"In combination, two stationary beds, two traveling Impression cylinders, and a feeding mechanism, substantially as described, combined together, and with suitable guides, substantially as described, and operating to print both sides of a web, as set forth."

The seventh claim is as follows:

"The web perfecting press above described, consisting of the two stationary beds, the two traversing impression cylinders, the two sets of inking apparatus, the web-guiding mechanism, substantially as described and the intermittently operating web-feeding mechanism, substantially as described, all operating together, substantially as described."

The Stonemetz, which is an improvement on the Kidder patent, contained the twelfth claim, as follows:

"The combination, in a printing-machine, of the side frames, A,A', the stationary type beds, B,B', with the traveling cylinder carriage, I, carrying the impression-cylinders, E,E, which operate both forward and backward on said type beds, substantially as and for the purpose set forth."

These claims were held by Judge Carpenter to be infringed by the defendant's printing press.

Stonemetz improved upon Kidder in this wise: He made his locomotive cylinder run upon type beds horizontally placed in the same plane, and, by means of rollers, he passed the web from one locomotive cylinder to the other, arranging his feed between the forward

and backward strokes of the cylinder so that the part of the web upon which the first cylinder had printed would be presented with its other side, by the second cylinder, to its type bed, on the return stroke. He was thus able to print upon both sides of the paper, upon each stroke of the cylinders, and save the time taken in the Kidder patent upon the back stroke, when no printing was done. Cox, in the defendant's press, uses horizontal flat type beds, not in the same plane. He places one above the other, and he passes the web over one locomotive cylinder, and over rollers up to the other, operating on the plane above it. Judge Carpenter held, after a full hearing, that the Kidder perfecting claims were valid, that the Stonemetz device was an improvement on Kidder, and, further, that the defendant's machine was a mere change of position of the parts shown in the Stonemetz patent, and was not a substantial deviation therefrom. There is no controlling reason advanced why, with respect to these claims, upon the motion for a preliminary injunction, the decision of Judge Carpenter should be departed from. No new evidence has been introduced upon this perfecting feature and we think that the decree of Judge Carpenter would justify a preliminary injunction. We reach this conclusion without any intention of foreclosing the action of the court below or of this court upon any of the points here mooted when the case comes on for final hearing.

Coming now to consider the conditions upon which such preliminary injunction should be granted or withheld, we propose, for the reasons stated in the opening of this opinion, to modify the order made below, because made under a misconception of the probable action of this court. The giving of the chattel mortgage by the defendant raises a strong presumption of fact that the complainant could not enforce a decree for damages against defendant, should one be awarded. On the other hand, the complainant is not manufacturing any presses under either the Kidder or Stonemetz patent, and the loss which it will sustain by infringements thereof will be confined to injury to its naked rights under the patent, with no consequential injury to its business. An injunction against defendant will break up its business, and throw several hundred men out of employment. Its loss from an injunction will be out of proportion to complainant's loss from infringement. Balancing the inconvenience of the parties, we think the order should be that the complainant may have a preliminary injunction against infringement by defendant of the first, second, and seventh claims of the Kidder patent and the twelfth claim of the Stonemetz patent by manufacturing the press it is now making, unless, within 10 days from the going down of the mandate, the defendant shall give a bond, with sureties to be approved by the court below, in \$25,000, conditioned to pay all damages which may be awarded in this action to the complainant from the defendant by reason of the manufacture of its presses after the giving of such bond. The order appealed from is modified accordingly, costs of appeal to be divided.

Addendum to the Opinion. It is not intended that the bond above required shall take the place of the bond already given in the court

below, which shall remain in full force and effect. If the appellants desire it, the bond for \$25,000 may be framed to cover not only the damages for the manufacture of the machines, but also the damages recoverable from the customers of appellants for the use of the machines sold.

THOMSON-HOUSTON ELECTRIC CO. v. ELMIRA & HORSEHEADS RY. CO.

(Circuit Court, N. D. New York. June 19, 1895.)

No. 6,130.

1. PATENTS — TWO PATENTS FOR SAME INVENTION — PATENT FOR MINOR IMPROVEMENTS.

While a second patent issued to the same person for the same invention is void, yet the granting of a patent for minor improvements pending an application for the broad invention will not invalidate a patent subsequently granted for the latter, where the purpose of the first patent was obvious, so that the public had due and formal notice thereof.

2. SAME—INFRINGEMENT SUITS.

Where an infringing machine was purchased from a corporation having no right to sell it, and afterwards this corporation, as well as the corporation owning the patent, came under the control of a dominant corporation, *held*, that this fact did not, on the ground of estoppel, prevent the bringing of an infringement suit, in the name of the corporation owning the patent, against the purchaser.

3. SAME—ELECTRIC RAILWAYS.

The Van Depoele patent, No. 424,695, for improvements in suspended switches and traveling contacts for electric railways, construed, and *held* valid and infringed, except as to certain claims.

4. SAME.

The use of numerous claims, covering practically the same subject-matter by different forms of expression, criticised.

Final Hearing in Equity.

This action is brought by the Thomson-Houston Electric Company against the Elmira & Horseheads Railway Company, a corporation operating an electric railway in the city of Elmira, N. Y., for the infringement of letters patent, No. 424,695, granted April 1, 1890, to Charles J. Van Depoele for improvements in suspended switches and traveling contacts for electric railways. The original application was filed March 12, 1887. It was divided and the application for the patent in suit was filed October 22, 1888. The invention relates to mechanisms and combinations thereof by which an electric railway having branches and turnouts may be operated automatically without regard to the height of the conducting wire, or its parallelism to the center of the rails. The specification says: "My present invention relates to electric railways of the class in which a suspended conductor is used to convey the working-current, a traveling contact carried by the car being employed for taking off the current for use in operating the motor by which the car is propelled. The return-circuit is preferably completed through the rails of the track. My invention consists in certain devices and their relative arrangement by means of which a contact device carried by a rod or pole extended from the car and pressed upwardly into contact with the conductor is switched from one line to another correspondingly with the vehicle. * * * More particularly my invention consists in a track-switch for the vehicle, a conductor-switch for the contact device or 'trolley,' as it is termed, and the trolley device attached to the vehicle, these elements being so arranged relatively to one another that in operation the vehicle reaches the track-switch and is diverted laterally before the trolley reaches the conductor-switch, whereby the trolley, which partakes of the lateral movement of the vehicle, has imparted to it a lateral-moving tendency before its switch is reached, and it therefore passes through the switch in a proper direction, corresponding to

the movement of the vehicle. My invention also consists in various details of construction and arrangement, which will be hereinafter pointed out." The inventor after describing the drawings continues as follows: "In order that the contact-wheel, E, shall be compelled to pass from one conductor to a branch or one attached thereto leading in a different direction, I provide the inverted open-bottom metallic boxes, I, which are formed with branching compartments and constructed in the form of switches, conforming to the curves and angles of the track-switches by which the direction of the car is controlled. These boxes are in the form of open smooth curved passages and are free from obstructions within so that the contact-wheel, E, which is slightly depressed on meeting the end of the switch-box, may roll freely therethrough and move laterally therein in the desired direction without hindrance. * * * The electric switches, I, are to be placed directly over—that is to say, above—their counterparts. The track switches and the contact-wheel, as before stated, are to be located so that as the front portion of the car swings in the desired direction as the front wheels pass the track-switch the contact arm will be deflected and the direction of the wheel, E, correspondingly changed while still on the straight wire, so that on reaching the switch box the wheel will be depressed and pass thereinto and naturally pass through and out of the proper compartment thereof. The switch boxes, I, being connected directly to the conductors, D, are similarly charged and when the wheel, E, is passing therethrough the current passes through the box, I, and thence into the contact-wheel, through its flanges, e, passing thence through the arm, F, or a separate conductor to the motor, C. Since there are no moving tongues or springs or points to catch or impede the progress of the wheel when three or four grooves, as the case may be, exist in one switch-box, the wheel will intersect the grooves and pass along in the desired direction and go through without any difficulty whatever, its direction being previously indicated by the movement of the front portion of the car. Thus it will be seen that by locating my traveling contact-wheel in the position shown or one equivalent thereto I obviate all the difficulties of switching from conductor to conductor and with the smallest possible amount of special construction. I believe myself to be the first to devise this arrangement of contact device and switches, whereby the lateral movement of the vehicle is first imparted to the trailing-contact arm and the contact-wheel is then flexibly, yet without interruption of contact, drawn into the switch and guided thereby into engagement with the desired branch conductor, and I intend herein to claim broadly, any relative arrangement of track-switch, conductor-switch, vehicle, and contact device by means of which the former switch will act in advance of the latter and the vehicle impart a lateral tendency to the trailing contact by the time it engages with the conductor-switch. The contact-carrying arm described in the present application possesses substantial practical advantages over any other means yet proposed for establishing moving contact between a vehicle and a stationary supply-conductor, in that by the use of a hinged flexibly-mounted arm much greater freedom of movement is compatible with the maintenance of a positive mechanical connection and electrical contact between the vehicle and supply conductors."

The patent may be divided as follows: First, the contact device, commonly known as the "trolley;" second, the support therefor; and, third, the overhead switching devices. The contact device belongs to the class known as "under-running" contacts. It consists of a grooved wheel mounted upon a pivoted support on the roof of the car having a sufficient capacity of vertical and lateral automatic adjustability and capable of being detached and lowered by an attendant on the car platform. This support is a pole or arm mounted on the roof of the car and pivoted and swiveled so as to be capable of swinging both vertically and horizontally. Attached to the short arm of this pole is a weighted spring which operates to maintain normal contact between the grooved wheel and the suspended conductor. The overhead switching devices are placed at points on the line of the road where branches and turnouts occur, and where the overhead trolley wires are required to branch correspondingly with the tracks. The object is to transfer the trolley from the main wire to the branch wire and vice versa without interrupting the contact. The switching device as shown in the patent consists of a Y-shaped plate of sheet metal, with depending side flanges. This plate is secured to the underside of the trolley wire at the point where it branches, the narrow end being turned in the direction of the main wire and the other end being connected with both the main and branch wire. The narrow end is wide enough to permit of the easy movement of the trolley-wheel through it

while the other end is wide enough to permit the wheel to move out in the direction of either the main or the branch wire. The switch device is placed at the junction of the main and branch wire above the corresponding switch on the track and the wheel is to be so supported on the roof of the car that it will not reach the switch box until at least the forward wheels of the car have passed the junction of the main and branch track. Thus the switch box will guide the wheel automatically upon that one of the trolley wires which corresponds with the track upon which the car has been directed.

The patent contains 35 claims, all of which are said to be involved, except those relating to the fender for the trolley wheel. These so-called "fender claims," numbered 18, 28, 29 and 30, were withdrawn at the argument. The other claims may be divided into groups as follows:

"Claims relating to the construction and attachment of the conductor switch.

"(1) The combination, with crossing or branching overhead wires, of a plate along the top of which said wires pass, and deflecting-ribs at the lower side of said plate at its extremities. (2) The combination, with an overhead conductor arranged to receive a traveling underneath contact, of a switching device secured to and depending from the conductor. (3) The combination, with an overhead wire for receiving an underneath contact, of a switch-plate attached to the wire in about the same horizontal plane as the wire. (9) In an electric railway, a switching device for suspended conductors, comprising two or more branching compartments or ways corresponding to the direction of the track, and of the main and branch conductors, and secured to the said suspended conductors, substantially as described. (10) In an electric railway, a switching device for suspended conductors, consisting of an open-bottom box formed with two or more branching compartments corresponding to the direction of the track and arranged to be secured to the conductor, substantially as described. (11) The combination, with an overhead line-wire, of a grooved contact device pressed against the wire and receiving the wire between the flanges of the groove, and a guiding switch-plate connected to the wire against which the said flanges bear in passing from one line to another. (12) In an electric railway having an electric conductor suspended above the track, a switching device supported by the conductor and formed with downwardly-open compartments or ways corresponding with the direction of the track, said ways being substantially flat at their upper sides to form paths for the flanges of the contact-trolleys, substantially as described. (13) In an electric railway, a switch for suspended conductors, consisting of a box formed with branching compartments corresponding with the branches of the conductor, and of the track-switches and secured to the said suspended conductors, substantially as described. (14) In an electric railway, a switch for suspended conductors, consisting of a box formed with branching compartments corresponding with the branches of the conductor, and of the track-switches, and secured to and depending from the said suspended conductor, substantially as described. (19) In an electric railway, the combination, with branching overhead conductors, of an upwardly-pressed contact-arm carrying a grooved wheel embracing the conductor, and a switch-plate at the branching point adapted to receive the tips of the wheel flanges, and provided with depending ribs, between which the wheel is free to move laterally to engage with one of the branch conductors. (23) The combination, with branching overhead conductors, of a vehicle having a laterally-swinging contact-arm pressed upward to engage the conductors, and a switch-plate at the branching point having depending sides, but open at its extremities, the interior width of the plate between the sides being greater than the thickness of the contact-wheel, whereby the wheel is free to move laterally with relation to the main conductors and engage one of the branching conductors.

"Claims relating to the centralizing spring.

"(21) In an electric railway, the combination, with main and branch overhead conductors, of a vehicle, an intermediate contact-arm thereon movable laterally with respect thereto, a spring tending to return the arm to its normal central position, a guiding-switch at the branching point of the conductor, and a track-switch for the vehicle located so as to operate in advance of the conductor-switch, whereby the lateral tendency of the contact device at the branching point is imparted to it by the vehicle, while its outer extremity is flexibly guided by the overhead switch from main to branch conductor. (24)

In an electric railway, the combination, with branching line-conductors, of a track-switch, a vehicle, an intermediate contact-arm swinging laterally with respect to the vehicle, but provided with a spring tending to restore it to its normal central position, and a lateral deflecting-switch at the branching point of the conductors, whereby the extremity of the contact-arm may be flexibly guided from main to branch conductor. (31) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device consisting of a trailing arm having a grooved contact-wheel at its outer end and moving laterally relatively to the vehicle, but provided with a spring tending to retain it in its normal central position. (32) In an electric railway, the combination, with an overhead conductor and a vehicle, of a trailing contact-arm guided at its outer end by the overhead conductor, and movable laterally relatively to the vehicle, but having a normal centralizing tendency by means of a spring or weight. (33) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device consisting of an upwardly-pressed trailing arm having a grooved contact-wheel at its outer end by which it is guided by the conductor, the said arm being free to swing laterally relatively to the vehicle, but tending to remain in its normal central position by means of a spring or weight. (34) The combination, with a vehicle and an overhead conductor, of a trailing contact-arm guided normally by the conductor, but having a spring-connection with the vehicle tending constantly to maintain it in a definite position, while at the same time it is free to swing laterally with respect to the vehicle against the pressure of the said spring. (35) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device consisting of a rearwardly-extending arm guided at its outer extremity by engagement with the conductor and movable laterally relatively to the vehicle, but having a spring or weight tending to restore it to its normal central position.

"Claims relating to the weighted tension spring.

"(15) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a contact-carrying arm pivotally supported on top of the car and provided at its outer end with a contact-roller engaging the under side of the suspended conductor, and a weighted spring at or near the inner end of the arm for maintaining said upward contact, substantially as described. (16) In an electric railway, the combination of a car, provided with a pivoted arm, as F, having a contact at its outer extremity, a tension-spring, as G, attached at its inner extremity, and a vertically-moving weight connected to said spring for holding the same in operative relation to the arm throughout its entire range of movement, substantially as described. (17) In an electric railway, the combination of the car having suitably-pivoted arm, F, carrying a contact-wheel at its outer extremity, a spring, G, secured to its lower extremity, and a connection extending from said spring and provided with a weight at its lower end, substantially as described.

"Claims relating to the directive action of the track switch, or the combination of the conductor switch and trolley, with the track switch.

"(4) The combination of a track having switches, an overhead conductor above the track and having switches, and a car on the track provided with a contact-carrying arm arranged to engage the conductor at a point in rear of the front wheels of the car. (5) In an electric railway, the combination of a track having suitable switches, an electric conductor suspended above said track and having switches located above the track-switches, and a car on said track provided with an upwardly-extending arm carrying a contact-wheel arranged to engage the suspended conductor at a point in rear of the front wheels of the car, substantially as described. (6) In an electric railway, the combination of an electrically-propelled car, a supply-conductor suspended over the line of travel of the car, a swinging arm mounted upon the car and carrying a contact device at its free end, said contact arranged to bear against said conductor, suitable switching devices upon the track traversed by the wheels of the car, and corresponding switches on the suspended conductors located above those on the track and arranged to engage the contact devices, substantially as described. (7) In an electric railway, the combination of a track having suitable switches, an electric conductor suspended above said track and

having switches located above the track-switches, a car on said track provided with a swinging arm carrying a contact-wheel arranged to engage the suspended conductor, and switches at a point in rear of the front wheels of the car, whereby the contact-wheel is directed through the proper part of the suspended switch, substantially as described. (8) In an electric railway, the combination of a switch or turn-out on the track and a corresponding one on the overhead line, the same being so arranged relatively that the car will reach the switch or turn-out before the trolley does, substantially as described. (20) In an electric railway, the combination, with an overhead switch-plate having depending ribs, but open at its extremities, of main and branch conductors extending from its two extremities, respectively, a vehicle, an upwardly-pressed contact-arm attached to the vehicle and tending to move laterally therewith, and a track-switch for the vehicle located so as to operate in advance of the conductor-switch. (22) In an electric railway, the combination, with main and branch conductors, of a vehicle, a contact-arm thereon having vertical and lateral spring-pressure, a switch-plate for the conductors, and a track-switch for the vehicle located so as to operate in advance of the conductor-switch, whereby the lateral tendency of the contact device at the branching point is imparted to it by the vehicle, while its outer extremity is flexibly guided by the overhead switch from main to branch conductor. (25) In a branching electric railway, the combination of a track-switch, an overhead conductor-switch, and a vehicle having a rearwardly-extending contact-arm whereby the track-switch will operate in advance of the conductor-switch. (26) In a branching electric railway, the combination, with a vehicle, of a track-switch, an overhead conductor-switch, and a contact-arm extending upward from the vehicle to the conductor, and so located relatively to the length of the vehicle and the two switches that the lateral movement of the vehicle will give a corresponding movement of the contact device on the conductor-switch. (27) In a branching electric railway, the combination, with a vehicle, of a track-switch, a contact device consisting of a trailing spring-pressed arm having a grooved contact-piece embracing the conductor and guided thereby, the said arm being jointed to the car and tending to move laterally therewith, and an over-head conductor-switch adapted to engage the contact-piece and whereby the extremity of the arm is flexibly guided from main to branch conductor."

The parties do not agree as to the grouping of some of these claims, but it is thought that the above arrangement is as convenient as any.

The defenses are anticipation, lack of patentability, noninfringement, and as to a part of the defendant's cars, estoppel because of an alleged license.

Samuel A. Duncan and Frederic H. Betts, for complainant.

William A. Jenner, Edwin B. Smith, and Thomas B. Kerr, for defendant.

COXE, District Judge. The patent in controversy deals with a comparatively new art. Electricity has so completely supplanted horse power as a means for propelling street cars that it is difficult to realize that only about 10 years have passed since the first successful electric railroad was installed. At the present time there are more than 500 roads in operation, employing an immense army of workmen and a vast amount of capital. That this wonderful result was accomplished only after innumerable difficulties and obstacles had been encountered and overcome is manifest. The potentialities of the art attracted a large number of brilliant and ingenious men who, for more than a decade, have been laboring to make electric railroading successful. Even after the necessities of the situation had evolved the fundamental principle of taking the electricity from an overhead conductor the difficulties in finding suitable contact and switching devices for a long time prevented commercial success and the solution of the problem taxed the in-

genuity of a large number of inventors. Although the electric road of to-day is a composite organism to which many ingenious and able men have contributed, yet it cannot be denied that to Van Depoele, more than to any other man, belongs the credit of having made it a practical working success. His contributions to the art rapidly supplanted the crude and tentative prior structures and have continued in use until the present time. No one can read this record without being impressed with the truth of this proposition, and, this being so, the court naturally approaches this controversy in liberal spirit and with an inclination to give the inventor the full fruits of his invention. If there be any deviation from this determination it is due to the fact that he has obscured his real invention in a multitude of fuliginous and attenuated claims many of which can only be distinguished when their language is subjected to the most searching analysis. He has particularly pointed out his invention in the description, but, because of this seemingly needless verbosity, he has claimed it indistinctly, to the annoyance of the public, and especially that part of the public which is called upon to construe the patent. A fair amount of tautology and reiteration is prudent and permissible in the claims of a patent, but it is hardly conceivable that it requires 35 claims to secure a comparatively simple mechanical invention. Where the patentee has taken pains to cover every shadow of a shade in his claims the range of construction is limited and he must be held strictly to language which he has adopted with such painstaking deliberation and exactness.

Generally speaking the patent covers devices and combinations by which electric cars are run automatically upon branches and turnouts, the motor being supplied from an overhead system of wires. This is done by a trailing under-running trolley mounted on a long pivoted arm supported on the top of the car and pressed up against the wire by a spring, or equivalent device. This arm has sufficient horizontal and perpendicular movement to adjust itself automatically to the wire, although the wire may not at all times be directly above the center of the rails or suspended at the same distance above the car. The conductor without leaving the platform of the car has full control of the trolley. The other important device used by the inventor is an overhead switch so mounted on the wire that when the forward wheels of the car take the track switch a trend or direction is given to the trolley so that when it reaches the overhead switch it is guided to the proper branch automatically without in any manner disturbing the electric current or the running of the car. In this way a system is produced which is well-nigh perfect in its essential details. That it was necessary in order to attain this result to surmount many difficulties and solve many problems might almost be assumed by the court, but it is abundantly proved by the record.

It is argued by the defendant that the patent is void because all of the inventions claimed therein—except claims 15, 16 and 17, which are not infringed—are covered by earlier patents to Van

Depoele. There is no dispute as to the law. It is fundamental that two patents cannot be granted for the same invention. Where two patents for the same invention issue to the same person the second patent is void. The supreme court in *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, lays down no new rule of law. It simply adheres to the old rule which is well stated in the syllabus as follows:

"No patent can issue for an invention actually covered by a former patent, especially to the same patentee, although the terms of the claims may differ.

"The second patent, in such case, although containing a claim broader and more generic in its character than the specific claims contained in the prior patent, is also void.

"But where the second patent covers matters described in the prior patent, essentially distinct and separable, and distinct from the invention covered thereby, and claims made thereunder, its validity may be sustained."

The question here is, are the inventions of the patent in suit all covered by prior patents to Van Depoele? The patent chiefly relied upon by the defendant is No. 397,451, dated February 5, 1889, for improvements in "overhead contacts and switches." The application was filed November 12, 1888, while the application for the patent in suit was pending in the patent office, the original application being filed March 12, 1887, and the divisional application October 22, 1888. At line 9 of No. 397,451, the patentee says: "My invention relates to improvements in electric railways and includes improvements upon the invention forming the subject-matter of a prior application," viz.: the original application for the patent in suit. It is manifest on reading this patent that it was intended to secure a few minor improvements upon the broad invention then pending in the patent office. The public was given due and formal notice of this intention. No one was misled or injured. The claims of No. 397,451 are wholly insufficient to secure the invention of No. 424,695. An infringer unless he used the peculiar contractions and guide ribs shown in the former would escape all accountability if the latter is held invalid. In other words, it is the patent in suit which protects the basic invention. Destroy this and the inventor is despoiled of his principal contribution to the art. The substance is gone, the shadow remains. A court of equity should be very sure of its premises before reaching a result so unjust, so contrary to the policy of our government, so dispiriting to inventors. A decision holding this patent invalid would simply be a confiscation of Van Depoele's property. Why should he be thus punished? What equities demand it? He made a valuable invention and promptly went with it to the patent office. Subsequently he made what he thought to be improvements and asked for a patent for them also. He could not describe his improvements without referring to his original invention, but he did all in his power to inform the public of the exact situation. The patent for the improvements was issued first, and because the invention was thus, in a sense, disclosed, it is argued that it is lost. In other words, the proposition is that Van Depoele, in endeavoring to secure his improvements in the only way known to the law, has forfeited his

right to the main invention. The supreme court had no difficulty in reaching the decision in the Miller Case, because upon the peculiar facts there disclosed they were convinced that the two patents were for the same invention. Here, to say the least, there is grave doubt whether the two patents are for the same invention. If, to use the hypothesis of the Miller Case, the patents had been granted to different parties, would the apparatus and combinations of the patent in suit infringe the restricted claims of No. 397,451? It is thought not. The patents are susceptible of the construction above suggested, viz.: that the patent in suit is for the broad invention and that No. 397,451 is for improvements in minor details and should be so restricted. This construction gives the inventor the fruits of his inventions, but nothing more, and fully preserves the rights of the public. If the other construction were possible the facts are such that there is every reason why it should not be given. What is said of No. 397,451 is also true of Van Depoele's other prior patents.

It is said that there is no invention in the claims relating to the switching apparatus because the patentee has simply suspended, face downward, the well-known form of railroad switch. Assuming that this is a fair statement of his achievement it does not follow that patentability is wanting. When it is considered that he was dealing with an under-running system, that it was necessary to shift the trolley not only but the mysterious current which the trolley carries, and that he accomplished this result automatically when others failed, it is not difficult to place him above the plane of the mechanic. As was said by Mr. Justice Brown in *C. & A. Potts & Co. v. Creager*, 15 Sup. Ct. 194:

"But where the alleged novelty consists in transferring a device from one branch of industry to another, the answer depends upon a variety of considerations. In such cases we are bound to inquire into the remoteness of relationship of the two industries; what alterations were necessary to adapt the device to its new use, and what the value of such adaptation has been to the new industry. If the new use be analogous to the former one, the court will undoubtedly be disposed to construe the patent more strictly, and to require clearer proof of the exercise of the inventive faculty in adapting it to the new use—particularly if the device be one of minor importance in its new field of usefulness. On the other hand, if the transfer be to a branch of industry but remotely allied to the other, and the effect of such transfer has been to supersede other methods of doing the same work, the court will look with a less critical eye upon the means employed in making the transfer. Doubtless a patentee is entitled to every use of which his invention is susceptible, whether such use be known or unknown to him; but the person who has taken his device and, by improvements thereon, has adapted it to a different industry, may also draw to himself the quality of inventor. * * * Indeed, it often requires as acute a perception of the relations between cause and effect, and as much of the peculiar intuitive genius which is a characteristic of great inventors, to grasp the idea that a device used in one art may be made available in another, as would be necessary to create the device *de novo*. And this is not the less true if, after the thing has been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of before. The apparent simplicity of a new device often leads an inexperienced person to think that it would have occurred to any one familiar with the subject; but the decisive answer is that with dozens and perhaps hundreds of others laboring in the same field, it had never occurred to any one before. The practiced eye of an ordinary mechanic may be safely trusted to see what ought to be apparent to every one."

Again, in *Du Bois v. Kirk*, 15 Sup. Ct. 729, the same learned judge says:

"The Kirk invention is undoubtedly a very simple one, and it may seem strange that a similar method of relieving the pressure had never occurred to the builders of bear-trap dams before; but the fact is that it did not, and that it was not one of those obvious improvements upon what had gone before, which would suggest itself to an ordinary workman, or fall within the definition of mere mechanical skill. It was in fact the application of an old device to meet a novel exigency, and to subserve a new purpose. That it is a useful improvement can scarcely be doubted."

The defendant argues that the complainant is estopped from asking a decree against six cars purchased by it from the Sprague Electric Railway & Motor Company in 1890 for the reason that in May, 1892, the General Electric Company acquired a controlling interest in the stock of the Sprague Company and of the complainant. The theory is that the General Electric Company is the real complainant and, as successor to the Sprague Company, it is violating its obligation to the defendant, as vendee of the Sprague Company, in bringing this suit. Even if the complainant had given the defendant a license in May, 1892, it would seem that it might still have a decree for an accounting during the two years that the defendant used the cars without any claim of right. But the court is unable to discern how the complainant's right to maintain this action is affected by the proceedings alluded to. The proposition is this, that one who purchases a patented machine from an infringer and operates it unlawfully for a term of years acquires a right to its use if the vendor and owner of the patent subsequently enter into partnership. The complainant is a legal entity entitled to sue. It has never given the defendant a license to use the cars in question, either express or implied. The defendant never acquired the right from the Sprague Company, for that company had no right to give. How then did the defendant get the right to infringe the complainant's patent? So far as this plea is concerned the defendant stands a naked trespasser claiming to do an unlawful act because of a subsequent arrangement between its vendor, the patent owner and a third corporation, to which it was in no way a party. The complainant has done no act to deceive or mislead the defendant. The latter has parted with nothing and lost no right, relying upon complainant's declarations, for none were made. If the complainant had in any manner induced the defendant to purchase the cars in question, intimating that they did not infringe the Van Depoele patent, the situation would be different, but as it is the case seems devoid of every element of estoppel. The decree should not, of course, include the car purchased of the complainant.

The defendant owns and operates an electric railway at Elmira. The current is supplied to the motor of the cars by a trailing under-running trolley mounted on the roof of the car. The trolley is pressed up against the wire and the lateral and vertical action of the pole is controlled by springs. Two forms of trolley are used known as the "Anderson" and the "Nuttall." Both are adjustable from the car platform by a cord in the hands of the conductor.

There are about 12 sheet metal pan switches, ten so-called "Murray" switches and two so-called "General Electric" switches, in use on the defendant's road. The Murray switches are used at turnouts, the others at branches. They are so located that "the car has fully passed the track switch before the trolley enters the overhead switch." The circuit remains unbroken while the trolley is passing through.

It remains to consider the claims with reference to the question of infringement.

Claims 15, 16 and 17 are not infringed. One of the elements of the claims is "a weighted spring," or, as it is expressed in claim 16, "a vertically-moving weight connected to said spring," and in claim 17 "a connection extending from said spring and provided with a weight at its lower end." The function of the "weight, H," is pointed out with care in the description. The defendant does not use this weight in any manner whatever and consequently does not infringe. *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76; *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274.

I fully agree with the defendant that several of the remaining claims are for the same subject-matter and, in a patentable sense, are not distinguishable. To attempt to differentiate them would, in the language of the *Miller Case*, "involve the drawing of distinctions too refined for the practical administration of the patent law."

The counsel for the complainant admit that claims 9-14, inclusive, "cover substantially the same ground." Claims 9 and 10 are so nearly alike that the difference is only a verbal one. The language of claims 13 and 14 is identical, except that the latter adds to the former the words "and depending from." What the significance of these words is, in view of the description and other claims, the court is at a loss to conjecture. To analyze all of the claims involved, or, more correctly speaking, the involved claims, and attempt to point out their differences and similarities, would extend this opinion beyond all reasonable length. As the brief for the defendant says, "no special harm can come of it" where several claims for substantially the same invention appear in one patent, but, on the other hand, the issues in these causes should be simplified as much as possible. In view of the admitted similarity of the claims it is possible that the complainant should be compelled to elect which of them it will rely upon, but further discussion of the matter may well be reserved until the settlement of the decree.

Of the claims relating to the construction and attachment of the conductor switch the complainant's counsel regard claim 2 as the leading one in the group. This claim is very broad, but it must be construed in the light of the specification and drawings and so construed fairly secures the invention. Claim 9 is also pointed out as the one which best secures the special features of the switch. From what has been already said of the defendant's railway it is manifest that these claims have been infringed. The particulars of the infringement may be conveniently left to the master.

Claims 4 and 20 are pointed out by complainant's counsel as the leading claims in the group relating to the directive action of the

track switch. Infringement of these claims is satisfactorily established.

Whether or not claims 5, 6 and 7 are infringed it seems unnecessary now to determine.

Of the claims relating to the centralizing spring the complainant seems to rely principally upon the thirty-third as describing with the greatest accuracy the patented construction. It is thought that this claim is infringed by the "Anderson" trolley which is given a centralizing tendency by springs located at its base, but not by the "Nuttall" which has no spring tending to restore it to its normal central position.

It follows that the complainant is entitled to a decree for an injunction and an accounting, but, as the defendant has succeeded as to some of the claims, the decree should be without costs.

CARTER-CRUME CO. et al. v. WATSON et al.

(Circuit Court, N. D. New York. June 26, 1895.)

No. 6,336.

1. PRELIMINARY INJUNCTION IN PATENT SUITS—ESTOPPEL.

In an infringement suit against small dealers who purchased the alleged infringing goods from a corporation, it appeared that the patentee of the patent sued on was a member of that corporation, and that the goods sold by the corporation were made under a subsequent patent, which was alleged to cover the device of complainant's patent, with an added feature. *Held*, that if any estoppel arose from these facts, against defendants, it was not so clear as to justify the court in issuing a preliminary injunction on that ground alone.

2. SAME—CHECK BOOKS.

A preliminary injunction against alleged infringement of the Rodden patent, No. 503,914, for a counter check book denied.

This was a suit by the Carter-Crume Company and others against George F. Watson and others for infringement of a patent for a counter check book. Complainants moved for a preliminary injunction.

C. H. Duell, for complainants.

George B. Selden, for defendants.

COXE, District Judge. The patent upon which this action is based, No. 503,914, is not two years old. It has never been adjudicated and there is no public acquiescence. Infringement is disputed. The defendants are small dealers who purchased the books in controversy from the American Counter Check Book Company, a corporation organized under the laws of West Virginia. The principal reliance of the complainants is an alleged estoppel based upon the fact that William H. Rodden, the patentee of complainants' patent, is a director in the West Virginia Company, and that the books sold to defendants are said to be made under a subsequent patent to Rodden which shows the device of the complainants' patent with an added feature. In other words, the contention is that because

Rodden cannot dispute the validity of the patent owned by the complainants, the West Virginia Company and the defendants, who purchased from that company, are also estopped. No authority is cited which carries the doctrine of estoppel quite to this extent. It is enough, however, to say that the estoppel relied on is not so absolutely clear as to justify the court in making it the sole support of a preliminary injunction. Motion denied.

WHITFIELD v. HIGBIE.

(Circuit Court, N. D. Illinois. July 24, 1895.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—GRAIN SEPARATORS.

The first claim of letters patent No. 343,324, issued June 8, 1886, to Christian Kaspar, for an improvement in grain separators, consisting of a case formed with enlargement near its top, and deflector, in combination with inclosed screens, forming a zigzag grain channel fixed rigidly in the sides of the case, with an adjustable grate located in the enlargement to regulate the speed of the grain, and a gate operating between the grate and the deflector, is not infringed by a device having a fixed grate instead of an adjustable one.

2. SAME.

The third claim of said patent for an inclined grate comprising longitudinal bars angular in cross section, and set at an angle in the plane of the grate surface, is not infringed by a device having round bars, not set at an angle.

In Equity. Suit by Thomas Whitfield against Nathan B. Higbie to enjoin the alleged infringement of a patent.

Banning & Banning, for complainant.

Dyrenforth & Dyrenforth, for defendant.

SHOWALTER, Circuit Judge. This is a bill to stop an alleged infringement of certain letters patent of the United States, and for an accounting. Said letters patent, issued to one Christian Kaspar on the 8th of June, 1886, and numbered 343,324, and being for an improvement in grain separators, came to be the property of complainant by assignment. The machine in question consists of an elongated upright box, containing at the top a hopper, formed by a plane inclined towards one side, leaving along the lower edge an opening, the size of which is regulated by a gate. Next below this is a grate, inclined in the opposite direction, and having its bars towards its lower end or edge curved downward, and connected at their extremities by a crossbar. Below said grate is a series of inclined screens and covers, connected, the lower edge of one with the upper edge of the next, in alternating angles, and forming a zigzag channel terminating in an opening on one side, and near the bottom of the box. Grains poured into the hopper fall through the gate, then through the grate, then down the zigzag channel from side to side, and out at the opening in the bottom of the box. Foreign substances,—straws, pieces of dirt, nails, chips, etc., larger than the grains,—being separated therefrom by the grate, fall over the lower edge of the grate, and down through a passageway next the side of

the box to the bottom of the box. Dust and particles of foreign matter smaller than the grains are separated therefrom as the grains fall on the successive inclined screens. Such smaller foreign substances also lodge in the bottom of the box, after passing through the screens, and being deflected and kept from re-entering the zigzag grain channel by the covers. The foregoing description will answer in general as well for defendant's machine as for complainant's. It is said that the first and third claims are infringed. The first claim is in words following:

"(1) In a grain separator, the case, A, formed with enlargement, a, near its top, and deflector, a², in combination with inclosed screens forming zigzag grain channel, B, fixed rigidly in the sides of the case; the grate, C, located in the enlargement, a, and adjustable at its lower end to regulate the speed of the grain flowing over it; and the gate, D, operating between the grate and the deflector, a², substantially as set forth."

The specification contains the following:

"When in position, the grate forms the cover of the upper section or step of the grain channel. Its upper end rests freely against the wall of the outside box or case, and its lower end adjustable at the angle of the channel, where a slotted strap, c⁴, and set screw or other suitable device, is employed to adjust that end more or less vertically, as may be required. It has been found that different elevations are required, according to the quantity of oats flowing through the cleaner. If the flow is heavy, the grate should be raised, which operates to scatter the stream to the sides, and so spread it that it will run through the grate before it reaches the end. A slight difference in adjustment makes a great difference in the action of the grate. There is a constant tendency in the grain, when it strikes the grate, to get 'wild,' and fly down its smooth surface and over its curved end into the waste channel below, instead of gravitating, as it naturally should, through the openings into the channel designed for it. This tendency has to be overcome and controlled by the adjustment of the screen to the pitch required to do perfect work."

A part of the combination claimed is "the grate, C, * * * adjustable at its lower end to regulate the speed of the grain flowing over it, * * * substantially as set forth." The mechanism—or some equivalent mechanism—described in the specification and shown in the drawing accompanying the specification for raising and lowering the end of the grate is part of the combination. In the machine as made by defendant the grate is fixed in position; it is not adjustable. There is not only no equivalent for the mechanism shown in complainant's specification, but no mechanism of any kind for changing the position of the lower end of the grate. Where a patent goes for a combination, every special matter named in the claim as entering into the combination is held essential. The patent, being on the combination, cannot be infringed by any combination which does not contain each element or an equivalent. Hence there is here no infringement of said first claim.

Of the eight claims made in the original application, the seventh only was allowed. Abandoning this, with the others, Kaspar presented three new claims. Of these, the third was in words following:

"(3) In a grain separator, the grate, C, formed of bars of uniform size throughout their length, and running longitudinally of the grate, and curved downward at their lower ends as shown, and a crosspiece connecting said bars

at their curved ends, whereby straw and similar refuse carried over said grate is readily discharged, and the clogging of the grate is prevented, substantially as set forth."

This claim also was disallowed, but it was signified to Kaspar, from the patent office, that said claim might be allowed if amended to the following:

"(3) In a grain separator, the inclined grate comprising longitudinal bars angular in cross section, of uniform size throughout their length, set with an angle in the plane of the grate surface, and curved downwards at their lower ends as shown, and a crosspiece connecting said bars at their curved ends, substantially as set forth."

This amendment was thereupon so made, the claim as so amended was allowed, and it is said that defendant has infringed the same. The specification contains the following words:

"At the upper end of the channel, B, I place a grate, C, arranged to cover the upper section of the said channel in its entire length and breadth. This grate may be struck up from a slotted plate of sheet metal, but I prefer the construction here shown. This construction involves a corrugated casting, c, a plain, bottom clamping plate, c¹, and a leather or other flexible packing, c², at each end, with a series of bars or angle iron, c³, or other suitable forms, bent as shown, and secured by means of bolts between the plates above described. It will be observed that by constructing the grate of parallel bars angular in cross section, and arranging them as shown, they present a sharp angle to the plane of the grate, whereby their inclined sides are utilized to carry the grain laterally, and direct it downward through the spaces between the bars. These bars, furthermore, are arranged longitudinally, and as near together as may be found practicable with different kinds of grain. If the grain is small, the grate should be finer than when it is coarse. To clean oats, the proper space between the bars is about five thirty-seconds of an inch. The bars should be highly polished, so as to facilitate the distribution and discharge of the grain as it is delivered upon the grate. They are curved at their lower ends, so as to clean themselves of sticks, nails, and the like, which, in sliding down the open spaces between the bars, will strike against the inner clamping bar, and be titled and thrown out, thus avoiding clogging at this point, and the obstruction of the grate, which might occur if the bars were straight."

In the grate as made by defendant the bars are round. They are not "angular in cross section," nor are they "set with an angle in the plane of the grate surface." If said third claim as proposed by Kaspar had been allowed, defendant's grate would prima facie, and apart from the prior art, have been an infringement. But Kaspar yielded to the demands in the patent office, so that said third claim as allowed must be distinguished in construction from the third claim as so abandoned and relinquished. A grate having bars "angular in cross section," and "set with an angle in the plane of the grate surface," cannot, in view of the proceedings in the patent office, be treated as an equivalent for a grate like that used by defendant, namely, a grate with round bars. Even apart from said patent-office proceedings,—since the claim in a patent is the patentee's own definition of his rights,—it would seem to involve a disregard of words which a court could hardly justify to say that a claim for a grate having bars "angular in cross section," and "set with an angle in the plane of the grate surface," means a grate with round bars.

I think, in view of the suggestions made, there was no infringement of the third claim. The bill is therefore dismissed for want of equity.

BASS, RATCLIFF & GRETTON, Limited, v. GUGGENHEIMER et al.

(Circuit Court, D. Maryland. August 2, 1895.)

COSTS IN EQUITY—INFRINGEMENT OF TRADE-MARKS.

Where a party unwittingly violating a trade-mark by printing labels ordered by a third person, on being notified of the infringement, promised to desist from further printing, and offered to surrender the lithographic stone, but an injunction suit was nevertheless brought, *held*, that complainant should pay his own costs.

This was a suit in equity by Bass, Ratcliff & Gretton, Limited, against Isaac Guggenheimer and Albert Weil, trading as Guggenheimer, Weil & Co., for infringement of a trade-mark.

Price & Steuart, for plaintiff.

M. R. Walter, for defendants.

MORRIS, District Judge. The defendants admit printing the infringing trade-mark labels, but claim that they did so upon the order of the Avon Bottling Company in good faith, without suspicion of any want of authority on the part of that company to have them printed, and supposing that the labels would be used in an honest and legitimate way. About four years after the labels were printed, the defendants were notified by the complainant of the infringement. They at once offered to surrender the lithographic stone from which the labels had been printed, and stated that they would print no more of them, and they have not printed any since the first order. By this prompt acquiescence in the complainant's demands, and the offer at once to surrender the lithographic stone, and the promise to respect the complainant's rights, the complainant obtained all it was entitled to obtain by an injunction. The complainant, for reasons of its own, has preferred, notwithstanding, to file a bill and obtain an injunction, and to have the lithographic stone given up under order of the court. It is a sound rule—for the prevention of unnecessary litigation, and to encourage parties who have ignorantly, and without bad faith, infringed a trade-mark, to promptly desist, without suit, upon being notified—that where a complainant had already obtained, before entering suit, by the prompt acquiescence of the defendant, all that an injunction can give him, he should not recover costs. I think the present is a case proper for the application of this rule. The decree will provide that each party shall pay their own costs.

THE SEVEN SONS.

ANCHUTZ et al. v. THE SEVEN SONS et al.

(District Court, W. D. Pennsylvania. April 23, 1895.)

ADMIRALTY JURISDICTION—MARINERS' WAGES—VOYAGE NOT PERFORMED.

Where river pilots were employed, at a specified rate, to go on a particular voyage on the next rise in the river, and, though the rise came, the voyage was not performed, *held*, that they could not maintain a libel in rem for wages, it appearing that they never performed any labor under the contract and never went on board, but only reported to the captain's office on shore, where they were told that the trip would not be made.

Albert York Smith, for libelants.
Geo. C. Wilson, for respondents.

BUFFINGTON, District Judge. This is a libel filed by Lee Anchutz and D. A. McDonald, Jr., against the steamer Seven Sons. The allegation of the libelants is that, about November 28, 1894, they were employed by C. W. Posey, the captain of that vessel, to make a trip from Pittsburgh to Cincinnati and return on the next rise of the river; that Anchutz was to serve as pilot at \$125 for the trip, and was paid \$15 on account in advance; that McDonald was to act as assistant pilot at \$100 for the trip; that such a rise happened early in December, and libelants held themselves in readiness to go, but the vessel did not proceed on the trip. The respondents claim the agreement was conditioned upon the vessel making the trip; that she did not make the run to Cincinnati as contemplated, but instead made a trip to Steubenville; that they offered said trip to Anchutz but he declined to accept it unless he was paid at the Cincinnati rate.

Two questions are raised: First, have the libelants proven an absolute hiring for the trip if the rise came? and, secondly, conceding they have, have they a lien upon the vessel in view of the fact that the trip was not made? Conceding, for present purposes, there was an unconditional contract for a trip to Cincinnati on the rise which occurred, yet the facts remain that the vessel did not make the trip and the libelants did not render any services whatever in pursuance of the contract, nor were they, indeed, on the vessel. They only claim they reported at the shore office of the captain, and were informed the trip would not be made. Under these facts, it is quite clear to us that, whatever rights the libelants had, they cannot be enforced in the present proceeding. In the case of *Vandewater v. Mills*, 19 How. 90, Mr. Justice Grier cites the case of *The City of London*, 1 W. Rob. Adm. 89, and says:

"It was decided that a mariner who had been discharged from a vessel after articles had been signed might proceed in the admiralty in a suit for wages, the voyage for which he was engaged having been prosecuted; but, if the intended voyage be altogether abandoned by the owner, the seaman must seek his remedy at common law by action on the case."

An examination of the cases fails to show any departure from this doctrine. It seems founded on correct principles which, in view of the authoritative character of the foregoing decision, we do not deem it necessary to adduce. Any seeming departures from it will be found on closer examination not to be such, for the cases cited on argument show that where liens were sustained (though the voyage was abandoned) the libelants had gone aboard the vessel and had performed some work in pursuance of their hiring,—an entirely different state of facts from those before us. The law is with the respondents in this case, and the libel will be dismissed, without prejudice. Let a decree be prepared.

CHATTANOOGA TERMINAL RY. CO. v. FELTON.

(Circuit Court, E. D. Tennessee, S. D. August 20, 1895.)

1. EQUITY JURISDICTION—INTERVENTIONS.

A federal court of equity, in an ancillary case, has jurisdiction to control a railroad receiver against whom complaint is made by an intervening petition filed against the receiver in the ancillary receivership litigation.

2. RAILROAD COMPANIES—RECEIVERS.

A railroad receiver is an officer of the court, and his officers and employés are agents and employés of the court.

3. SAME—AUTHORITY—INJUNCTION.

Such a receiver secretly, in the nighttime, and on Sunday, and without permission of the court or authority of law, sent his chief officials with a construction train loaded with track material and a large force of workmen, and entered, forcibly and against the protest of the owner, upon the tracks and right of way of another railroad, and laid cross-overs and switches to connect a leased line of the receiver with certain private manufacturing establishments already served and supplied with transportation accommodations by such other railroad. *Held*: The facts justified, on mere preliminary motion to show cause, the issuance of an injunction, both prohibitory and mandatory, to restrain entrance upon and use of the tracks and right of way, and to require a removal of the cross-overs and switches already laid, so as to place the property in the condition in which the receiver found it before his unlawful interference.

4. EMINENT DOMAIN—WHEN RIGHT EXISTS.

In such a case, the right of eminent domain does not exist. The attempted taking of the property was for a purpose the same as that for which the property was already used; and switch connections with private manufacturing enterprises, for the purpose of handling their freight, do not constitute such a public use as will justify the condemnation of private property.

5. SAME—PREREQUISITES—COMPENSATION.

A forcible seizure, against the will of the owner, of private property, even for a public purpose, is unauthorized by law, prior to the payment of compensation for the taking.

6. SAME—POWERS OF LESSEES OF RAILROADS.

Whether the lessee of a railroad can exercise the right of eminent domain to build switches and spur tracks to the leased line, when such do not connect to its own line, or whether such right remains in, and must be exercised by, the lessor company,—reserved, without expression of opinion.

7. EQUITY—ANCILLARY JURISDICTION—REMOVAL OF RECEIVERS.

While a court of ancillary jurisdiction has the same authority over a receiver as the court of the primary appointment, yet, in deference to that comity which exists between the federal courts, jurisdiction in the ancillary court ought to extend only to matters respecting property and rights of property within the court's territorial limits; and the question of the receiver's removal for misconduct ought to be presented to the court which first appointed him.

8. INJUNCTION—RAILROAD COMPANIES—RECEIVERS.

A preliminary injunction may be made to operate upon the receiver, his officers, servants, and agents, and all persons claiming in privity with him, by conveyance, lease, or other contract.

9. SAME—LIABILITY FOR WRONGFUL ACTS—DEFENSES.

A receiver of a railroad cannot escape responsibility by a claim that the acts complained of were done, not as receiver, but for another distinct railway. The power, position, and property, with all its appliances, were in his possession as the trusted officer and agent of the court, for the purpose only of carrying into effect the orders of the court in the administration of the trust; and the fact that, instead of using that property and power, and the men under his control, including his chief officers, for the purpose of

doing an unlawful and violent act, himself, he surrenders these into the custody and under the direction of another, with the distinct knowledge that they were to be used for an unlawful purpose, will not affect the responsibility.

10. SAME—LIABILITY FOR ACTS OF SERVANTS.

Neither can a receiver, while using the power, property, and men under his control, in a trust capacity, deny responsibility for what his officials and servants do; nor can he deny that he was acting in the premises as a receiver.

This is a petition by the Chattanooga Terminal Railway Company against S. M. Felton, receiver of the Cincinnati, New Orleans & Texas Pacific Railway Company, for a prohibitory injunction against the use and occupancy of certain switches, and for a mandatory injunction requiring the removal of such switches. Decree for complainant.

Brown & Spurlock, Young & Coleman, and Thomas, Elder & Thomas, for petitioner.

Shepherd & Frierson, for defendant.

CLARK, District Judge. The questions now to be disposed of arise upon the petition filed by the Chattanooga Terminal Railway Company, a corporation organized under the laws of Tennessee, and hereinafter, for convenience, called the "Terminal Company," in the above-named case. The Cincinnati, New Orleans & Texas Pacific Railway Company is a corporation organized under the laws of the state of Ohio, and hereinafter called the "Cincinnati Southern Road." This company was organized for that purpose, and is operating the lines of railroad originally constructed and now owned by the trustees of the Cincinnati Southern Railway, under a lease from that company, and among parts of that railway material to be noticed is what is called its "River Track," extending along the west side of the city of Chattanooga, and up the general course of the Tennessee river, northwardly along that section mostly occupied by manufacturing and other business establishments. It will be called herein the "River Track." Another company connected with the facts of this transaction, and necessary to be referred to, is what is called the "Chattanooga Belt Railway," a company which it is claimed was recently formed for the purpose of taking the property formerly owned by the Union Railroad and the Chattanooga Union Railway Company, recently sold under decree of this court. This company was organized under the laws of Tennessee, and will be called the "Belt Road." The Terminal company owns and operates a line of railway running practically parallel with the river track aforesaid, from Boyce street to and beyond Ash street northwardly. On the night of August 3, 1895, a construction train came into the city of Chattanooga from and over said Cincinnati Southern road with about 20 flat cars, loaded with material suitable for the work hereinafter mentioned, and with a crew of about 100 men, and entered upon the right of way of the Terminal company just after midnight, and began the work of putting in certain cross-over or switch tracks from said river track of the Cincinnati Southern road, and tearing up, for that purpose, the tracks

of the Terminal company. Three of these switch-over tracks were for the purpose of reaching the Plow Works, the Ross-Meeham Brake-Shoe Foundry, and the Malleable Iron Works, manufacturing establishments situated on the line of the Terminal company, and the business of which was already being handled by the Terminal company. The cross-over or switch tracks do not run at right angles to the Terminal company's line, but in such diagonal direction as that they appropriate almost longitudinally the right of way of the Terminal company, so far as may be necessary to reach said factories; and, in fact, in the method of construction, as appears on the map made, they actually appropriate and use the track of the Terminal company for some distance. These switches are put in for the sole purpose of reaching the industrial establishments aforesaid, and do not reach any new or different place from those already served by the Terminal company, and do not penetrate any new territory. The only purpose is to reach and handle the business of these three establishments already transacted by the Terminal company. Then, at the crossing of Ash street, a line was put in upon the right of way of the Terminal company longitudinally, for the purpose, as the defendants insist, of connecting the river track with what they claim is an old track of the Chattanooga Union Railway Company, running northwardly from that point. It may be stated, in this connection, as well as elsewhere, that the defendants do not claim that either the Cincinnati Southern road or the Belt road had any right or title to the property on which these cross-over tracks are placed, but assert a right of way to so much of the ground as is occupied by the track put in at Ash street. This claim, I think, is so entirely without foundation, from anything disclosed in the record, that it can be easily stated that neither the Belt road nor Cincinnati Southern road had title to the land occupied by any of these tracks put in during the night and Sunday following, as before stated. The position now taken by the defendants is, that, although they had no title to the property, having entered upon the same, and taken and appropriated the same for public use, and being in the possession thereof (although by violence and unlawfully), still, inasmuch as they have the right, by regular condemnation proceedings, in accordance with law, to take this property for public use, this court should not disturb their possession, or the use of the property, but should leave the Terminal company to its remedy at law in an action for damages for the property so taken; or that this court should, in some method, simply require compensation to be made, and this is the limit of relief which it can grant. The Belt road, as before stated, was recently formed for the purpose, as said in argument, of taking the property of the Chattanooga Union Railway Company. It has obtained no title thus far to that property; and the defendant's able counsel frankly concedes that it has no property now at all subject to execution at law, but maintains that, under a plan of reorganization agreed upon, it will soon become the owner of the property sold, as before stated. It is not controverted that a party holding a judgment and execution against that company would have to resort to further litigation for the satisfaction of the same. The Cincin-

nati Southern road is insolvent, and now in the hands of a receiver, appointed in the above cause, under an ancillary bill filed in this court, the original bill for that purpose having been filed in the United States court at Cincinnati, and Felton appointed receiver by Judge Taft in that court, and also under the ancillary bill in this.

The construction train and crew of men before mentioned came to the place of operations under the control of R. Carroll, the general manager of the road, under Mr. Felton's control, as receiver, and A. Griggs, division superintendent of that part of the line extending from Somerset, Ky., to Chattanooga; and with them was Mr. Nicholson, the engineer of the same road under Mr. Felton. After this train had entered the city, it was assisted, to a limited extent, by the officials of the Belt road, although it sufficiently appears that the officials of that road were not advised of the plan of operations until August 3d, and after the plans had been determined upon between Felton and his general manager, Carroll. Certain telegraphic correspondence took place between Felton and his manager, Carroll, too lengthy to be embraced in this opinion in full, but parts of the same are set out as follows:

"Chattanooga, Aug. 2, 1895.

"To S. M. Felton, Care Monmouth Club, Monmouth Beach, N. J.: Getting material together and will begin work midnight, Saturday; expect to finish by midnight, Sunday. Suggest you wire strong message Capt. Chamberlain to-night to co-operate, as Judge Shepherd says work must be done under charter Belt Company. Three crossings needed.

R. Carroll."

"Monmouth Beach, N. J., Aug. 3.

"R. Carroll, G. M. C., N. O. & T. P. Ry. Co.: Keep everything quiet. Act in all legal matters, under Shepherd's advice. Avoid personal conflicts, and see that connections are made so we can handle business. Have wired Chamberlain. Keep me posted.

S. M. Felton."

"Chattanooga, Aug. 3, 1895.

"To S. M. Felton, Receiver, Monmouth Beach, N. J.: Satisfactory interview with Chamberlain this morning. Acting strictly on Shepherd's advice. Do not anticipate conflict, but work must be done, and hope to report completion by wire Sunday.

R. Carroll."

"Monmouth Beach, N. J., Aug. 3, 1895.

"R. C. Carroll, G. M. C., N. O. & T. P. Railway Company: I have just received your tracing. Shaler advised me, after careful examination, that we could reach all industries on terminal tracks. I don't expect you to put in tracks that cannot be used, or waste money; but, with co-operation of industries, you ought to be able to get in enough tracks to make our position safe. See Capt. Chamberlain. Ask him to try to get lease of Southern Iron tracks at reasonable figures.

S. M. Felton."

"West End, Long Branch, N. J., Aug. 3, 1895.

"R. Carroll, G. M. C., N. O. & T. P. Railway Company: Am very much pleased with the work you have done. Don't lose your advantage. Have Judge Shepherd to get injunction first thing in morning, or take legal steps preventing interference from any one with our work. Of course, Nashville people have no right yet to property, and cannot interfere legally. Let me know the situation in the morning.

S. M. Felton."

"Monmouth Beach, N. J., Aug. 5, 1895.

"R. Carroll, Central Passenger Station: Does Judge Shepherd say switch connections can be used? I should say crossings were absolutely necessary. Fear part of your work is wasted, unless court gives us right to use their track at switches.

S. M. Felton."

"Monmouth Beach, N. J., Aug. 3, 1895.

"H. S. Chamberlain, Chattanooga, Tenn.: I am advised by J. W. Thomas that he has leased terminal; so it is necessary to take vigorous measures. Please aid Carroll and Shepherd in every way possible. I find it necessary to use Belt charter; so must have your assistance. Kindly help me in this. Spencer is anxious it should be done, and I should not have brought you in it but for reasons given. Will consider what you do a personal favor. Please answer here.

S. M. Felton."

"Monmouth Beach, N. J., Aug. 5, 1895.

"Capt. H. S. Chamberlain, Chattanooga, Tenn.: We better hold the fort now, and make no compromise. Have you heard from Thomas? How does Nicholl feel? Very much obliged to you. What about my trackage claims?

"S. M. Felton."

In addition to these telegrams, numerous affidavits are put in evidence, and it is apparent that the entire facts of the transaction have been brought out as fully as if the case had been prepared for final hearing. It may be stated here that, so far as appears from the record, neither Carroll, Felton, Griggs, nor the engineer, Nicholson, has any interest in, or occupies any relation of obligation to, the Belt road. The petition in the case is brought against Felton, as receiver, and Carroll and Griggs, and charges that the invasion of plaintiff's property, and its unlawful appropriation in the manner set out, was done by Felton, as receiver of the Cincinnati, New Orleans & Texas Pacific Railway; and complains that, as he is the officer and trusted agent of this court, acting under its immediate orders, it is virtually the court itself taking the property of the petitioner, by violence, and without authority of law. The defendants deny, in general terms, that the work was done, by or for Felton, as receiver, but say that it was done for and under the direction of the new company, called the "Belt Road." It was probably meant by this statement in the answer to make it conform to and support the claim that the work was done under the charter of the Belt road, rather than to deny that the receiver was personally cognizant of and concerned in the operations which took place. Upon the foregoing facts, I think it is clear, beyond all question, that the petitioner is entitled to a prohibitory injunction restraining the use and occupation of the tracks and switches thus put upon its property without compensation, and without any lawful method of taking. And, as this injunction will operate, and will be made to operate, against the defendants who actually committed the unlawful act, as well as against the officials of the Belt road, and all other persons aiding and abetting or holding by privity of contract with these defendants, it would, if this case involved no feature beyond that of ordinary litigation of the kind, become unnecessary for this court to decide, at the present time, whether the work was done by Felton as receiver, or for his own purposes, or for the benefit of the Belt road. So far as this character of injunction is concerned, the petitioner has brought its case clearly within the doctrine announced by the supreme court of the state in the case of *Parker v. Railroad Co.*, 13 Lea, 669, in which an injunction was asked and granted inhibiting the defendant railroad company "from occupying, holding, and controlling a right of way for a branch road being constructed over com-

plainant's land by said company, until compensation is made both for the land occupied, as well as incidental damages have been paid or secured, and until appropriate steps are taken to condemn and appropriate said land in a lawful manner"; and, giving the opinion, Judge Freeman said:

"Our bill of rights is very imperative (section 21) 'that no man's particular services shall be demanded, or property taken or applied to public use, without the consent of his representatives, or without just compensation being made therefor; and this compensation must be secured beyond all contingency.' *White v. Railroad Co.*, 7 Heisk. 538, 541. That is, it must be secured or paid, or else it cannot be said that 'just compensation' has been made therefor. In fact, a strict construction of the language would require actual payment in cash before the taking. It is certain, however, this language cannot be complied with, either in letter or spirit, where the land is entered upon and taken, and not only no compensation paid or secured, but the party required to engage in a fruitless litigation with an insolvent company, the result of which would be a judgment only, but no compensation whatever. This would be to take the citizen's land, and impose the burden and expense of a lawsuit only by way of compensation, and make the constitutional provision an illusion."

I refer to the decision of the supreme court of the state, because a question of eminent domain, such as this, involves the construction of the state constitution and statutes, as to which the ruling of the court of the highest authority in the state is followed by the federal courts. In the courts of the United States, when acting in accordance with their own ruling, it is only necessary in such cases, to authorize an injunction for the plaintiff, to show that his property has been taken, or is being taken, in violation of the constitution requiring compensation to be first made. In *Pumpelly v. Green Bay Co.*, 13 Wall. 166, the supreme court of the United States said in substance, that, by the general law of European nations and the common law of England, it was a qualification of the right of eminent domain that compensation should be made for private property taken or sacrificed for public use; and the constitutional provisions of the several states which declare that private property shall not be taken for public use without just compensation were intended to establish this principle beyond legislative control; and, in the late case of *Osborne v. Railroad Co.*, 147 U. S. 258, 13 Sup. Ct. 299, in respect to a question of eminent domain, Mr. Chief Justice Fuller, delivering the opinion of the court, said:

"As a general rule, this court follows the decisions of the highest tribunal of a state upon the construction of its constitution and laws, if they do not conflict with, or impair the efficacy of, some provision of the federal constitution or of a federal statute; but we are not required to express an opinion as to the applicability of that rule in this case, as the decree must be affirmed on other grounds. Whenever the power of eminent domain is about to be exercised, without compliance with the conditions upon which the authority for its exercise depends, courts of equity are not curious in analyzing the grounds upon which they rest their interposition. Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy, where the injury is destructive or of a continuous character, or irreparable in its nature; and the appropriation of private property to public use, under color of law, but in fact without authority, is such an invasion of private rights as may be assumed to be essentially irremediable, if, indeed, relief may not be awarded *ex debito justitiæ*."

It would seem, therefore, that the courts of the state have construed and enforced the terms of the constitution less strictly than the courts of the United States; but, as stated, the plaintiff has brought itself fully within the doctrine announced by the courts of the state; for it clearly appears, and is not controverted, that the Belt road has no property whatever subject to execution, and the plaintiff, for property taken, is not required to resort to what may grow out of any complicated plan of reorganization, and to probably interminable litigation, to obtain that just compensation which the constitution plainly requires shall be made before the property is taken and appropriated; and if there is one right of the citizen which the courts are under a higher obligation to fully protect than another, it is a right which has been guarded by express and specific declaration in the constitution. And for a court to withhold such process as will furnish full relief is a denial of justice, and would justly deprive the court of the respect and confidence of the community, and encourage a resort to violence.

So far as the right to look to Mr. Felton, receiver, for compensation, is concerned, it is sufficient to say that the company which he represents is insolvent and now in his hands as receiver, and that the unlawful invasion of the plaintiff's property, if done by the receiver, was without authority of law, and without authority, express or implied, from the court, and could not by the court lawfully be made a charge against the funds to the credit of the receivership, if any. So that both parties charged with this unlawful taking of property are, for all practical purposes, insolvent, and the plaintiff is clearly without any adequate remedy except that of injunction. In addition to this, I am clearly of the opinion that neither the Belt road, under its charter, nor Felton, under the charter of the Cincinnati Southern road, had any lawful right to have condemned and appropriated this property, if he or the company had attempted to do so in the method provided by law. It is not claimed that Felton, as receiver, had any such right, and it is set up in avoidance in the answer that the taking was under authority of the Belt road charter. The cross-over switches and the connections which form the subject of the controversy, are in no just or reasonable sense crossings at all. No new territory is penetrated or served by the road, and the only purpose of these switches was to reach certain manufacturing establishments whose business was already being handled by the Terminal company; and was done for the distinct purpose, as far as possible, of taking that business away from the Terminal company. It was much more nearly a longitudinal appropriation of its right of way for a spur track to these factories, and, indeed, an actual use is necessary to be made of a considerable part of the Terminal company's track in order to make these spur tracks available to the defendants. The crossing at Ash street is clearly a track parallel to that of the Terminal company, and on its right of way, and, besides, the use of spur tracks for the purpose of reaching these manufacturing establishments is of no concern to the public, and it is not a taking for public use. *Kyle v. Railroad Co.* 4 L. R. A. 275, and notes; *In re Split Rock Cable Road Co.*, 128 N. Y. 408, 28 N. E. 506, and cases

cited. And it has been repeatedly decided by the supreme court of this state that the power to take property under the right of eminent domain depends upon and is limited by public necessity. *Railway Co. v. Telford's Ex'rs*, 89 Tenn. 293, 14 S. W. 776; *Memphis Freight Co. v. Mayor, etc., of Memphis*, 4 Cold. 428; *Harding v. Goodlett*, 3 Yerg. 40; *Clack v. White*, 2 Swan, 548; *Weidenfeld v. Railroad Co.*, 48 Fed. 615.

It is a well-established proposition, too, that when property has already been condemned, and is devoted to a public use, it may not be taken for exactly the same and no different or higher use than that for which it is already appropriated. This is the rule established by well-considered cases, in the absence of specific legislation whose terms are such as to require a different interpretation; and the legislation in this state is not of that character. When a franchise is granted with power to take or acquire property for public use, it is a fair and just implication that, where large sums are invested in the enterprise, it shall not be destroyed by another company armed with power to condemn for exactly the same use and to take away the same business already done by the older company. This is inherently unjust, and is bad policy, as tending to prevent solid and solvent enterprises in the state. *Mobile & G. R. Co. v. Alabama Midland Ry. Co.*, 87 Ala. 501, 520, 6 South. 404; *City of Ft. Wayne v. Lake Shore & M. S. Ry. Co.*, 132 Ind. 558, 32 N. E. 215; *Id.*, 32 Am. St. Rep. 277; *Illinois Cent. Ry. Co. v. Chicago, B. & N. R. Co.*, 13 N. E. 140, 122 Ill. 473; *Postal Tel. Cable Co. v. Norfolk & W. R. Co.*, 88 Va. 920, 14 S. E. 803; *Groff v. Turnpike Co.*, 144 Pa. St. 150, 22 Atl. 834; *Davis v. Railway Co.*, 87 Ga. 605, 13 S. E. 567; *Appeal of Pittsburgh Junction R. Co.* (Pa. Sup.) 6 Atl. 564, 9 Am. St. Rep. 128; *Appeal of Sharon Ry. Co.* (Pa. Sup.) 17 Atl. 234, 9 Am. St. Rep. 133; *Fidelity T. & S. V. Co. v. Mobile St. Ry. Co.*, 53 Fed. 687; *Lake Erie & W. R. Co. v. Board of Com'rs Seneca County*, 57 Fed. 945; *Minneapolis & St. L. Ry. Co. v. Minneapolis W. Ry. Co.* (Minn.) 63 N. W. 1035; *St. Louis, H. & K. C. Ry. Co. v. Hannibal U. D. Co.* (Mo.) 28 S. W. 483; *Lewis, Em. Dom.* § 276; *Rand. Em. Dom.* §§ 97, 98. Cases may be found apparently holding otherwise, but, where the result does not depend on special legislation, such cases are not sound in principle, and should not be followed. The question here is that of the right of one corporation to take the property of another for the same or similar public use. The right of the state to grant franchises to a rival company under which competition is established, operating injuriously to an older company, involves a different and distinct question, about which there is not now any doubt, where the older franchise is not by the grant made exclusive. Entertaining these views it becomes unnecessary for me to decide, at this time, whether the charter of the Belt road is valid, or whether that question can be made in the way that it is made, or whether there has ever been any valid corporate organization under such charter, or whether the Belt road, as lessee of the River Track of the Cincinnati Southern road, could on that account exercise the right of eminent domain. All of these are evidently questions of serious import. The plaintiff, however, maintains that its property has been unlawfully invaded and taken

by the trusted officer and receiver of this court, and that whatever he does as receiver is virtually the act of the court, and that the court was thereby put in the false position of having itself authorized and sanctioned the lawless act on the part of its officer. It is further insisted that the receiver should be summarily removed, and should now be required by mandatory injunction to take up and remove the tracks and switches put in at night and during the Sunday following, and thereby make full restoration of the plaintiff's rights and property to its condition as found at the time of the receiver's trespass thereon. And this contention does make it necessary for the court to decide whether the entry upon this property and its attempted appropriation was by and for the Belt road or by the receiver, for the benefit of his own road and for his own purposes. And upon this point the court has no doubt whatever. The facts given in the opening paragraph of this opinion, and appearing in the telegraphic correspondence put in evidence, establish clearly the proposition, if facts can be relied on to establish anything, that this work was done under the direction, at the instance, and for the benefit of Mr. Felton, as receiver. If the force of such facts as appear in this case could be overturned by mere unsupported assertion or by mere naked declaration, all the claim which the law of evidence can make as a safe method of working out the final facts of a case is a failure. The law concerns itself earnestly with the development of facts from which the court may form legal conclusions. The common law did not permit an interested party to testify to any fact in the case, and it never has allowed any party, interested or disinterested, to state conclusions or make mere assertions, but only to give the facts on which it is supposed these rest. It is not necessary for any purpose of this opinion to review the facts in further detail. The very message which opens the telegraphic correspondence, when studied, clearly and distinctly implies that the plan of operation had previously been agreed upon between Mr. Carroll and Mr. Felton, and that Carroll was then carrying forward preparations for the execution of such plan, as by the message he informs Mr. Felton. It clearly appears from the same correspondence, as well as otherwise, that the suggestion that this work be done under cover of the Belt charter was an afterthought suggested by the able counsel of Mr. Felton. And, in addition to the direct and specific evidence of the facts, the inherent improbability of the statement that this work was for the Belt road leads to the same result. Is it credible or possible to believe that defendant Felton would have sent his superintendent, general manager, engineer, and a loaded construction train, and a crew of 100 or more men, so long a distance, and to begin at midnight, and complete through the daytime of the Sabbath so extraordinary and unusual a performance as this, as a matter of disinterested friendship for a company in which neither himself nor any one of the chief actors associated with him had any interest whatever, direct or indirect, so far as appears? Our common reason and common experience forbid that we should believe this to be true. And is it reasonable to suppose that Mr. Felton's general manager, superintendent, and engineer would have entered

upon so remarkable a task as this by the mere direction of the Belt Company, and for the interest of that company, and without the order or direction of their superior, Mr. Felton? It can be certainly said, I think, that no court would go so far as to give credence to this. It is clear, too, from this evidence, that if the so-called Belt Company had anything whatever to do with this, it was as a mere dummy and instrument of the receiver, and not otherwise. It appears that the officials of this company had really little or no notice or knowledge of the plan of operations about to be set on foot until after it had been agreed upon and was in process of execution, and the one telegram, of itself, above quoted, from Mr. Felton to Mr. Chamberlain, is sufficient to show this. In this he stated that he would not have brought Mr. Chamberlain into the affair except for reasons given, expressing his appreciation of the personal favor, and saying that Mr. Spencer is also anxious that this work should be done. It is to be noted that Chamberlain is president of the Belt road. It appears in other parts of the messages that it was thought necessary to administer strength to Mr. Chamberlain in order that he might stand up to the end, as the somewhat perilous looking work went on. It was very much feared, it seems, that the aspect of things was such that Chamberlain would finally weaken. Whether this was on account of the violent character of the work going on, or because it was being done on the Sabbath, and in violation of a statute of the state prohibiting work of that kind on Sunday, does not appear. It is probable that both, with his want of real interest in the matter, were operating to an extent to intimidate Mr. Chamberlain. Nor do I think that, for any practical purpose, the case would be changed, so far as Mr. Felton's relation to it is concerned, if the statement that it was done for the Belt road could be considered credible. The power, position, and property, with all its appliances, were in Mr. Felton's possession as the trusted officer and agent of this court, for the purpose only of carrying into effect the orders of this court in the administration of his trust; and the fact that, instead of using that property and power, and the men under his control, including his chief officers, for the purpose of doing an unlawful and violent act himself, he surrendered these into the custody and under the direction of another, with the distinct knowledge that they were to be used for an unlawful purpose, does not by any means help the case. Nor can Mr. Felton, while using the power, property, and men under his control in a trust capacity, deny responsibility for what they do, nor deny that he is acting as receiver. This would put it in his power to claim that he was acting as receiver when it suited his purposes, and that he was not acting as receiver when he desired to avoid responsibility, although the end accomplished would be done in the same way and by the use of the same property and power. This the law does not permit him, for obvious reasons, to do. It would be as competent for him to say that for a specific time and purpose he had delivered over to others the management and responsibility for the whole railway system. The difference is one of degree and not of kind.

Having reached the conclusion, then, that this was the act of Mr.

Felton, as the officer of this court, the question of what relief should be granted on this application is now to be determined. That this court, in a proper case, and for proper purposes, may make its injunction mandatory, is a doctrine that is no longer open to question. This subject received full consideration in a recent case before Judge Taft, of the circuit court, and Judge Ricks, and the cases are reviewed at length in an opinion by Judge Taft in *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730. Reference to that case is all that is necessary for the purpose of the present discussion.

In regard to the question made as to the removal of the receiver, I need only say that the receiver was appointed by Judge Taft in the principal case at Cincinnati, and his appointment here in the ancillary jurisdiction was under the well-known rule of comity in such cases. I therefore think it would be improper for me to consider any question of this kind, and must decline to do so. If it is desired to present any question of this kind, it must be presented to Judge Taft. I think I have complete jurisdiction, and it is a duty devolving upon me, to pass upon any question respecting property and property rights; and this I will do. It is true that so distinguished a judge as Gresham, in *Atkins v. Railway Co.*, 29 Fed. 161, not only passed upon the rights involved in the controversy, but removed the receiver, for what he considered misconduct in his office, and that this was done in a court of ancillary jurisdiction; but Mr. Justice Brewer, then circuit judge, in *Central Trust Co. v. Wabash, St. L. & P. R. Co.*, Id. 621, presiding in the court of primary jurisdiction and administration, complained of this as being in disregard of that comity which had existed between the federal courts, although he fully conceded Judge Gresham's power to do so, and that the removal was lawful and valid; and Judge Brewer acted upon the situation as this removal had left it. I could not, in this or any other case, permit Judge Taft to entertain a similar view in regard to anything I might do. Judge Taft is himself uniformly thoughtful in every detail of that comity and courtesy due to other courts and other judges. So I leave entirely out of view and unaffected by this opinion any question as to whether Mr. Felton should or should not remain the officer of this court. So long as he promptly obeys the orders of this court, I shall take no action in that regard; but, whether citizens within the jurisdiction of this court, and in regard to rights and property situated within its territorial limits, have rights of action against the receiver, and, if so, what order should be made upon him in that respect, are questions upon which it is my duty to pass, and citizens within the district are not required to go to the courts of another state for the redress of such rights. As before stated, the court has the power, and in a proper case it is a duty, to issue a mandatory injunction. This has been the ruling in cases of ordinary litigation, where the parties were all private litigants and strangers to the court; but where the receiver, an officer of this court, is charged with having done an unlawful or wrongful act, in respect of which such receiver may not be sued in other courts, and the persons injured are compelled to apply to the court for which he was acting as agent for such relief as they ob-

tain, a very different question is presented as to the manner in which the case may be dealt with, and as to the orders which may be made on the receiver. This distinction and the doctrine upon this subject are stated by Judge Taft, with great force and clearness, in *Felton v. Ackerman*, 9 C. C. A. 457, 61 Fed. 225, as follows:

"In the present case, however, we are of the opinion that the principle relied on cannot aid the appellant. He is the receiver of the federal court, and, while it is true that this is an adversary proceeding, as already stated, he does not lose his character as an officer of the court, with all the consequences as to directness of remedy against him which this relation makes necessary. Section 2 of the act of August 13, 1888, defining the jurisdiction of the circuit courts of the United States, provides that whenever in any cause pending in any court of the United States, there shall be a receiver or manager in possession of any property, such receiver or manager shall manage and operate such property according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof; and then follows a provision for punishment of any receiver who shall violate the foregoing requirement. If Ackerman, by his petition and his proofs, shows that the receiver has been guilty of a public nuisance in erecting a fence across the highway, in the administration of the trust, it is the duty of the court to make an order enjoining him from doing so, even though in an independent action Ackerman as an individual may not be able to obtain relief. It is of the greatest importance that receivers of the federal courts shall not be violators of the state laws; and, wherever a court is made to know, in any proper way, that its receiver is violating the law of the state in which is the property of which he has charge, the court must sua sponte direct him to cease further violation. We cannot, therefore, on any technical rules of procedure, however well established as between private litigants, sustain this appeal, and reverse the order below, if it appears that the receiver's act, enjoined by the order of the court appealed from, was a violation of public right."

In this case, Judge Key had directed the receiver to remove a railway fence unlawfully put across the public highway, and this order was affirmed. Similar ruling was made, and a similar practice followed, in *Handy v. Railroad Co.*, 31 Fed. 689. And in *Thomas v. Railroad Co.*, 62 Fed. 670, Judge Taft said:

"The receiver is the agent of the court in operating the road. The petitioners are the employes of the receiver, and therefore are the employes of the court."

The cases are to this effect: That a court of the United States will not permit its receiver to do any unlawful act, nor any act which amounts to violence or a breach of the peace; and that, when such act shall first come to the knowledge of the court, and at the first opportunity, regardless of any technical pleading, the court will make such order as provides for full restitution, and will not permit its receiver to continue the unlawful act, nor obtain any advantage thereby. The court in such case properly holds that its officer and receiver, clothed with power from the court, shall not use that power oppressively nor unlawfully, but that, as such officer, he is under the highest obligation at all times to set an example of obedience to law, and of the pursuit of strictly peaceable methods in his conduct. This proposition is fully borne out by the cases cited, as well as many others not necessary to be noticed here. The transaction complained of in this case was a direct physical invasion of and injury to the property of the plaintiff, and was entirely without authority of law, being over the protest

of the owner of the property, and at a time and in a manner which made it peculiarly violent and lawless. The statutes of this state do not authorize an entry upon the land of another in any such manner nor for any such purpose as was done here. Sections 1569 to 1571, inclusive, of Milliken & Vertrees' Code, clearly show that the only entry which is lawfully made prior to making compensation is one for the purpose of preliminary survey, and these sections imply a denial of the right to make any other kind of entry. The last section only refers to cases, which often happen, of a railroad being built upon land, without objection, and apparently with the acquiescence, of the owner. *Roberts v. Railroad Co.*, 158 U. S. 11, 15 Sup. Ct. 756, is an example of such cases, and of the facts which give rise to the estoppel on which they rest. A statute is not to be construed as authorizing an otherwise manifestly unlawful taking over the objection of the owner, unless its terms are such as to make that meaning clear beyond doubt.

In view of what has been said, prohibitory injunction will issue against the defendants Felton, Carroll, and Griggs, their servants and agents, and all persons claiming in privity with them, by conveyance, lease, or other contract, restraining them from occupying or using in any manner whatever the three cross-over switches above referred to, as well as that portion of the track put in at the same time, and crossing Ash street; and a mandatory injunction will issue against Mr. Felton, R. Carroll, and A. Griggs, requiring them to take up and remove said switches and said track at Ash street, and to restore the ground on which the same are situated, and the tracks of the plaintiff Terminal company, so as to leave them in the same plight and condition in which they were found at the time of the unlawful entry thereon on the night of August 3, 1895, and this they will be required to do within the space of 10 days from this date; and until that time further action and further orders in the case are reserved, and the question of costs will be reserved until its final disposition.

DALY v. BRADY.

(Circuit Court, S. D. New York. June 24, 1895.)

1. COPYRIGHT—JURISDICTION OF COURTS.

The only jurisdiction which the federal courts have of an action between citizens of the same state to recover damages for the unauthorized public performance of a copyrighted dramatic composition is conferred by Rev. St. § 4966, and all actions at law between such parties to recover moneys, damages, or penalties are controlled by that section.

2. SAME—EVIDENCE—ACTION FOR PENALTY.

Rev. St. § 4966, is, in its nature, a penal statute, and therefore, in an action to recover the penalties prescribed thereby, evidence obtained from defendant by a prior judicial proceeding is inadmissible against him.

This was an action at law by Augustin Daly against William A. Brady to recover for alleged infringements of a copyright.

Stephen H. Olin, for plaintiff.

A. J. Dittenhoefer, for defendant.

SHIPMAN, Circuit Judge. This action having come on regularly for trial before the circuit court of the United States for this district on May 29, 1895, and the parties, by their attorneys of record, having filed with the clerk a stipulation in writing, signed by them, waiving a jury, and consenting that the issues should be tried by the court without a jury, I, holding said court and presiding therein, thereupon took the proofs offered by the respective counsel, and hereby make the following special findings of fact and conclusions of law:

Findings of Fact.

(1) That before August 1, 1867, the plaintiff invented and composed, and was the author of, a dramatic composition or play in five acts, entitled "Under the Gaslight," which play was original with him.

(2) That on the 1st day of August, 1867, the plaintiff, being a citizen and resident of the United States of America, and being then the sole and exclusive proprietor and owner of said dramatic composition, and the same then never having been printed, published, acted, performed, or represented, took out a copyright therefor in the United States, by depositing a printed copy of the title—viz.: "Under the Gaslight. A Romantic Panorama of the Streets and Homes of New York"—of said composition in the clerk's office of the district court of the United States for the Southern district of New York, of which district the plaintiff was then a resident, and in all respects complied with the provisions of the existing acts of congress relating to copyrights, and received from said clerk, who then and there recorded said title as required by said acts, a certificate and record in the form required by such acts, containing the title of said composition, and that the said Daly has been continuously since said day the sole and exclusive proprietor of said dramatic composition and of said copyright.

(3) That the plaintiff subsequently, and within a reasonable time thereafter, caused the said composition to be printed and published, and within three months from the date of such printing and publication he caused a printed copy of said composition so printed and published to be delivered to and deposited with the clerk of said district court, and also to be delivered to and deposited in the library of congress, at Washington, for the use of said library, as required by said acts of congress. The title, as published, was: "Under the Gaslight. A Totally Original and Picturesque Drama of Love and Life in These Times."

(4) And that the plaintiff gave information of the copyright of said composition being secured to him by causing to be printed and inserted in the several copies of each and every book and edition of such book or composition so published and printed, on the title page thereof, or on the page immediately following, the following words, viz.:

"Entered according to act of congress, in the year 1867, by Augustin Daly, in the clerk's office of the district court of the United States for the Southern district of New York."

(5) That the plaintiff, in and by the aforesaid proceedings, intend to obtain, hold, and possess, and did obtain, hold, and possess, by virtue of the act of congress approved February 3, 1831, and the acts amendatory thereof and supplementary thereto, not only the sole and exclusive right and liberty to print and publish such dramatic composition and book, but also the sole and exclusive right to act, perform, or represent the said dramatic composition or play, and to cause it to be acted, performed, or represented, on any stage or public place, during the whole period for which the said copyright was obtained.

(6) That the said play was produced by the plaintiff as alleged in the complaint, and has been often produced by him, and for his profit and advantage, by his employes, or by persons licensed to produce the same; and the plaintiff has received, as fees, from different persons performing the same under his license, substantial license fees in almost every year since 1868.

(7) That the cause of the success and profit of the play was the scene and incident in the end of the third scene of the fourth act of the said composition, commonly called, after being so publicly performed, the railroad scene or sensation, in which one of the characters in said composition is represented as secured by another of the characters, and laid helpless upon the rail of a railroad track, in such a manner and with the presumed intent that the railroad train momentarily expected shall run him down and kill him, and just at the moment when such a fate seems inevitable another of the characters in the composition contrives to reach the intended victim, and to drag him from the track as the train rushes in and passes over the spot.

(8) That this incident and scene, as thus carried out, was novel, and unlike any dramatic incident known to have been theretofore represented on any stage, or invented by any author before the plaintiff.

(9) That the chief value of said composition and its popularity depend upon the said railroad scene or sensation contained in it, and upon the representation of said scene, only, which scene constituted its essential feature, and that at the times of the acts of the defendant hereinafter referred to the sole commercial value of the said play of "Under the Gaslight," and the source of its power of earning royalties, consisted of the said railway scene.

(10) That, soon after said play was produced, Dion Boucicault, a native and subject of Great Britain, without the knowledge or consent of the plaintiff, prepared a play called "After Dark," in which he introduced a railway scene varying slightly from the railway scene as it appeared in "Under the Gaslight," so as to be colorably different, but substantially the same, as alleged in the complaint.

(11) The defendant, William A. Brady, is, and at the times hereinafter mentioned was, a manager and actor. The plaintiff was at the commencement of this suit a citizen of the state of New York, and the defendant was a resident therein, whose citizenship was not averred; and this court obtains its jurisdiction, not by reason of

diverse citizenship, but solely under the copyright laws of the United States.

(12) The defendant, at the times hereinafter mentioned, without the consent of the plaintiff, produced and procured to be publicly performed and represented, in divers cities, the said play of "After Dark," including the said railway scene, which, as produced by the said defendant, was substantially the same, although colorably different from the plaintiff's play of "Under the Gaslight," as alleged in the complaint.

(13) That said play, "After Dark," has been publicly produced and represented by the said defendant and his agent in different parts of the United States without the plaintiff's consent, and that such performance and production of the said play took place 747 times between June 19, 1889, and October 4, 1892, and that, of the said 747 performances, 156 took place in or after August, 1891, and within two years of the commencement of this action, which was commenced August 23, 1893. All the evidence upon the subject of the number of these performances was obtained from the defendant, by the plaintiff's examination of him, in the accounting before the master in the equity suit hereinafter mentioned.

(14) That the plaintiff had required and received license fees for the production of the said railroad scene prior to the said infringements by the defendant. Said license fees were not uniform. They diminished as the play, in process of time, became more familiar to the public. Ten dollars for each performance of the said railway scene was the smallest and most recent fee that had been paid, and was a reasonable royalty for the defendant to have paid for the use thereof.

(15) That a portion of the royalties received by the plaintiff for the production of "Under the Gaslight" prior to the said infringements by the defendant were for the use of this scene alone.

(16) On May 20, 1889, the plaintiff brought a suit in equity against George P. Webster, William A. Brady, the present defendant, and Henry C. Miner, in the circuit court of the United States for the Southern district of New York, in which he prayed that they should be enjoined against the further performance of said play of "After Dark," upon the ground that such performance or representation was an infringement of the copyright, and for an accounting of all money and profits received from or by reason of the performances of the play "After Dark," and of the railroad scene therein. The said court, on June 19, 1889 (39 Fed. 265), denied the plaintiff's motion for an injunction pendente lite, after an appearance of the defendants and a hearing upon said motion, upon the ground that there was a material variance between the registered title and the published title of "Under the Gaslight," and that therefore the complainant had not a valid copyright. After proofs had been taken on the issues joined, the circuit court for said district followed the decision of the court upon the said motion, and dismissed the bill, with costs, on November 4, 1891. 47 Fed. 903. An appeal was taken by the plaintiff from the decree dismissing the complaint, to

the circuit court of appeals, which court, on the 4th day of October, 1892, reversed the decree of the circuit court, and remanded the cause with instructions to enter the usual decree for an accounting and perpetual injunction. 4 C. C. A. 10, 56 Fed. 483. That the said circuit court held that the complainant's copyright was valid, and had been infringed by the defendants in said play, "After Dark," by placing a character on the railroad tracks in apparent peril of his life from an approaching train, and having him rescued by another character.

(17) Pursuant to said mandate, a decree for a perpetual injunction by the circuit court was entered on November 5, 1892, and John E. Ward, Esq., one of the masters of said court, was directed to take proof of the number of performances given by the defendants, and where each performance took place, said defendants being directed to attend with their books and papers. That the defendant did attend, pursuant to the said decree of the said court, before the master, and gave evidence for the plaintiff. Upon said examination the defendant's counsel objected to the defendant's being compelled to produce the manuscript play of "After Dark," upon the ground that "neither the defendant nor his books can be used against him in any proceeding wherein it is sought to obtain a penalty, or for the purposes of this hearing before the master." The decree did not direct the master to ascertain anything in regard to profits. No evidence was offered upon that subject, and no finding was made thereon. A final decree in said cause, accepting the master's report, and making the findings of the master the findings of the court, was entered on April 1, 1893. No judgment or decree for profits was asked or rendered.

Conclusions of Law.

1. That the copyright of the dramatic composition entitled "Under the Gaslight," obtained on August 1, 1867, by Augustin Daly, being the copyright referred to in the complaint herein, is good and valid; that said railway scene is covered and protected by said copyright.

2. That the acts of the defendant were in disregard of said copyright, and violated the plaintiff's exclusive rights thereunder, by producing and publicly representing, without the plaintiff's consent, a colorable imitation of the substantial and material portion of said "Under the Gaslight," and by using and producing the railway scene as copyrighted in the dramatic composition entitled "Under the Gaslight."

3. That section 4966 of the Revised Statutes confers upon the courts of the United States their only jurisdiction in an action between citizens of the same state for the recovery of damages for the unauthorized public performance and representation of a dramatic composition for which a copyright has been obtained. *Boucicault v. Hart*, 13 Blatchf. 47, Fed. Cas. No. 1,692.

4. That all actions at law in the courts of the United States, between citizens of the same state, by a proprietor of a copyrighted dramatic composition, for the recovery of moneys as damages or

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penalties against a person who, without consent, has given public representations of such composition, are controlled by the provision of section 4966.

5. That the evidence does not authorize an increase of damages above the minimum amount provided by said section, and that the court, in this suit, has no power to establish a rule of damages for any representation or set of representations below the minimum provision of the statute.

6. If section 4966 is to be construed as a penal statute, the only testimony in this case in regard to the number of representations, which was the testimony of Brady in the accounting and the master's report, which is based solely upon the evidence given by the defendant before him in the equity suit, was inadmissible, upon the ground that evidence obtained from a party by means of a judicial proceeding must not be used against him for the enforcement of a penalty. *Johnson v. Donaldson*, 18 Blatchf. 287, 3 Fed. 22. Such evidence can be used in aid of the recovery of damages in a suit at law. *Atwill v. Ferrett*, 2 Blatchf. 39, Fed. Cas. No. 640.

7. Section 4966 declares that the person who violates its provisions shall be liable to damages, which are, in all cases, to be assessed at such sum, not less than \$100 for the first, and \$50 for every subsequent, performance, as to the court shall seem just. The amount is not to be measured by the pecuniary injury, but in all cases is to be the statutory sum, subject to be increased if the circumstances of aggravation or of injury or of willfulness shall convince the tribunal that justice requires an increase. The injury to the proprietor is but one element in the case. The phraseology of the section suggests a punitive, rather than a remedial, purpose; and the phraseology of the statute, as originally passed, in 1831 (4 Stat. 438), conveyed the same suggestion that a penalty was to be inflicted, rather than that a recompense for the injury was to be obtained. The general intent of congress, apart from proceedings in equity and from actions at law for damages for the unauthorized publication of a manuscript (section 4967), seems to have been to enforce the copyright laws by penalties and forfeitures, rather than by the ordinary common-law remedies. Section 4968 provides a limitation of two years for actions for forfeitures and penalties. If section 4966 is not a penalty, no federal statute of limitations is applicable, and it can hardly be supposed that it was the intent of congress to permit so serious a statutory rate of damages to run without federal statutory limitation. The damages in the corresponding section of the English copyright statutes (3 & 4 Wm. IV. c. 15, § 2), in which damages of 40 shillings were the minimum, are regarded as a penalty. *Chatterton v. Cave*, 3 App. Cas. 489. My conclusion is that the section is penal, rather than remedial, in its character.

8. That there has been in this case no accounting of profits, and no election to endeavor to obtain profits, for any representation of the dramatic composition which is the subject of this suit, and that there has been no finding and no adjudication upon the subject of profits.

9. That if the master's report, or the evidence upon which it was based, had been admissible, the plaintiff would have been entitled to judgment against the defendant in the sum of \$50 for each performance falling within the period of two years prior to the commencement of this action,—that is to say, for 156 performances, the sum of \$7,800,—but that there was no adequate testimony before the court upon which to found a judgment for the plaintiff, and that as the case now stands the defendant is entitled to judgment, with costs.

OSGOOD v. A. S. ALOE INSTRUMENT CO.

(Circuit Court, E. D. Missouri, E. D. June 15, 1895.)

No. 3,839.

1. EQUITY PLEADING—EXCEPTIONS TO ANSWER.

It is no ground of exception to an answer that it is not entitled in the case so as to agree with the names of the parties as they appear in the bill, or that, being the answer of a corporation, it is not sworn to by any officer or representative thereof. The proper remedy, in case of such defects, is a motion to strike the answer from the files.

2. SAME.

An attempt to involve an affirmative defense in a denial of the averments of the bill, by expanding the denial beyond the scope and meaning of such averments, is inadmissible, and the matter is subject to exception.

3. SAME—EXCEPTIONS FOR IMPERTINENCE.

An exception for impertinence must be allowed in whole or not at all.

4. COPYRIGHT—INFRINGEMENT SUIT—DEFECTIVE ANSWER.

In a suit for infringement of a copyright, an answer averring that the copy of complainant's book, of which profert was made in the bill, is not a true copy of the copyrighted book, but that the title-page thereof had been removed, and another page substituted therefor, containing matter materially different from the title-page of the copyrighted book, is insufficient to constitute a defense, unless it further avers that the substitution was made after the publication of the book; for a change prior to that time might be proper and necessary.

5. SAME—SUFFICIENCY OF NOTICE OF COPYRIGHT.

A notice as follows: "Copyright, 1891. All rights reserved,"—is not a sufficient notice of copyright, as the law requires that the name of the person by whom the book is copyrighted shall be stated.

6. SAME—COPIES DEPOSITED IN LIBRARY OF CONGRESS.

It is not necessary to a valid copyright that the copies deposited with the librarian of congress shall contain any notice of the copyright itself.

7. SAME—WORK DONE IN FOREIGN COUNTRIES.

It is not incumbent on complainant, in the first instance, to allege or prove that her copyrighted books were printed from type set within the limits of the United States, etc., as required by section 4956, Rev. St. Such, if it be a fact, is subject-matter of affirmative defense.

This was a bill in equity by Adelaide H. Osgood against the A. S. Aloe Instrument Company for infringement of a copyright. Complainant excepts to certain parts of the answer.

Paul Bakewell, for complainant.

M. B. Jonas and A. C. Fowler, for defendant.

ADAMS, District Judge. This is an action for an alleged infringement of a copyright. An answer was filed, and complain-

ant excepts to several of its parts. The particulars will appear hereafter.

1. The first exception is taken because, as is said, the answer is not entitled in the case so as to agree with the names of the parties as they appear in the amended bill. This, if true, is not ground for exception at all. The remedy for such failure is to move to take the answer from the files. But, as a matter of fact, the answer is not defective in the particular complained of, as there appears to be an appropriate heading, as follows: "The Answer of the Aloe Instrument Company, Defendant, to the Amended Bill of Complaint of Adelaide H. Osgood, Complainant." This is a perfect title, and it is not rendered imperfect by the fact that the pleader premised this heading by the style, "Osgood vs. Aloe." The first exception is, therefore, disallowed.

2. The second exception is taken because, as is said, the answer filed in the cause does not appear to be sworn to by any officer or representative of defendant corporation. If such were in fact true, it does not afford ground for exception to the answer, either for insufficiency, scandal, or impertinence. The proper remedy for this, also, is to move to take the answer from the files. However, I do not think the allegation in the exception is true, for the following reasons: The answer referred to concludes as follows: "In testimony whereof the said defendant, the Aloe Instrument Company, has caused its corporate name and seal to be hereto affixed by Sidney Aloe, its president." The affidavit is made by Sidney Aloe, in which he states that he has "read the foregoing answer, and knows the contents thereof, and that the same is true, of his own knowledge," etc. Preceding this affidavit, at the end of the answer, he signs himself as president of the A. S. Aloe Instrument Company. This exception is therefore disallowed.

3. The third exception is for impertinence, and excepts to that part of defendant's answer which reads as follows:

"The defendant, further answering, denies that the book marked 'Complainant's Book,' of which profert is made in the said amended bill of complaint, is a true and substantial copy of the said copyrighted book, but avers that the title-page of the book so marked had been removed, and another page substituted therefor, which substituted page contains matter materially and vitally different from the matter contained on the title-page and the page immediately following the title-page of the copyrighted book, the matter on said pages of the said copyrighted book being fatally defective."

This part of the answer, so far as it can be claimed to be responsive to any allegations of the amended bill, is responsive to that part of the amended bill reading as follows:

"And your orator marks one of her books, 'Complainant's Book,' and is ready to produce the same in court, if required."

So far as the portion of the answer excepted to consists of a denial, it is manifestly broader than the averments of the bill itself, and is manifestly an attempt to involve an affirmative defense in a denial of averments of the bill itself. It is not clearly apparent for what purpose the allegation of the bill above quoted is made. It is not clear that the complainant intends to state that the book

marked, "Complainant's Book," is a true or substantial copy of her copyrighted book. It is certain, however, that the defendant cannot enlarge the scope and meaning of the averment of the bill by expanding the denial beyond the allegations of the bill.

The remaining part of the answer excepted to, as above quoted, manifestly is intended to state new matter constituting an affirmative defense. In this, I think the pleader has failed. His averments are not specific enough. In order to state an affirmative defense in the respect contemplated in this part of the answer, the pleader should make it appear affirmatively that the title-page of the book of which profert is made was removed by or at the instance of the complainant, and another page substituted therefor, after the publication of the book was made; for, if this change were made prior to the publication, it might have been entirely proper and necessary so to do to conform to the true and legal notice of copyright. The pleader should also state the facts and particulars in respect of which the matter on the title and next following page of the copyrighted book are fatally defective, rather than to state, as he does, that the above-mentioned matter is "fatally defective." I think the portion of the answer criticised by the third exception, as pleaded, constitutes no defense, and that the exception thereto for this reason also is well taken. It is therefore allowed.

4. The fourth exception relates to that portion of the answer which denies that the complainant has given notice of her copyright, as required by law, in this: that she did not insert on the page immediately following the title-page, nor at any other place, a notice as follows: "Copyright, 1891, by Adelaide H. Osgood. New York. All rights reserved." For the balance of the answer excepted to reference may be had to exception 4. Inasmuch as a large part of the matter excepted to in this fourth exception consists of a denial of averments of the bill, it is manifest that the exception cannot be allowed, as the answer is, so far at least, responsive to the averments of the bill. An exception for impertinence must be allowed in whole or not at all. But, as counsel have argued the exception on other grounds, I will add that, immediately following the denials in that part of the answer excepted to, appears an affirmative statement of facts which, if true, support the prior denial. This affirmative statement is as follows: "First. That the notice of copyright contained in said book was and is as follows: 'Copyright, 1891. All rights reserved.'" And, after specifying what elements of a lawful notice are omitted, the pleader proceeds and says: "That the books deposited with the librarian of congress contained copyright notice as last stated,—that is: 'Copyright, 1891. All rights reserved;' and that the said books published and sold by complainant contain this latter notice of copyright, and not the notice of copyright as alleged by the complainant in her said bill." This, in my opinion, is a sufficient statement that the books published and sold by complainant contain a notice of copyright in the following language: "Copyright, 1891. All rights reserved." This being no sufficient notice under the law, it is the equivalent of plead-

ing that the complainant published and sold books without any lawful copyright notice, inasmuch as the law requires that a lawful copyright notice must state the name of the person by whom the book is copyrighted. The portion of the answer complained of in this fourth exception, which states that "the books deposited with the librarian of congress contain copyright notice as last stated,—that is, without the name of the person by whom the book was copyrighted," even if impertinent and immaterial, cannot be expunged on this exception, as the exception itself must be overruled on the principle above announced. Yet, I have examined fully the elaborate briefs of counsel on the question whether the books deposited by the person seeking copyright must themselves contain copyright notice. It seems to me that the act of transmitting to or depositing with the librarian of congress two copies of the book for which copyright is sought is an act required by the act of congress to secure a copyright, and that, under the statute, it is not necessary that those books should contain any notice of the copyright itself. I have no knowledge, except that stated in the argument of counsel, that these books, when deposited with the librarian of congress, are treated by the librarian of congress as published, or are subject to the inspection or use of the public. Even if that were so, I should not hold, under the authorities shown, or under the language of the act of congress itself, in relation to copyright, that the depositing of the two books in question for the purposes of securing the copyright, was, in itself, such a publication of the book as would destroy the copyright if there were no proper notice of copyright in them. That portion of the answer, therefore, which alleges that the books deposited with the librarian of congress contain improper or unlawful copyright notice would not, by itself, constitute a defense to the complainant's action. But for that reason only the averment should not necessarily be held impertinent, as it is an averment which, taken with others, might be very proper in answering a bill containing the averments which the complainant's bill contains. The fourth exception must be disallowed.

5. The fifth exception is predicated upon that part of the defendant's answer wherein the defendant says that its said catalogue (referring to a catalogue published by the defendant) is copyrighted, and contains proper copyright notice required by law. This averment of the answer is strictly responsive to the allegations of the bill which, in terms, allege that the defendant published its catalogue without the proper copyright notice required by law. It is, therefore, not impertinent. The fifth exception is disallowed.

6. The sixth exception assails that part of the answer in which the defendant says:

"He has no information whether or not the two copies of the said book delivered or deposited, as alleged in the bill of complaint, in the office of the librarian of congress, were printed from type set within the limits of the United States or from plates made therefrom, or from negatives or drawings on stone made within the limits of the United States, or from transfers made therefrom, as required by section 4956 of the Revised Statutes, in force July 1, 1891; and therefore the defendant requires strict proof thereof."

The exception to this part of the answer is for alleged impertinence, and, according to the argument of counsel, is intended primarily to raise the question whether the burden rests upon the complainant to allege and prove that the work above mentioned was done within the limits of the United States. The act of congress in question does not, in terms or by fair implication, make the doing of this work within the limits of the United States a condition precedent to securing a valid copyright. Section 4956, *supra*, merely prohibits, "during the existence of such copyright, the importation of any book * * * so copyrighted or any plates of the same, not made from type set * * * within the limits of the United States," etc. It is necessary for the complainant to allege and show that she deposited with the librarian of congress, on or before the day of publication, a printed copy of the title-page of her book, and also two copies of her book, and that she has given the lawful copyright notice. Further than this complainant is not required to go in making out a *prima facie* case of legal copyright. For another reason, also, this exception ought to be allowed. The bill does not allege that the books in question were printed from type set within the limits of the United States. It contains no allegations on the subject. If the defendant's views are correct, that the burden is upon the complainant to aver and prove such fact in order to establish a copyright, the bill is fatally defective, and the defendant's remedy is by demurrer. The defendant cannot make an issue by denying averments not made. Exception 6 is, therefore, allowed.

CENTRAL TRUST CO. OF NEW YORK v. CHATTANOOGA S. R. CO.
(HARRIS, Intervener).

(Circuit Court, N. D. Georgia. April 23, 1895.)

RAILROAD COMPANIES—INSOLVENCY AND RECEIVERS—CLAIMS FOR SERVICES
RENDERED PRIOR TO RECEIVERSHIP.

One rendering services to a railroad company, as its secretary, within six months prior to the appointment of receivers, is not entitled to priority over the mortgage bondholders, where there has been no diversion of earnings for the benefit of bondholders. *Fosdick v. Schall*, 99 U. S. 235, and *Cutting v. Railroad Co.*, 9 C. C. A. 401, 61 Fed. 150, distinguished.

This was a petition filed by Franklin Harris in the consolidated causes brought, respectively, by Elias Summerfield and the Central Trust Company of New York against the Chattanooga Southern Railroad Company, praying payment of the sum of \$600 for services rendered, and asking that the claim be decreed a prior lien to that of the mortgage bonds, and be directed to be paid either out of the net earnings of the receivership, or out of the proceeds of the sale. The grounds of his claim are thus set out by the petitioner:

"Petitioner further shows that he was employed by said defendant company as its secretary from the year 1890, and continuously acted as such from said date until the appointment of a receiver in this cause, and fully performed and discharged all the duties appertaining to said office, and incumbent upon him as such secretary. Petitioner shows further that his salary

as such secretary was not stipulated nor agreed upon prior to said appointment, nor any time since, but that the sum of one hundred (\$100) dollars per month for the six months next preceding the receiver's appointment is a reasonable compensation for his services as said secretary for said period, and that he has never received from said defendant company or from any one else any compensation whatever for said services, from the time of his original appointment down to this date. * * * Petitioner is advised that he is entitled, by virtue of said services, to a superior lien upon the property and assets of said Chattanooga Southern Railway Company over the lien of the mortgage being foreclosed in this cause, and to payment of said sum of six hundred dollars, or whatever amount the court may adjudge reasonable compensation for said six months' services, either out of the net earnings of said railway company during the receivership, or out of the proceeds of the corpus of its property in case of sale thereof before payment of its bonded debt. * * * Petitioner shows further that said services were rendered for said company after default made by it in the payment of its mortgage debt and accrued interest thereon, and after knowledge of such default by the mortgagee, and while said railroad was still a going concern, and that said services were necessary, proper, and essential to the conduct and management of its business, and to the preservation of its property, and to keep said railway a going concern."

D. Lauck Grayson, for intervenor.
Robert C. Alston, for plaintiff.

NEWMAN, District Judge. The only question discussed on this demurrer has been the right of intervenor to priority over the lien of the mortgage debt. So far as that question is concerned, I am clear that the intervenor does not make a case by his petition such as makes his claim one to be preferred over the mortgage indebtedness. The case of *Cutting v. Railroad Co.*, 9 C. C. A. 401, 61 Fed. 150, decided by the circuit court of appeals for this circuit, following *Fosdick v. Schall*, 99 U. S. 235, decides that, in order to make such a claim preferential, it must appear that there was an order of court, at the time the receivers were appointed, providing for its payment, and evidence that the current earnings before or after the appointment of the receivers were diverted to paying interest on the bonded debt. Neither is shown by this intervening petition. It is true that about a month after his appointment the receiver was authorized to borrow a certain amount for paying the claims of employes within six months. But, even if this petitioner was such an employe as was embraced in the order, and if the order itself is such as comes within the decisions of the supreme court and the circuit court of appeals, there is no pretense that the earnings were diverted from their proper channel for the benefit of the bondholders in any way. So that it is clear that, so far as the petition seeks to establish priority, the demurrer to it is good. I see no objection to the special master ascertaining the amount of the claim, if that will be of any benefit to the intervenor. He probably does not care for this, however, from what has been said on the argument, unless given the preference he seeks. The demurrer, so far as it goes to the question of his right to have his claim established as a preferred claim, is sustained.

KOONS v. BRYSON et al.

(Circuit Court of Appeals, Fourth Circuit. May 28, 1895.)

No. 117.

1. PRACTICE—NONSUIT AT SUGGESTION OF COURT.

A judgment of nonsuit, taken in deference to the opinion of the court upon a question of law which disposes of the case, is subject to review on writ of error.

2. EVIDENCE—BOUNDARIES.

In an action of ejectment declarations of a chain carrier as to the location of certain lines in the survey in which he took part, which lines, without regard to the location of others, necessarily include the land in controversy, are sufficient to require the submission of the question of boundary to the jury.

3. SAME—POSSESSION OF LAND.

In an action of ejectment, evidence of a declaration of one of the defendants, made on the premises, that they had dug a mining shaft and cut timber to build a fence and cabin on the premises, to establish their possession, with evidence that the fence and cabin remained on the land and had been kept up by the defendants, who had also employed an agent to sell the land, is sufficient to require the submission of the question of possession to the jury.

4. SAME—PROCEEDINGS IN SUIT—RECITALS IN DECREE.

The recitals in a decree duly entered in a foreclosure suit are sufficient prima facie evidence of the previous proceedings therein, although the original papers showing such proceedings are missing.

In Error to the Circuit Court of the United States for the Western District of North Carolina.

This was an action of ejectment by Henry Koons against J. B. Bryson and others. Upon the trial in the circuit court the plaintiff submitted to a nonsuit at the suggestion of the court, and thereupon brings error. Reversed.

Moore & Moore, for plaintiff in error.

Before GOFF and SIMONTON, Circuit Judges, and SEYMOUR, District Judge.

SEYMOUR, District Judge. This was an action of ejectment, tried in the circuit court for the Western district of North Carolina. Upon the conclusion of the plaintiff's evidence, the learned judge who tried the case in the circuit court ruled "that the plaintiff had failed to make out his case as to three material points: He had failed to locate the boundaries claimed; he had failed to make out a chain of title, there being one missing link—the lost record had not been supplied; and he had not shown the defendants in possession of the land claimed." Thereupon, in deference to the opinion of the court, the plaintiff took a nonsuit, and appealed. Judgment of nonsuit was duly signed by the judge.

Being a final judgment disposing of the case, and rendered upon a ruling on matter of law duly excepted to by the plaintiff, it is subject to review by writ of error. *Central Transp. Co. v. Pullman's Palace Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478. It can make no difference, being merely matter of form, whether the plaintiff takes a nonsuit in deference to the opinion of the court, or the court orders a nonsuit. The former is the uniform practice in the state

The defendants claim that the boundaries of the grant are represented by the dotted lines on the plat marked 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 1. The defendants are said to claim under a grant from the state which includes the "gold mine" of the plat. If plaintiff's contention as to boundaries be correct, the mine is within the boundaries of grant 406. If defendants' claim of location be admitted, it is not. So the question raised is, whether there is evidence that should have been submitted to the jury in support of the former contention. On this question the plaintiff introduced the testimony of R. B. Justice, one of the two surveyors appointed by the court, and one of the signers of the plat referred to and printed herewith. Mr. Justice says in his testimony that, when he went into the community to survey "these lines," he knew nothing of the boundaries, and made inquiries "for the persons named in the certificate and survey to grant 406, viz. W. W. Lowdermilk and J. A. McCall, named as chain carriers in said survey." He could not ascertain the whereabouts of Lowdermilk, but found McCall. McCall, at his request, went with him to the black oak, located at D. Putting his hand on the black oak, which was marked as a corner, McCall stated that the surveyor began at this point; that they then ran east to the next corner at a chestnut. McCall went with witness along a marked line to the chestnut at E, and putting his hand upon the chestnut, which was marked, said, "This is the corner to which we run." In the same manner, alluding to Justice's testimony, McCall went with him to corners F, G, H, etc., until they reached A, pointing out the lines and corners. At or near A, as McCall told Justice, the original survey stopped. The other courses and distances were estimated. When the party reached A, as McCall declared, it became dark, and they only ran a short distance from that point south towards the South Carolina line. The call for the line A, B, witness (Justice) goes on to testify, of 110 poles did not take them to the South Carolina line, which is $276\frac{1}{2}$ poles south of A. Contrary to what is indicated by the original patent and plat, the line of Jackson county is crossed by the line from A to the state line, so that upon reaching the latter, to reach the next corner called for, viz. the corner of Jackson county, the call must be reversed and a distance of about 28 poles must be run in a direction opposite to that called for in the grant. From the chestnut oak at corner A the boundaries described in the grant are:

"Thence S. 110 poles to the South Carolina line, thence S., 70° W., with said line, to a pine (80 poles) at the corner of Jackson county; thence N., 70° W., with said county line, 410 poles to a stake; thence N., 23° E., 180 poles to a black oak."

The black oak, as has been stated above, is identified in the declaration of McCall to the witness Justice as the initial point of the original survey, and is the D of the plat. McCall died after having been subpoenaed as a witness in this action. That his declarations as given by Justice, are competent evidence in North Carolina is undisputed. The evidence tends to locate, and must be held, in the present attitude of this case, absolutely to locate the bound-

aries of the patent from D to A in accordance with the plaintiff's contention. It is not necessary, for the purposes of this decision, to definitively locate the boundaries of A, B, C, D. In whatever manner the three courses from A to C may be run, whether or not it should be held that the corner of Jackson county and the South Carolina line must be a corner of the patent, and that one of its boundaries must run from such corner 410 poles with the Jackson county line, in any event the succeeding line of the patent must be run, regardless of course or distance, to the black oak identified by McCall as the beginning of the actual survey. *Barclay v. Howell*, 6 Pet. 498; *Preston v. Bowmar*, 6 Wheat. 580; *Morrow v. Whitney*, 95 U. S. 551; *Land Co. v. Saunders*, 103 U. S. 316; *Ayers v. Watson*, 113 U. S. 594, 5 Sup. Ct. 641; *Credle v. Hays*, 88 N. C. 321; *Baxter v. Wilson*, 95 N. C. 137; *Redmond v. Stepp*, 100 N. C. 212, 6 S. E. 727. This being the case, the boundaries of the patent must of necessity include the gold mine. We are therefore of the opinion that plaintiff had, when he rested, made out his case on the question of boundary.

2. We also think that there was evidence, which should have been submitted to the jury, tending to show possession by defendant of part of the land claimed in the declaration. Such evidence is found in the testimony of W. H. Crowe, who testified that after defendants had obtained their grant, and prior to the commencement of this action, he went with one of the defendants, William McCall, to what was known as the gold mine to get some ore; that said McCall told him that they had dug the shaft and had cut timber on the land, out of which they had built a cabin and fence around the mine to establish their possession, and had kept it up and maintained it for that purpose. Witness further testified that this fence and cabin were there now (unless recently removed), and had been kept up by defendants ever since, and that defendants had at one time employed him as their agent to sell the land. Additional evidence of possession, corroborative of Crowe, is given in the testimony of Justice.

3. The other material matter, as to which the learned judge held that the plaintiff had failed to make out his case, was that he had failed to make out his chain of title, there being one link missing,—that the lost record had not been supplied. We think the court record, of which a certified copy was produced, is in itself sufficient, without any proof of the contents of the lost papers. After deraigning title from the state to one Zachery, plaintiff introduced a deed from Zachery to one Miller, conveying the lands described in the declaration, including those conveyed in grant 406. This deed bears date February 16, 1865. He then introduced a deed of the same date from Miller to Zachery, conveying the same lands in mortgage. He next introduced a transcript of the proceedings in a foreclosure suit in the superior court of Jackson county, N. C., brought by Wimbish et al., plaintiffs, against Miller, defendant, to foreclose this mortgage. Wimbish et al. were, as appears, assignees of the mortgage. The transcript shows proceedings in court beginning with the fall term of 1870 and ending with a final judg-

ment. It shows a jury trial and verdict at the spring term, 1875, and a judgment for plaintiffs. The decree appears to have been entered at the fall term of 1875, *nunc pro tunc*, as of the spring-term proceeding. It recites, among other things, the making of the mortgage, sets forth by reference thereto the land conveyed in it, and states the assignment of the mortgage to the plaintiff; it further recites as facts the due service of process upon Miller, and his appearance, as well as that of sundry parties claiming under him, who had made themselves parties by attorney; and it orders that the land conveyed in the mortgage be sold at auction by one C. A. Moore, commissioner, and directs him to make a deed to the purchaser at such sale, and that the defendants be foreclosed of all equity of redemption. Plaintiff then proved by the said Moore, commissioner, the sale at auction, and the making by him of a deed in pursuance thereof. Plaintiff further introduced a deed from Moore, commissioner, conveying the premises in pursuance of the sale to one Thaddeus C. Davis, and deeds carrying the title from Davis to himself. The missing link in plaintiff's chain of title, spoken of by the judge below, is a supposed insufficiency of the evidence with respect to the foreclosure suit. We are again embarrassed by the absence of any brief in behalf of the defendants. We are, however, informed that the alleged defect in the chain of title consists in the fact that the papers in the case of *Wimbish v. Miller* have been lost, and their loss not supplied. The material lost papers are, as we suppose, the summons, with proof of its due service, the declaration, containing a description of the land, and, perhaps, the order confirming the sale. But all that could be shown by these papers appears in the decree of foreclosure. That the recitals in the decree are at the least *prima facie* evidence of the facts recited may be conclusively proved by authority. *Black, Judgm. §§ 270-277, inclusive; Galpin v. Page*, 18 Wall. 350-366. The decree recites both service and appearance of defendants by attorney; it describes the land by reference to the mortgage, which appears in plaintiff's evidence, and it directs the commissioner to make title to the purchaser. The latter may be irregular, as contrary to the settled practice in North Carolina; but the direction is not void, and cannot be collaterally attacked. All these matters are concluded by the recitals in the decree. It is true that there are decisions which hold that it may be shown, as a defense to a suit in a judgment of a foreign state, that the party was not served and did not appear, although the record may state the contrary. *Ferguson v. Crawford*, 70 N. Y. 253. However this may be, we know of no case where the recital of an appearance or of service is held not to be *prima facie* evidence of those facts. If, however, it were necessary to supply the lost records, there was evidence upon that point that should have been submitted to the jury, *viz.* the testimony of Moore, the commissioner, who swore to the fact that all of them had been duly filed and had constituted parts of the record. The only possible objection to this evidence seems to be this: That the Code of North Carolina (section 60), having provided a method of supplying a court record in case of its loss, that method is exclusive.

The contrary, however, is held by the supreme court of North Carolina. *Mobley v. Watts*, 98 N. C. 284, 289, 3 S. E. 677; *Clifton v. Fort*, 98 N. C. 173-178, 3 S. E. 726.

The judgment of the circuit court is, therefore, reversed, at the cost of the defendants in error, and the cause remanded, with instructions to grant a new trial.

McELWEE et al. v. METROPOLITAN LUMBER CO.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1895.)

No. 262.

1. SALE—WHEN COMPLETE.

The M. Lumber Company made a contract in May, 1892, with one B. for the sale to him of all the product of its mill during the season of 1892. It was agreed that the amount of lumber manufactured each month should be determined by inspectors on the first day of the succeeding month, and that B. should give his notes due in 90 days for the price, less the freight from the M. Company's mill in Michigan to Chicago. It was also agreed that, if B. did not desire the lumber shipped as fast as made, the M. Company would renew B.'s notes for the price so long as the lumber remained in its possession, not exceeding 90 days. At the close of the season, on November 12, 1892, a considerable quantity of lumber remained in the possession of the M. Company, for which notes were outstanding, having been discounted by the M. Company. In January, 1893, B. requested renewals of such notes, under the clause in the contract providing therefor, and new notes were given, maturing in May, June, and July. On May 30th B. failed, and the M. Company at once asserted a right to retain the lumber remaining in its possession. *Held*, that upon the execution of B.'s promissory notes for each month's product of lumber after its inspection the contract of sale thereof was complete, and the title and right of possession passed to B.

2. SAME—VENDOR'S LIEN—REVIVAL.

Held, further, that, although during the running of the original notes no vendor's lien existed, upon the renewal of the notes such lien revived in the M. Company, upon all lumber in its possession, under the provision in the contract for renewal, so long as the lumber remained in its possession, and such lien would have revived upon the insolvency of B. without regard to the contract provision.

3. SAME—WAIVER.

Held, further, that such lien was not waived as to lumber remaining in its possession by partial shipments to B. after the lien revived.

4. SAME.

It was claimed that, shortly after the close of the season of 1892, in consideration of B.'s executing his note for the lumber, made between November 1st and 12th, before the end of that month, the M. Company had agreed to turn over absolutely to B. all its right and title to the lumber on hand, and thereafter held such lumber as bailee of B. *Held* that, even if such agreement were proved, it would not prevent the revival of a vendor's lien on the lumber actually held by the M. Company upon the expiration of the credit or upon B.'s insolvency.

5. SAME—SUBVENDÉE—ESTOPPEL.

It was also claimed that, at the same time, which was before the expiration of the credit, and while B. had full title and right of possession, it was agreed by the M. Company, in the presence of H. and C., that B. might sell and dispose of all the lumber in its possession. B. afterwards sold parts of such lumber to H. and to C., but no specific lumber was set apart to fill such contracts, and no notice of the sales was given to the M. Company, which renewed B.'s notes in ignorance of them. After B.'s insolvency and the M. Company's assertion of its lien, H. assigned his con-

tract to C., and C., asserting title to the whole amount of lumber, claimed it from the M. Company. *Held*, that the M. Company was not estopped to set up its vendor's lien as against C. or H., whose rights as subvendees were subject, in the absence of estoppel, to the revival of the vendor's lien upon insolvency of the vendee, or otherwise.

6. PROMISSORY NOTES—RENEWALS.

Upon the question whether the notes given by B. in January, 1893, were renewals of former notes or were given for loans of money, the court instructed the jury that, if there was an agreement between the M. Company and B. that there should be renewals of the notes, and that, in order to maintain his credit, the same should be accomplished by B.'s paying his first notes, and giving new ones of similar amount to the M. Company, which should procure their discount, and forward the proceeds to B., such transaction would constitute a renewal of the first notes, the same being a matter of intention, though, *prima facie*, taking up a note by check is payment. *Held* no error.

7. PRACTICE—FOLLOWING STATE STATUTES—SPECIAL FINDINGS.

The provisions of a state statute requiring the submission of special questions to the jury upon request of counsel, and providing that the findings thereon shall control the general verdict, are not binding upon the courts of the United States. In those courts the effect of inconsistent findings is to be determined by the common law, and not by such statute.

In Error to the Circuit Court of the United States for the Northern Division of the Western District of Michigan.

Two separate actions of replevin, instituted by McElwee & Carney, as plaintiffs, to recover the possession of a large quantity of lumber from the Metropolitan Lumber Company, were by agreement consolidated and tried together. The judgment was against the plaintiffs and for the defendant, in the sum of \$29,064.05, the value of the lumber taken from the possession of the defendant by the writ of replevin. The plaintiffs have sued out this writ of error. The facts involved, so far as necessary to be here stated, are as follows: The plaintiffs below, and plaintiffs in error here, were commission merchants and dealers in lumber, engaged in business at Chicago, Ill., and were citizens of the state of Illinois. The defendant was a corporation of the state of Michigan, and was operating a large sawmill for the manufacture of lumber at Metropolitan, in the state of Michigan. On the 25th of May, 1892, the Metropolitan Lumber Company entered into a contract in writing with S. B. Barker, residing and doing business as a dealer in lumber at Chicago, under the firm name of S. B. Barker & Co., for the sale and delivery at Chicago of all the product of its mill then on hand at its mill yard, and all which should be cut during the lumbering season of 1892, estimated at 14,000,000 feet of pine lumber; also all laths and shingles made at the mill during the season. A specific price for each kind and quality of lumber was agreed upon, which included freight from the mill to Chicago. The other provisions of the contract necessary to be stated were as follows: "It is hereby agreed that, the amount of lumber, lath, and shingles in pile at said mill on the 1st day of June, 1892, shall be estimated by two inspectors, one to be chosen by each of the parties hereto, or said estimate shall be made by Mr. George Gilbert, if said party of the second part shall prefer; and that such estimate shall be so made on the first day of each month thereafter, of the lumber, lath, and shingles manufactured during each preceding month. The said parties of the second part agree to give to said first party their promissory note, dated June 1, 1892, due in ninety days after date, without interest, for the full amount of the purchase price of the lumber, lath, and shingles then manufactured and estimated as aforesaid; and said second parties agree to give to said first party on the first day of each succeeding month thereafter their promissory note due in ninety days after date, without interest, for the amount of the purchase price of the lumber, lath, and shingles manufactured during each preceding month, and estimated as aforesaid. And it is also agreed that, if said parties of the second part do not desire said lumber, lath, and shingles shipped as fast as estimated as aforesaid, said first party will extend the time on, or renew the notes given for the purchase price of, said lumber, lath, and shin-

gles, so long as the same remains in the possession of said first party, not to exceed ninety days, but upon the express condition that said second parties shall pay such rate of interest on said notes during the time of such extension or renewal as the said party of the first part may have to pay to have said notes discounted. It is further agreed that the final settlement for said lumber, lath, and shingles shall be made on the inspection and measurement thereof made on the dock at Escanaba, Michigan. And it is agreed that the parties of the second part shall take all risk of damage by fire of such part of said lumber, lath, and shingles as may be carried over and not shipped during the season of 1892, and shall pay for all insurance thereon during the time it is so carried over. It is also understood and agreed that the within described lumber, lath, and shingles are to be manufactured in a good and workmanlike manner, as directed from time to time by second party. It is also agreed that, in settling for the lumber each month on estimate, that notes are to be given less the freight to Chicago, viz. \$1.50 per M." There was evidence tending to show that the lumber on hand June 1, 1892, was inspected and estimated according to contract, and the negotiable notes of Barker & Co. executed for same to the lumber company, and that on the first of each month thereafter a like inspection and estimate of the lumber cut the preceding month were had, and the notes of the buyer executed therefor, according to the agreement, less \$1.50 per thousand, the rate of freight to point of delivery. Purchase-money notes aggregating more than \$50,000 were renewed in February, 1893, by notes maturing in May, June, and July, 1893. These renewals were claimed and granted under the provision in the original contract in respect of renewals for notes for lumber remaining in possession of the seller at time renewals should be asked. On the 30th of May, 1893, Barker & Co. failed, at which time more than \$40,000 of purchase money remained unpaid, represented by notes, many of which had been indorsed by the lumber company, and discounted for its benefit. At the date of this failure, lumber to the value of \$27,234.78 was in the actual possession of the lumber company, being either on the dock at Escanaba, and under the control of the agents of the lumber company, or piled in the mill yard at Metropolitan. Defendant in error at once, upon the failure of Barker & Co., asserted a right to retain the lumber in its possession till the price was paid. The plaintiffs in error, claiming to be purchasers from Barker & Co. of all the lumber which had not been delivered to them at Chicago, demanded possession, and were refused. Thereupon they instituted two actions of replevin in the circuit court, one for the lumber at Escanaba, and another for that in the mill yard at Metropolitan. Plaintiffs in error insisted that the written contract above set out had been modified in many important particulars. The learned district judge submitted a number of questions, to be answered by the jury, in respect of the alleged modification. These questions and the findings thereon are in these words: "First. Was the contract of May 25, 1892, by and between Barker & Co. and the Metropolitan Lumber Company, modified by the parties on or about November 14, 1892? If so, where was the modification made, and was it oral or written? Yes, in Chicago; orally, at Chicago, November 14, 1892. Second. If you find that said contract was modified, was it agreed that Barker & Co. should have possession of the lumber then sawed and in the possession of the Metropolitan Lumber Company under the agreement of May 25, 1892? Yes. Was it agreed that Barker & Co. should have title in said lumber? No. Was it agreed that Barker & Co. should have the right to sell said lumber? Yes. Third. Did the plaintiffs, before bringing suit, demand from the defendants the lumber taken in replevin? Yes." The defendant moved the court to set aside the special finding made by the jury to the question: "Was it agreed that Barker & Co. should have the right to sell said lumber?"—upon the ground that there was no evidence to support the finding. The plaintiffs moved the court for a judgment for the plaintiffs upon the verdict rendered in said cause, on the ground that the general verdict was inconsistent with the special findings of the jury, "and under said special findings, and according to the rules of law, the judgment should be entered for the plaintiffs." Both of these motions were overruled, and judgment entered against the plaintiffs for \$27,234.78, the value of the lumber at the time it was seized, and \$1,829.27, interest thereon, and for one dollar, the damages sustained, in all \$29,064.05.

To all of which the plaintiffs duly excepted. Many exceptions were also taken to the charge as delivered and to the refusal of the court to charge as requested. Such of these exceptions as have been made the subject of an assignment of error, and as are necessary to an understanding of the rulings thereon, appear in the opinion.

F. O. Clark and Hanchett & Hanchett, for plaintiffs in error.

F. D. Mead and Ball & Ball, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Though the agreement was originally executory, being for the sale of lumber to be manufactured, yet, when the product of a particular month was completed, and it had been inspected and measured, there was a complete bargain and sale of the lumber thus designated. That particular lumber became appropriated to the contract, and the vendee under the agreement was obliged to make his promissory note to the vendor for the price, payable 90 days after date. The element necessary to a perfect and complete sale was supplied by the appropriation of a particular lot of lumber to the contract. In the absence of a contrary intention, clearly expressed by other parts of the contract, the right of property and of possession would vest in the buyer upon the execution of his promissory note payable to the seller. The provision for a final inspection at Escanaba after the delivery had begun was merely for the correction of errors before final settlement, and does not operate to defeat the presumption that title passed when the lumber was first inspected and accepted and conditional payment made. *Macomber v. Parker*, 13 Pick. 183; *Cotton Press Co. v. Stanard*, 44 Mo. 71. To say that title remained with the vendor after the lumber had been appropriated to the contract and accepted by the buyer, and after the negotiable notes of the vendee had been delivered in settlement, would leave the vendor liable for loss by fire or other casualty, and the vendee without security for the payment he had made. The clause concerning the risk, from fire, of lumber carried over from the season of 1892, was not interpreted by the defendant in error as leaving the risk with the defendant during the season; for the insurance carried in its own name was, by its own procurement, made payable to Barker & Co., to the extent of their interest. It may be added that, at the date when the right of plaintiffs in error accrued, this insurance had been transferred to Barker & Co. as owners, and was being carried by them. Neither did the provision that the vendor should deliver at Chicago prevent the title from passing before such delivery. Undoubtedly, the general rule is that if the seller obligates himself as a part of his contract to deliver the property to the buyer at some specified place, title will not pass until such delivery. *The Venus*, 8 Cranch, 275; *Sneathen v. Grubbs*, 88 Pa. St. 147; *Benj. Sales*, §§ 325, 377; *Com. v. Greenfield*, 121 Mass. 40. "Slight evidence," says Mr. Benjamin, "is, however, accepted as sufficient to show that title passes immediately on the sale, though the seller is to make a delivery. The question, at last, is one of in-

tent, to be ascertained by a consideration of all the circumstances." *Benj. Sales*, § 329. Here the lumber cut, inspected, and measured was completely identified. Nothing more remained to be done to put it in a deliverable condition. It was then paid for. The delivery might be delayed by the neglect of the seller, or for the convenience of the buyer. In paying for the lumber, the price of the freight was deducted. Under such circumstances, it would be difficult to say that, if the lumber should be destroyed without fault of the seller, the loss would not fall on the buyer. *Terry v. Wheeler*, 25 N. Y. 520, is much in point. That was a case of the sale of lumber which was selected by the buyer, and measured and piled in the yard of the seller, and the price was paid. The seller, however, agreed, as part of the contract, to deliver the lumber free of charge on board of the cars, no time being specified. The lumber was destroyed by fire on the day of sale, and the buyer sued to recover his purchase money. *Selden, J.*, said:

"No case has been referred to by counsel, nor have I discovered any, in which, where the article sold was perfectly identified and paid for, it was held that a stipulation of the seller to deliver at a particular place prevented the title from passing. If the payment was to be made on or after the delivery, at a particular place, it might fairly be inferred that the contract was executory, until such delivery; but where the sale appears to be absolute, the identity of the thing fixed, and the price for it paid, I see no room for an inference that the property remains the seller's merely because he has engaged to transport it to a given point. I think in such case the property passes at the time of the contract, and that in carrying it the seller acts as bailee and not as owner." *Hobbs v. Carr*, 127 Mass. 532; *Weld v. Came*, 98 Mass. 152; *Lingham v. Eggleston*, 27 Mich. 324; *Underhill v. Booming Co.*, 40 Mich. 660; *Booming Co. v. Underhill*, 43 Mich. 629, 5 N. W. 1073; *Steam Mill Co. v. Brown*, 57 Me. 9; *Hatch v. Oil Co.*, 100 U. S. 135; *Dyer v. Libby*, 61 Me. 45.

The passage of title does not militate against the existence of a vendor's lien. Such a lien arises upon the vesting of the title in the vendee, and is a mere right of the vendor to retain possession until the price is paid. If the title remains with the vendor, there is no lien; and this was explicitly stated to the jury, who distinctly found in their general verdict that the appellee had a vendor's lien. If such a lien existed when appellants replevied the lumber involved, it arose in consequence of facts occurring after the vendee gave his original notes. The agreement to give credit for 90 days after each installment of lumber was placed in a deliverable condition, and had been inspected and estimated, was wholly inconsistent with any right of the vendor to retain possession until the price was paid. The duty of immediate delivery, credit having been given, was wholly inconsistent with a right to hold as security for the purchase price.

"Selling goods on a credit means *ex vi terminorum* that the buyer is to take them in his possession, and the vendor is to trust to the buyer's promise for the payment of the price at a future time." *Benj. Sales* (Corb. Ed.) § 1182.

The doctrine is well stated in the leading English cases of *Bloxam v. Sanders*, 4 Barn. & C. 941, and *Bloxam v. Morley*, Id. 951, by *Bayley, J.*, who thus stated the general principles concerning the lien of a vendor of goods:

"The vendor's right in respect of his price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership

and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering the goods, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him; but his right of possession is not absolute; it is liable to be defeated if he becomes insolvent before he obtains possession. *Tooke v. Hollingworth*, 5 Term R. 215. If the seller has dispatched the goods to the buyer, and insolvency occur, he has a right, in virtue of his original ownership, to stop them in transitu. Why? Because the property is vested in the buyer so as to subject him to the risk of any accident. But he has not an indefeasible right to the possession, and his insolvency, without payment of the price, defeats the right. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price; or they may still act on their right of property, if anything unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury; but they can maintain no action in which the right of property and the right of possession are both requisite, unless they have both those rights."

Thus, after the execution to the vendor of the promissory notes of the vendee, the title or right of property and the right of possession to the lumber embraced within each monthly settlement were vested in Barker & Co. The actual, manual possession was with the Metropolitan Lumber Company, which was under obligation to deliver to the buyer as delivery should be required. Delivery could not be refused unless one of two things should occur before the actual possession was surrendered, namely, insolvency of the buyer or non-payment of the price when the credit expired. In case of the happening of either of these contingencies before the actual possession of the lumber passed from the seller to the buyer, the vendor's lien, which had been waived by a sale on a credit, would revive, and the vendor might lawfully retain his possession until the price was paid. Even if goods have been delivered to a carrier consigned to the vendee, and insolvency occurs before they reach the actual possession of the buyer, the vendor may exercise the right of stoppage in transitu to recover his possession, and thereby revive his lien. The right of stoppage in transitu is but an equitable extension or enlargement of the vendor's lien, and is not an independent or distinct right. 2 Benj. Sales (Corb. Ed.) §§ 1229-1245; *Loeb v. Peters*, 63 Ala. 249; *Babcock v. Bonnell*, 80 N. Y. 244. In the very well considered case of *White v. Welsh*, 38 Pa. St. 420, it was said by the court that:

"Judges do not ordinarily distinguish between the retainer of goods by a vendor and their stoppage in transitu on account of the insolvency of the vendee, because these terms refer to the same right, only at different stages of perfection and execution of the contract of sale. If a vendor has a right to stop in transitu, a fortiori he has a right of retainer before any transit has commenced." "The rule is," said the court, "that so long as the vendor has the actual possession of the goods, or as long as they are in the custody of his agents, and while they are in transit from him to the vendee, he has a right to refuse or countermand the final delivery, if the vendee be in failing circumstances."

Unless, therefore, the actual possession had been surrendered before the alleged change in the contract, to be hereafter considered, the vendor's lien would revive, in case insolvency occurred before delivery or the period of credit expired and the price was unpaid.

The effect upon the vendor's right of the expiration of the period of credit while the actual possession is with the vendor is thus stated:

"When goods have been sold on credit, and the purchaser permits them to remain in the vendor's possession till the credit has expired, the vendor's lien, which was waived by the grant of credit, revives upon the expiration of the term, even though the buyer may not be insolvent." *Benj. Sales* (Corb. Ed.) § 1227.

This reversion of the lien is not affected by the fact that the seller had received conditional payment by promissory notes or bills of exchange, nor by the fact that such notes or bills had been negotiated so that they were outstanding when they matured, or unmatured and outstanding when the insolvency occurred. *Benj. Sales* (Corb. Ed.) §§ 1130-1185, and note 4; *Valpy v. Oakeley*, 16 Q. B. 941; *Griffiths v. Perry*, 1 El. & El. 680; *Grice v. Richardson*, L. R. 3 App. Cas. 319; *White v. Welsh*, 38 Pa. St. 420; *Wanamaker v. Yerkes*, 70 Pa. St. 443; *Arnold v. Delano*, 4 Cush. 33; *Townley v. Crump*, 4 Adol. & E. 58. The liability of defendant in error as indorser on such notes as had been negotiated operated to continue the relation of an unpaid vendor. The right of retention is not a right of rescission, and it is not essential to the revival of the lien that the notes of the purchaser shall be delivered up or ready for delivery, though in *Arnold v. Delano*, cited above, it seems to have been so regarded. If, after the revival of the vendor's lien by expiration of the credit, the seller extended further credit by taking renewal notes, payable at a future date, the revived lien would be waived, unless there was some agreement that this further credit should not have that effect, and that the seller should hold the property as security for the renewal notes. This state of things seems to have been contemplated by the parties; for, by one of the clauses of the original contract, a provision was made for renewals or extensions for such time as the lumber in the actual possession of the vendor when an extension was granted should "remain in the possession" of the lumber company, "not exceeding ninety days." The reasonable construction to be placed upon this provision is that the revived lien, resulting from the expiration of the original credit, should not be waived by renewal of purchase notes and an extension of credit. Before such extension, the buyer undoubtedly had the right of property and right of possession. After such renewals, all right of possession till the renewal notes were paid was lost. Independently of the agreement that extended credit should not waive the lien which had been revived by expiration of original credit, the insolvency which occurred during the running of the renewal notes would operate to revive the suspended lien, and, between vendor and vendee, or a subvendee standing on no higher ground than the vendee, the defendant in error had a right to hold the possession till the renewal notes were paid. The authorities already cited fully sustain this position. Aside from all questions arising on the alleged modification of November 14, 1892, and all questions of estoppel, the rights of the defendant in error, in the actual possession of lumber which had not been paid for, would not be affected by a sale to a third person. Such a subvendee would buy subject to the right of the vendor to hold

possession as security for renewal notes; and, without regard to this special agreement, a subvendee would take subject to the possibility that before possession was obtained the lien might be revived by insolvency of the vendee or expiration of the stipulated credit. These considerations lead us to the conclusion that the rights of the plaintiffs in error, as subvendees, must, as the learned judge who presided at nisi prius instructed the jury, depend either upon questions of estoppel or upon the legal effect of the modification in the contract as defeating any right of lien in the vendor. The construction given the original contract that the title did not vest in the purchaser till delivery at Chicago, though erroneous, was harmless. It is a matter of no moment to plaintiffs in error whether the defendant in error had a right of retention by reason of the fact that it had not parted with the title or because it had a vendor's lien. In either case, plaintiffs in error must fail in this action.

Before passing to a consideration of the terms and effect of the modifications claimed, it is proper to consider the contention of plaintiffs in error, presented by several requests for special charges refused by the court, that the so-called renewal notes were not in fact renewals, but independent loans to Barker & Co. by defendant in error. There was evidence that all these subsequent renewals were claimed and allowed upon the theory that the provision of the original contract concerning renewals was still in force. The letter of Barker to the lumber company of January 20, 1893, uses this language:

"Now, in regard to the lumber left over from last year, our contract says you are to renew our notes for amount of lumber left in your hands. * * * We have from seventy to eighty thousand dollars in lumber, so we shall expect you to arrange to carry, or renew, as you prefer, at least \$50,000 next month. The balance we will pay. We will send you our notes for that amount February 1st, or, if you wish to arrange it differently, let us know. Fifty thousand dollars we wish to pay in May, and will make our notes due in May. Let us hear from you."

Again, on January 27, 1893, Barker wrote:

"We only ask for renewals for the amount of lumber you have on hand after all the notes are paid up to that amount. Our estimate of the value is \$85,000.00."

The evidence showed that renewals to the amount demanded were made in February, March, and April, 1893, and notes given payable in May, June, and July, 1893. These extended notes were discounted by defendant in error. There was evidence tending to show that the notes of Barker & Co. had been discounted by the vendor, and that, in advance of their maturity, it was arranged that Barker & Co. should meet them severally at maturity, but that new notes of Barker & Co., corresponding in amounts and dates with the maturing notes, should be sent to the lumber company, who should indorse and procure their discount, and forward the proceeds to Barker & Co. There was evidence that this plan was carried out, and Barker & Co. produced the matured notes and their canceled checks, by which they had been paid. The contention of the lumber company was that this plan of renewing was with the intent and purpose that the new notes should in fact stand as renewal notes. The court,

after in substance stating the contention of the parties as to this question, instructed the jury as follows:

"Now, the taking up of a note by giving a check for it is *prima facie* a payment of the note, but it is not necessarily a payment. If there was an agreement—an understanding—that there should be renewals, and if it was expressly or manifestly agreed that the renewals should be accomplished in the way in which defendant claims they were made in this case, they were renewals, and it would not lie in the mouth of Barker & Co., or anybody claiming under them, to insist afterwards that they were not renewals. After all, it is a matter of intention. If I agree with a party to renew his note, but I say, 'Here, I want you to go and take that note up by your own check, and the next day I will take your note and have it discounted, and give you the proceeds,' that would amount to a renewal. You can see for yourselves, gentlemen, if you have ever had any dealings with banks, that there might be a very sufficient reason for adopting that course. The man who does business in a bank impairs his credit by going repeatedly to have a note renewed, because it is taken as an indication of slender means, or of being hard pressed. And banks generally require that notes be paid after the second, or, at the most, the third, renewal. Now, that might be a reason, if these parties desired to maintain their credit, that the party should ostensibly take up the note. That, so far as the bank was concerned, would be a payment. Then, if, in a day or two, another note should be presented, and that should be discounted as a new transaction (I don't say that was so in this case; I only state this by way of illustration),—if anything of that sort was done, the transaction, taken altogether as between the parties to it, would be a renewal, and not a payment. The claims of the plaintiffs are that these were payments, and that the subsequent notes were merely loans, under which the Metropolitan Lumber Company became an accommodation party by indorsing the notes and securing money for Barker. It is for you to decide what is the true version of the facts."

We find no error either in the charge or in the refusal to charge on this matter. The question of payment was one of intention, and, under the evidence, was one for the jury.

This brings us to the legal effect of the alleged modifications of November 14, 1892, upon the rights of the parties; for, unless that modification materially changed the agreement, the renewals allowed in February following would continue a vendor's lien for the security of the renewal notes. Concerning this modification, the evidence tended to show that the mill of defendant in error closed down about the 11th or 12th of November, 1892. All the lumber theretofore cut, except such as was sawed after October 31st, had been inspected and settled for by the notes of the vendee. The lumber sawed between October 31st and the closing of the mill was inspected and estimated under the contract, and was in value something over \$9,000. The purchaser was not required, under the contract, to give notes for any lumber until the end of the month. Defendant in error wished, however, to settle up this matter at once, and therefore requested that Barker & Co. would give their notes for this remnant without waiting, as they had a right to do, until December 1st. Barker & Co. were at first unwilling, and the contention of the plaintiffs in error is that Barker & Co. did execute notes for the November cut, upon certain concessions being made. The view which they took as to these concessions, and the legal effect thereof, appears by two requests, which were as follows:

"If you believe from the evidence that, on or about the 14th of November, 1892, the defendant agreed to turn over absolutely all its right, title, and

interest in the lumber in question to S. B. Barker & Co. if the said S. B. Barker & Co. would give to said defendant its notes for the estimated amount of lumber sawed up to the time the mill shut down in November, 1892, and that the said defendant company also agreed to assign to the said S. B. Barker & Co. the insurance policies upon all the lumber on hand at the mill at Metropolitan in consideration of the making of said notes, and if you believe that the notes of \$9,000 in evidence in this case were given in accordance with such agreement, then the said S. B. Barker & Co. became the absolute owner of the said lumber, even if the notes given by the said S. B. Barker & Co. February 20, 1893, and March 31, 1893, were renewals or not; and, if you so believe, your verdict should be for the plaintiffs.

"If you believe from the evidence that, in accordance with the agreement of Nov. 14, 1892, the defendant company agreed to turn over absolutely all of its lumber cut during the year 1892, together with the insurance policies thereon, provided S. B. Barker & Co. would execute the notes of \$9,000, in evidence in this case, in addition to those already given, and if you believe that, in accordance with said agreement, the said defendant delivered to the said S. B. Barker & Co., or by its order, a portion of the said lumber, and assigned the insurance policies in evidence in this case to said S. B. Barker & Co., then your verdict in this case should be for the plaintiffs."

These requests were properly refused. Each absolutely ignores the distinction between the right of possession and actual possession. Whether the new agreement as to possession operated to change the character in which the lumber company thereafter held possession, and the effect, if any, in preventing a revivor of a vendor's lien, is the crux of this case, and will be hereafter considered. These requests imply that a mere agreement by which the title and right of possession vested in Barker & Co. would operate to prevent the subsequent attachment of a vendor's lien as a result of renewals, or as a consequence of insolvency before payment. Neither presents any question of estoppel operating to prevent the vendor from setting up a lien against subvendees. On this subject the jury were in substance and effect instructed that the plaintiffs could not recover unless it was found that the modification gave to Barker & Co. not only the title and the right of possession, but also an unqualified right to sell and transfer the lumber to third persons, and that this right of sale had been exercised in favor of plaintiffs. The charge more than once assumed, and in distinct terms instructed the jury, that there had been no change of possession; that the possession at time of insolvency was with the vendor. The language of the court in one place, in respect of possession at time of insolvency, was that:

"If the goods were not actually removed from the possession of the Metropolitan Lumber Co. before Barker & Co. failed,—and there is not any question on that point in this case, because by the testimony it remained in the possession of the Metropolitan Lumber Co. until after the failure of Barker & Co.,—why then the company could hold it against Barker & Co."

The objection most earnestly insisted on to this charge is that the court drew no distinction between an actual and constructive possession by the vendee; that it ignored the possibility that the vendor may, by agreement, make a constructive delivery to the vendee, and remain in possession as agent or bailee of the vendee. Though this question is now much pressed, it is noticeable that there is no distinct recognition of the question, either in the charge or requests for charge. The only way in which it can now be made

the subject of an assignment of error is by the suggestion that the court assumed that there had been no constructive transfer of possession because the actual possession remained with the defendant in error. There is no evidence in this record which would justify a finding that there was an agreement that, after the modifications of November 14th, the vendors should no longer remain in possession as vendors, but should thereafter hold as agent or bailee for Barker & Co. Upon the contrary, the construction placed upon the agreement, after the alleged modifications, by both parties, was wholly inconsistent with any change in the character in which the vendor remained in the actual possession. The claim of Barker & Co. for an extension of credit was made upon the clause providing for renewals while the vendors remained in possession, and the whole correspondence was based upon the theory that the lumber would stand as a security for the renewal notes. On the evidence before the jury, it was not error to assume, as the trial judge did, that at the occurrence of the vendee's insolvency, there had been no delivery to the vendee, either actual or constructive. Neither do we think that it would follow, if there was such evidence, that a mere agreement, express or implied, by an unpaid vendor, to hold possession as bailee or agent for the vendee, would operate as such a delivery to the vendee as to prevent the revivor of the vendor's lien if the vendee should fail before the actual possession was lost. It is to be borne in mind that this right of the vendor springs out of the relation of the parties and the natural equity that the vendor shall not be compelled to complete a contract by delivery when the vendee has not paid the price, or by insolvency becomes unable to carry out his side of the agreement. As put by Bayley, B., in *Miles v. Gorton*, 2 Crompt. & M. 511:

"Although everything may have been done so as to divest the property out of the vendor, and so as to throw upon the vendee all risk attendant upon the goods, still there results to the vendor out of the original contract a right to retain the goods until the payment of the price."

The case of *Barrett v. Goddard*, where the opinion was by Justice Story on circuit, and reported as No. 1,046, Fed. Cas., is much relied upon by plaintiffs in error. That case is, however, exceptional, and is founded for the most part on *Hurry v. Mangles*, 1 Camp. 452, where the rights of a subvendee had intervened, who had bought and paid for the goods, and then paid rent to the vendor as warehouseman. In *Miles v. Gorton*, 2 Crompt. & M. 506, *Hurry v. Mangles* was distinguished, upon the ground that the vendor, by receiving rent from a subvendee, had delivered the goods to the subvendee, and thereafter held as agent for the subvendee and not as agent for the vendee. The other cases cited by Justice Story are cases where the question was one of delivery to the vendee under the statute of frauds, and are applicable only in respect of questions upon the formation of the contract. There is a clear distinction between a delivery which will suffice to take a case without the statute of frauds, and an agreement of a vendor to hold in the character of bailee for the vendee, as a delivery sufficient to divest the vendor's lien or prevent its revival on insolvency or expiration of period of

credit. *Benj. Sales* (Corb. Ed.) §§ 1131-1134, 1187; *Miles v. Gorton*, 2 Crompt. & M. 504; *Hurry v. Mangles*, 1 Camp. 452; *Tanner v. Scovell*, 14 Mees. & W. 28-37; *Townley v. Crump*, 4 Adol. & E. 58; *Grice v. Richardson*, L. R. 3 App. Cas. 319. The case last cited is an opinion of the house of lords, and was decided as late as 1877. The doctrine of *Miles v. Gorton*, heretofore cited, was distinctly affirmed. In that case it appeared that the vendors were warehousemen, and made an arrangement with the purchasers that they should pay warehouse rent, and the sale was on a credit. It was held—First, that unless actual possession of goods sold has been delivered to the purchaser, the vendor is not deprived of his right of lien as against the assignee of the purchaser in the event of insolvency; second, that, as the goods remained in the possession of the vendors, and no actual delivery had been made to the purchaser, the vendors' lien revived upon the insolvency of the vendee, notwithstanding the vendors had become bailees for the vendee. The case was argued by Mr. Benjamin, the learned author of the work on *Sales of Personal Property*, in favor of the view announced by the house of lords. Other English cases bearing upon the question are: *Dodsley v. Varley*, 12 Adol. & E. 632; *Valpy v. Oakeley*, 16 Q. B. 941; *McEwan v. Smith*, 2 H. L. Cas. 309.

The conclusion we reach upon the foregoing questions may be summarized thus:

1. That the title and right of possession passed to Barker & Co. upon execution of their promissory notes as each month's product of finished lumber was inspected and received.
2. That during the running of the original notes no lien existed, and during the credit the vendees had a right to demand and take actual possession or make subsales to third persons.
3. That the lien of the vendor would revive upon expiration of the stipulated credit, without regard to the solvency of the vendee, or upon the insolvency of the vendee before or after maturity of purchase notes, and regardless as to whether such notes were outstanding or in the hands of the vendor.
4. That the renewal of matured purchase-money notes and the extension of a further credit would operate as a waiver of the lien which had revived upon the expiration of the original credit, unless there was an agreement to the contrary.
5. That the clause providing for renewal notes provided that this extended credit should not operate to waive the revived lien, by providing that the lumber should remain in the possession of the vendors till the renewal notes were paid.
6. That there was no evidence that the contract was subsequently modified so that the character in which the vendor thereafter held possession should be as bailee for the vendee, and not as vendor.
7. That, were it otherwise, such an agreement would not be such a delivery to the vendee, or loss of possession by the vendor, as would prevent the assertion of a vendor's lien upon expiration of the first or second stipulated credit, or upon the insolvency of the vendee before surrender of the actual possession. A fortiori, an agreement that the vendor should renew the vendee's notes and hold

possession till payment of the renewed notes would be unaffected by the alleged agreement to hold as bailee for the vendee. The one agreement would be inconsistent with the other during the running of the extended credit, and, between vendor and vendee, the agreement under which notes were renewed would supersede the agreement to hold as bailee.

Entertaining these views, it is clear that, if the defendant in error is debarred from asserting a vendor's lien upon the insolvency of the vendee, it must be because the plaintiffs in error have acquired rights as subpurchasers which the vendor is estopped to deny or contravene by the assertion of a lien. What are these rights, and what is their origin? As mere subpurchasers of lumber in the actual possession of the vendor, they only acquire the right and interest of the vendee. If, at the time they bought, the vendor had no lien, no right of retention, then they would acquire the right to demand delivery. But the right of a vendee who has bought on a credit is not an absolute right to demand delivery. The right is dependent upon the preservation of his credit, and, if he becomes insolvent before he obtains actual possession, the lien of the vendor revives, and the insolvent vendee must pay the purchase price before he can deprive the vendor of the goods remaining in his possession. So, if the vendor, for any reason, remain in the actual possession until the period of credit has expired, his lien revives. Now, a subvendee buys only this defeasible right of the vendee; and, if he does not obtain the actual possession or obtain from the vendor an actual attornment to him, as in *Hurry v. Mangles*, cited heretofore, and the credit given the vendee expires while the vendor holds the actual possession, or the vendee becomes insolvent, he cannot, in the absence of some estoppel, deprive the unpaid vendor of his actual possession. The rights of subvendees have most often been under consideration in cases involving the doctrine of stoppage in transitu. But the principle is the same where transit has not begun. It was well said in *White v. Welsh*, 38 Pa. St. 420, that, "if a vendor has a right of stoppage in transitu, a fortiori he has a right of retainer before any transit has begun." Now the right of stoppage in transitu, special legislation out of the way, can only be defeated by the transfer of a bill of lading to an indorsee who bona fide gave value for it. *Benj. Sales* (Corb. Ed.) § 1285; *Lickbarrow v. Mason*, 1 Smith, Lead. Cas. (Ed. 1879) 753. It will not be defeated by a mere assignment while in transit, or by an attachment by creditors of vendee. *Benj. Sales* (Corb. Ed.) § 1242; *Mississippi Mills v. Union & Planters' Bank*, 9 Lea, 318; *White v. Mitchell*, 38 Mich. 390; *Harris v. Pratt*, 17 N. Y. 249; *Umber Co. v. O'Brien*, 123 Mass. 12-14; *Calahan v. Babcock*, 21 Ohio St. 281; *Stanton v. Eager*, 16 Pick. 476; *Wood v. Yeatman*, 15 B. Mon. 273; *Loeb v. Peters*, 63 Ala. 243. No subsale during transit will defeat the right, unless the bill of lading be transferred. In the late case of *Kemp v. Falk*, L. R. 7 App. Cas. 573-582, it was said by Lord Blackburn that "no sale, even if the sale had actually been made with payment, would put an end to the right of stoppage in transitu." Now, what is the attitude of plaintiffs in error? Evidence was introduced of the execution of a series of

promissory notes by the Hines Lumber Company and payable to S. B. Barker & Co., all dated December 13, 1893, and payable at different dates, and aggregating some \$40,000. A receipt was given for these notes by Barker & Co., which concluded as follows:

"To apply on the purchase from me of one and one-half (1½) million feet of my good strips, now in cross-pile at Metropolitan, Mich., and on five hundred (500,000) thousand feet of 1¼", 1½", 2", and 3" selects, likewise in pile at Metropolitan, Mich., to be delivered by me along at intervals, within 60 days after the opening of navigation, at \$18.50 per M. for the strips and \$28.50 per M. for the thick selects, delivered on their dock in Chicago. It is understood, and I agree to extend each and all of the above notes for the same period as they are now given, with interest at going rate of interest, if the Edward Hines Lumber Co. desire the notes extended.

"S. B. Barker & Co. [Seal.]"

Another contract, between S. B. Barker & Co. and McElwee & Carney, was also introduced, which reads as follows:

"Chicago, Dec. 29, 1892.

"We have this day sold to McElwee & Carney, of Chicago, five million feet of pine lumber, shingles, and lath, piled on Metropolitan Lumber Co.'s docks at Metropolitan, Mich., and described as follows, to wit: Common boards, 8, 10, 12, 14, and 18 inches wide, one million three hundred and thirty (1,330) thousand feet, at thirteen (13) dollars per M.; strips three hundred (300) thousand feet, at eighteen (18) dollars per M.; saps six hundred and fifteen (615) thousand feet, at twenty-two (22) dollars per M.; culls four hundred and forty-seven (447) thousand feet, at seven (7) dollars per M.; shorts three hundred and twenty-five (325) thousand feet, at ten (10) dollars per M.; eleven hundred (1,100) thousand extra shingles, at two dollars and twenty-five (\$2.25) cents per M.; six hundred and thirty-eight (638) thousand lath, at one dollar and (\$1.40) forty cents per M.; and do hereby deliver to said McElwee & Carney all of said lumber, shingles, and lath, situated at Metropolitan, in Dickinson county, and state of Michigan, and do hereby authorize them or their agents to take immediate possession of the same. Said McElwee & Carney have paid on said lumber, shingles, and lath the sum of forty-five thousand nine hundred and sixty-seven (\$45,967.00) dollars.

"S. B. Barker & Co.

"Witness: W. J. Carney."

Now, neither of these contracts designates any particular piles of lumber intended to be sold, and no separation was ever made of that which was sold from that unsold. Some cargoes of lumber consigned to Barker & Co., and delivered to Barker & Co., were, on the evidence, applied on these contracts in the spring of 1893. But it is clear that the title and right of property to any particular lumber remaining in the possession of the Metropolitan Lumber Company did not vest in either of these subpurchasers. Clearly these sales were incomplete and inoperative to pass title or right of possession to any particular lumber until lumber should be thereafter set apart and applied on the contracts. *Cherry Val. Iron Works v. Florence Iron River Co.*, 12 C. C. A. 306, 64 Fed. 569-575. In this situation matters remained until after the failure of the vendees; no notice of any such sales having been given to the defendant in error until after it had renewed over \$50,000 of the matured notes of Barker & Co. in ignorance of any such subsales and in reliance upon the right conferred by the original agreement to hold the lumber in its possession at time of such renewals until the renewal notes should be paid. The case is even stronger; for Barker & Co. claimed

and obtained renewals upon the basis of the right secured under the contract, and gave no notice that third persons had acquired any rights which could be affected by renewals. It is true that, in a letter dated May 3, 1893, written by Barker & Co. to the Metropolitan Lumber Company, there does occur a casual reference that a sale of "some lumber" had been made to the Hines Lumber Company, and that the cargoes theretofore shipped had not been conveniently loaded for filling this sale. This casual reference to a sale to be completed by a delivery at Chicago out of lumber consigned to Barker & Co. carried with it no notice of the rights now claimed, and was subsequent to the renewal notes. No assent to the sale was asked or given, and the Hines Lumber Company in no way changed its position as a consequence of the silence of the defendant in error after the letter of May, 1893. There is no pretense of notice of the sale to McElwee & Carney, until after the insolvency of Barker & Co. The fact that defendant in error delivered several cargoes of lumber after the renewal of many of the notes of Barker & Co. did not affect their lien upon that undelivered. Such partial delivery operates as a delivery of the whole only when the intention is plain that such partial delivery was intended as a symbolical delivery of the whole and as a waiver of any right of retention as to the remainder. Benj. Sales (Corb. Ed.) §§ 1191-1195. The author just cited concludes a discussion as to the effect of partial delivery upon the lien of the vendor on the remainder by saying:

"No case has been met with where the delivery of part has been held to constitute a delivery of the remainder, when kept in the vendor's own custody." Section 1195.

To obviate the fact that title had not passed to either the Hines Lumber Company or McElwee & Carney under their several bills of sale (and that no action of replevin or trover would lie to recover any specific lumber), the Hines Lumber Company, after a demand for delivery and a refusal, made an assignment of its claim to the plaintiffs in error, which is dated after defendant in error had asserted its lien, and is in these words:

"Escanaba, Michigan, June 5th, 1893.

"The Edward Hines Lumber Co., of Chicago, Illinois, as party of the first part, does hereby sell, assign, and set over to Robert H. McElwee and William J. Carney, of same place, all the lumber purchased by said company from S. B. Barker & Co., of Chicago, about December 15, 1892, and which said Barker & Co. purchased from the Metropolitan Lumber Company, of Dickinson county, Michigan, and which is now in the yards of said Metropolitan Lumber Company, at Metropolitan, Dickinson county, Michigan. This sale is in consideration of one dollar and other valuable considerations.

Edward Hines Lumber Co.,

"By E. Hines, Prest."

Thereupon McElwee & Carney, claiming that by uniting these two contracts the entire remainder of undelivered lumber vested in them, brought these actions of replevin for the possession of all the lumber sawed for Barker & Co. remaining in the possession of defendant in error. It is unnecessary to determine whether this merger of both contracts in the same person operated to vest title in the whole mass in the assignee. Assuming that it did so, if the remainder was

less than the aggregate of both sales, then what follows? The best that can be said, favorable to plaintiffs in error, is that on the 5th of June, 1893, they for the first time obtained the title and right of Barker & Co. to the specified lumber involved in this controversy. Before the title to any part of this lumber vested, Barker & Co. had failed. Thereupon, the vendor's lien reattached, even assuming that it had been suspended by reason of the extended credit, and had not been saved as an effect of the stipulation concerning renewals. On this state of facts, the observation of Lord Blackburn, in *Kemp v. Falk*, L. R. 7 App. Cas. 582, is in point, that:

"Why an agreement to sell, unless it was made in such a way as to pass the right of property in the goods sold, should be supposed to put an end to the equitable right to stop them in transitu, I cannot understand." "I am quite clear," adds his lordship, "that it does not."

If we are right in these conclusions, it follows that defendant in error is entitled to assert its vendor's lien, unless still other aspects of the case shall raise an estoppel. Plaintiffs in error say that an estoppel arises as a consequence of an alleged agreement of November 14, 1892, by which it was agreed that Barker & Co. might sell and transfer the lumber for which they had made conditional payments, and that this agreement was made in the presence and hearing of representatives of both the Hines Lumber Company and McElwee & Carney, and that they bought in reliance upon the agreement thus made. Plaintiffs in error further say that one of the questions submitted to the jury was this: "Was it agreed that Barker & Co. should have the right to sell said lumber?"—and that the jury made a special finding that it was so agreed. The instruction upon this aspect of the case was altogether too favorable to the plaintiffs in error. The court was requested by the defendant in error to charge as follows:

"(7) If Barker sold the lumber, or any portion of it, to the plaintiffs, in December, 1892, as claimed, and the Metropolitan Lumber Company was not notified or advised of such sale, and Barker continued to deal with the lumber, and gave directions in regard to it, the same as before, and the plaintiffs, so far as the Metropolitan Lumber Company knew, did not undertake to exercise any control over it, and the Metropolitan Lumber Company had no knowledge of any such transfer, and, relying on the supposed fact that Barker was still the owner of the lumber or whatever interest had passed to him by the written contract and the subsequent dealings between them, and on the lumber still remaining in its possession extended the time of payment, or renewed the notes given for the purchase price, the plaintiffs are estopped from claiming under such transfer, except subject to the right of the Metropolitan Lumber Company to retain the lumber until the renewals were paid."

To this the court responded by saying:

"That is so, gentlemen, unless there was a right of sale extended by a modification under the contract of November 14, 1892. As I have already repeatedly said to you, if that right was given to Barker, it was a voluntary relinquishment on the part of Stack or the Metropolitan Company of all the lien upon the entire mass of lumber, and reducing all of the notes that they had, amounting to some \$110,000, to mere obligations of Barker & Co., without any security whatever; and it would not make any difference, if Barker & Co. made a sale under those conditions, whether the Metropolitan Company was advised of it or not. They could not be supposed to have renewed the notes after making such a stipulation as that, relying upon the lumber as security. If you find that such was the fact, then Barker might sell,

clear of all claim which they might have, because that would be the effect of the agreement that Barker should have an unqualified right of sale."

We have said that this charge was more than plaintiffs in error were entitled to, and for these reasons:

This alleged modification was, in fact, no modification whatever of the original contract. The title and right of possession was already vested in Barker & Co. The vendor's lien had been waived by the credit given, and it had not been revived at the date of the alleged agreement by expiration of the credit or by the occurrence of insolvency. Having the title and right of possession, Barker & Co. could have obtained the actual possession, or required the lumber to be delivered to another as subpurchaser, assignee, or pledgee. The refusal of a vendor without a lien to deliver to such subpurchaser, assignee, or pledgee would have been a conversion. All that is shown by the evidence upon this point amounts to nothing more than a claim by Barker & Co. of their clear legal rights, as matters then stood, and a recognition of those rights by the vendor. Not one word was said as to revivor of a lien in favor of the vendor if insolvency should occur, or when the period of credit should expire, and there was no evidence upon which a jury would have been authorized to find that it was agreed that no lien or right of retainer should arise by the happening of contingencies which neither party then apprehended. Neither was any reference made to the question of renewal notes and the right to retain possession in case an extension of credit should be asked under the clause relating to renewals. Mr. Carney, one of the plaintiffs in error, had negotiated the original contract of sale, acting as agent for the Metropolitan Lumber Company. He therefore knew of the provision concerning renewals in the agreement as it stood. A written contract may be modified by parol, and a stipulation waived or new terms included. But the written agreement of the parties will be presumed to continue, so far as an alteration or modification is not clearly shown. Not one word was said or done which seems to have been intended to modify this stipulation for renewals, and the parties themselves interpreted the so-called modification as not waiving or affecting that provision; for renewals were thereafter applied for by Barker & Co., and granted upon the theory that the lumber company was obligated to allow renewals so long as the lumber undelivered should remain in its possession. There was, therefore, no evidence which would justify a finding that the vendor might not assert a lien on expiration of the period of credit, or upon insolvency of the vendee, or in the event the vendee should claim and obtain renewals. The special finding of the jury as to the agreement concerning a sale by the vendee was, therefore, inconclusive, and can be given no legal effect in estopping the vendor from claiming a lien on granting an extension of credit or upon the insolvency of the vendee. Plaintiffs in error must be taken to have made their contract as subvendees with knowledge of the terms of the original agreement, and with knowledge that the actual possession was with the vendor, and with knowledge of the law which would give to the vendor a right of retention on insolvency of the vendee. They could have protected themselves by giving notice of their purchase and taking actual possession be-

fore the lien of the vendor should be revived by any of the contingencies which would revive a suspended lien. This they did not do. Upon the contrary, they neither gave notice nor demanded delivery. In ignorance of any rights of subvendees, defendant in error was induced to grant renewals in reliance upon possession, and there is no such counter-equity as should deprive it, as an unpaid vendor, of the possession by which it may be protected.

The learned counsel for plaintiffs in error have urged that the special findings are inconsistent with the general verdict in favor of defendant in error; and that the court was in error in not rendering judgment in favor of plaintiffs in error upon the special findings, as required by the provisions of the Michigan statute. This statute makes it the duty of the court, on a request of counsel, to require the jury to return, in writing, special findings upon particular questions of fact submitted to them, and also provides that if such special findings be inconsistent with a general verdict, the former shall control the latter, and the court give judgment accordingly. 3 How. Ann. St. § 7606. The provisions of a statute of a state requiring the submission of such special questions to a jury are not binding upon the courts of the United States, and are not within the meaning and intent of the act of congress adopting the practice of the state courts in suits at common law tried in the United States courts. *Nudd v. Borrow*, 91 U. S. 441; *Railroad Co. v. Horst*, 93 U. S. 300; *Association v. Barry*, 131 U. S. 119, 9 Sup. Ct. 755. It would seem to follow that, if the court was not required by the statute to submit such special questions for a special finding, and did so only in the exercise of its general and inherent common-law powers, the effect of an inconsistent verdict would be a question to be determined by the common law and not by the state statute. Counsel have cited, in support of their assignment of error on this matter, the cases of *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296, and *Glenn v. Sumner*, 132 U. S. 156, 10 Sup. Ct. 41. Neither of these cases seems to be in point, as both turn upon the effect of pleadings under state practice, and involve the interpretation of verdicts as affected by pleadings conducted under local rules of practice. But the special findings do not cover all the issues in the case. The general verdict was in favor of the defendant in error, and must be presumed to have been based upon the failure of plaintiffs in error to establish other facts essential, as we have seen, to any recovery in an action of replevin. A judgment rendered on a special finding which does not find all the facts necessary to support a judgment is bad, and will be set aside. *Hodges v. Easton*, 106 U. S. 408, 1 Sup. Ct. 307. We think the court did right in ignoring these special findings, and in rendering judgment on the general verdict. The charge delivered by the learned district judge who tried this case was well considered and clear. The various requests made and refused, and the many exceptions to the charge, have all been carefully considered. To separately pass upon each error assigned would be unprofitable, and extend an opinion already too long to still greater proportions. We content ourselves by saying, in conclusion, that we are of opinion that the record presents no harmful error of which plaintiffs in error can complain, and the judgment is therefore affirmed.

HIGH BRIDGE LUMBER CO. v. UNITED STATES et al.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1895.)

No. 271.

1. EMINENT DOMAIN—COMPENSATION—CONSEQUENTIAL DAMAGES.

When proceedings are taken by the United States, under the act of August 1, 1888 (2 Supp. Rev. St. 601), to condemn lands for a lock and dam on a navigable river, in a state which, like Kentucky, has no statute relating to the condemnation of land for such purposes, the compensation to be awarded must be determined upon the principles of the common law, and no allowance for consequential damages can be made.

2. SAME.

Neither a temporary flooding of other lands than those taken, not amounting to a "taking" of the flooded lands, nor an anticipated change in the current of the stream, nor an anticipated increase of danger to the property of the landowner from fire during the construction, is a proper subject of compensation, each being a purely consequential injury.

3. SAME—SUBSEQUENT DAMAGE.

It seems that if, after such improvement is completed, other lands than those taken are found to be permanently flooded, a right of action for the value of such lands would arise, which would not be barred by the condemnation proceedings.

In Error to the District Court of the United States for the District of Kentucky.

This was a proceeding by the United States and W. M. Smith, attorney, against the High Bridge Lumber Company for the condemnation of certain lands. Judgment was entered in the district court awarding the defendant \$4,750. Defendant brings error. Affirmed.

This was an action by the United States for the condemnation of 10,232 acres of land, the property of the plaintiff in error, and necessary to the erection and maintenance of a lock and dam for the improvement of the Kentucky river. The proceeding was by petition, filed in the district court of the United States for the district of Kentucky. The suit was begun and prosecuted under and by virtue of an act of congress which authorizes the secretary of war to cause proceedings to be instituted, in the name of the United States, and in the United States circuit or district court of the district wherein such real estate is located, "for the acquirement by condemnation of any land, right of way, or material needed to enable him to maintain, operate, or prosecute works for the improvement of rivers and harbors for which provision has been made by law; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted." That act, by section 2, provides that: "The practice, pleadings, forms and modes of proceedings in causes arising under the provisions of this act shall conform, as near as may be, to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the states within which such circuit or district courts are held, any rule of the court to the contrary notwithstanding." Act Aug. 1, 1888 (2 Supp. Rev. St. 601). Kentucky has no statute providing for the condemnation of private property for any other than railway construction, and the only procedure in suits of this kind is that prescribed for the condemnation of lands for railroad purposes. Barb. & C. St. Ky. § 835 et seq.

The practice pursued in this case was that prescribed in the section above cited. Upon the filing of the petition describing the property sought to be condemned, the purposes to which it was to be put, and the authority for the application, an order was made requiring the defendant to appear and show cause why commissioners should not be appointed to assess the value of the land desired and the damages sustained by the owner. Upon appearance, and after argument, three commissioners were appointed. These commissioners, by the order of appointment, were directed to go upon the land and assess the

value and damages as therein directed, and report their finding in detail,—“that is, they will say what is the actual present cash value of the land condemned; then they will report the amount of damages, if any, that may result to the adjacent lands of said owners, and they will report in full in what said damages consist; then they will report the amount in value of the benefits that may result to the land, and in what said benefits consist. But they will not consider any damages that may result to adjacent property of defendant by reason of any overflow, or any other damages that may hereafter result by the construction or operation of said lock and dam, such damages not being considered in these proceedings.”

The defendant, the High Bridge Lumber Company, was a corporation of the state of Kentucky, owning and operating a large sawmill upon the bank of the Kentucky river. To the order of the court instructing the commissioners as to the measure of valuation, the defendant then and there objected and excepted. The commissioners thus appointed filed a report in these words:

“The undersigned, commissioners appointed by the district court of the United States, district of Kentucky, as shown by copy of the order of court herewith attached and marked Exhibit D, after being duly sworn, as shown by Exhibits A, B, and C, hereto attached, have valued the land, containing 10,232 acres more or less, lying in Jessamine county, state of Kentucky, at thirty-five hundred dollars (\$3,500). The commissioners find that this land is used occasionally for storing logs along the water front, and that the company has been renting the buildings located thereon to its employes for the sum of one hundred and seventy-five dollars (\$175) per annum. This earning power and the occasional use of the land for storing logs, together with the value of the spring to the company, was the basis for the above finding. The adjacent land of the defendant lying down the river and west of the land condemned, is damaged to the extent of seven hundred and fifty dollars (\$750). The taking and cutting this part of the land from that of the main property of the defendant prevents the advantageous use of the same as heretofore. This land was valued on the basis of \$1,000, based on its earning power for the purpose for which it was used, and the commissioners consider that it would be damaged 75 per cent. The land adjacent to the land condemned and east of it up the river and on which the mill and lumber yard are located, the commissioners find: First. One hundred dollars (\$100) for a fence necessary to the defendant to separate its property from that condemned. Second. The commissioners find four hundred dollars (\$400) the cost necessary to level the ground for lumber storage purposes. Third. The commissioners further find fifteen hundred dollars (\$1,500) for the extra expense the defendant would have to incur by reason of the extra hazard in the way of fire risk during the construction of the lock and dam. This was based on an advance of about one per cent. on the present rate of insurance. The property on hand was valued at \$50,000, making it necessary for the defendant to pay out for such increased risk \$500 per annum, and for three years (which time it is estimated it will take to complete the lock and dam) they would have to incur an expense of (\$1,500) fifteen hundred dollars. The commissioners find that no benefit will result to the land. The commissioners have not considered any damages that may hereafter result by reason of any overflow, or any other damages that may hereafter result by the construction or operation of said lock or dam. The land sought to be condemned in this action is the property of the High Bridge Lumber Company, a corporation, and its principal place of business is at High Bridge, Jessamine county, Kentucky.

“C. C. Mengel, Jr.,

“L. H. Willis,

“W. W. Stephenson,

“Commissioners.”

Exceptions to this report were filed by the plaintiff in error, in words and figures as follows:

“(1) The commissioners erred in not allowing the High Bridge Lumber Company damages for the depreciation, by the lock and dam number 7, of its plant situated upon the eastern end of its property adjoining the 10,232 acres of land sought to be condemned herein; that said plant will be diminished in value by reason of the building of the lock and dam number 7 at the point

at which the same has been located, being about 400 feet down the river from the lumber yard of the High Bridge Lumber Company, with the lock on the Jessamine county side of the river, on which side defendant's property is situated, to the extent of 25 per cent. of its value,—that is to say, in the sum of at least \$10,000. (2) The commissioners erred in not considering any damages that may hereafter result to defendant by reason of overflow of the lands of the High Bridge Lumber Company in consequence of the building of the dam aforesaid. (3) The commissioners erred in not considering the damages that will hereafter result to the traffic and business of defendant, High Bridge Lumber Company, by the construction of said lock and dam. (4) The report of the commissioners is incorrect, incomplete, defective, and erroneous, because the court erred in instructing the said commissioners that they should not consider any damages that may result to adjacent property of defendant, High Bridge Lumber Company, by reason of any overflow or any other damages that may hereafter result by the construction or operation of said lock and dam number 7, and the court erred in adjudging that such damages are not considered in these proceedings. (5) The said report of the said commissioners is defective and incomplete, because the said commissioners failed to make any inquiry as to the location of the gateway of the dam, and to ascertain on which side of the river the gateway of the dam—that is to say, the lock pit—is to be situated. That the location of said gateway of the dam or lock pit is a material and important point in this proceeding, and the location of the same on the Jessamine county side of the river has been determined upon by the engineers of the United States in charge of said work, and that fact could have been ascertained by the said commissioners by application to said officers. The damages resulting to the High Bridge Lumber Company from the location and erection of said gateway of the dam, or lock pit as aforesaid, could have been ascertained by the said commissioners. It was the duty of the said commissioners, under the instructions of the court, to report the damages that will result to the business and property of the defendant by reason of the location and erection of said gateway or lock pit as aforesaid, and the consequent changing of the traffic of the Kentucky river at that point. That the whole business of the High Bridge Lumber Company will be seriously affected thereby, and great damage will result to it in the operation of its business, from the fact that it will not be able to supply its mill with logs without great cost and inconvenience, and consequent loss and damage. That the business of said mill from the river will be changed to such an extent that it will be impracticable for the High Bridge Lumber Company to bring its logs down the river to the mill, except at great expense, and by the construction of a boom, and the employment of a large force of men, on heavy wages, and the profits of its business would be thereby greatly diminished, and the value of its plant and business impaired, to the extent aforesaid. (6) The lands of defendant will be overflowed by the damming of the Kentucky river, as aforesaid, and its property and plant damaged in a large sum, to wit, in the sum of \$2,000. The defendant will be compelled to change and reconstruct part of its mill plant, and be forced to cut down trees and clear its land on the said river, in order to get logs to its mill, and to maintain its landing for its supply of logs for its business, and the commissioners erred in not allowing defendant damages for such necessary changes of its plant and manner of doing business, and such overflow of its lands. (7) The boiler and a large and indispensable portion of the machinery of the High Bridge Lumber Company is situated in a cellar under the mill, and the overflow of the water which will result from the construction of the dam, and the operation thereof, will submerge the said boiler and machinery, and ruin the same, and stop the operations of said mill, to the damage and injury of the said High Bridge Lumber Company in a great sum of money, to wit, \$——; and the commissioners erred in not assessing and allowing to said lumber company damages for such overflow and destruction and damage of said boiler and other machinery."

The United States excepted to so much of the report as awarded to the plaintiff in error the sum of \$1,500 for increased cost of fire insurance,

deemed a result of increased danger by fire during construction of the lock and dam. All the exceptions filed by plaintiff in error were overruled. The exception taken by the government was sustained. The report thus corrected was confirmed, and judgment awarded accordingly. The action of the court in overruling the exceptions of the plaintiff in error, and its action in sustaining the exception filed by the defendant in error, is the subject of the assignment of errors filed by the plaintiff in error.

Pirtle & Trabue and Bronough & Bronough, for plaintiff in error.
W. M. Smith, U. S. Atty., for defendants in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

LURTON, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The several assignments of error present substantially but one question, and that is, whether the district judge erred originally in instructing the commissioners "not to consider any damages that may result to adjacent property of the defendant by reason of any overflow, or any other damages that may result by the construction or operation of said lock and dam." The anticipated diversion of the current of the stream from one side of the river to the other, thereby inconveniencing the conduct of the business of the High Bridge Lumber Company, and the anticipated raising of the level of the stream causing overflows and a consequent damage to its mill machinery and to the use of its adjacent lands for the purposes of its business, are manifestly injuries not directly the result of the taking of the small parcel desired by the government, but damage anticipated as consequent upon the construction and maintenance of a lock and dam in the Kentucky river. If the land condemned had been acquired by purchase, the same result to the remainder might be as well anticipated; or, if the condemned parcel had belonged to a different owner, the High Bridge Lumber Company would be subjected to the same class and kind of injuries, as a result of the improvement of the river. The supposed increase of risk from fire during the work of construction belongs to the same class of consequential damages. The question at last is this: Do such damages constitute, within the meaning of the constitutional limitation upon the taking of private property for public uses, any part of the value of the land condemned, or any part of that "just compensation" which the owner is entitled to demand before he can be deprived of his property?

The commissioners have already allowed satisfactory compensation to the owner for any impairment of the value of the remainder of its land by reason of the relation of the part taken to the remainder of the owner's tract. This was obviously just. A strip carved out of a tract, in such a way as to divide the remainder, might very seriously affect the enjoyment of the parts not taken. If thereby the value of the adjacent and remaining land is impaired, such impairment constitutes an element to be considered in assessing the value of that which is condemned. The relation of that taken to that which is left is, therefore, a proper element to be estimated in

assessing a "just compensation." Cooley, Const. Lim. side pp. 565-568.

But plaintiff in error insists that the district judge should have gone further by allowing anticipated damages to the remainder consequent upon the use to which the condemned parcel is to be put. Let us consider the purpose for which this land is desired, and the use to which it is to be put. The Kentucky river is a navigable stream, accessible from states other than that in which it lies, and, therefore, within the constitutional powers of congress over the navigable waters of the United States. Congress may rightfully open and keep open such a river for the public benefit, and may make such improvements as its discretion may dictate for the purpose of maintaining its safe and profitable navigation. *Gilman v. Philadelphia*, 3 Wall. 721-725; *Scranton v. Wheeler*, 16 U. S. App. 152, 6 C. C. A. 585, 57 Fed. 803. The power to lock and dam such a stream in the interest of navigation is unquestioned. Now, if it be assumed that the gate of this structure shall be so placed as that the direction of the current of the stream will be changed in a way which shall impair the usefulness of the lands of the plaintiff in error above the dam, and that, as a further consequence of the presence of the dam in the river, the level of the water above it shall be so raised as to overflow the lands of riparian owners, including plaintiff in error, may such consequential damages to plaintiff in error be considered in estimating the value of the parcel now condemned? The well-settled rule in respect of consequential injuries resulting from the prudent and skillful construction of public works by the government or the state, or those acting under legislative authority, is that for such damages no action will lie unless expressly conferred by statute. Cooley, Const. Lim. side pp. 541-543; *Transportation Co. v. Chicago*, 99 U. S. 635-641; *Railroad Co. v. Bingham*, 87 Tenn. 522, 11 S. W. 705; *Smith v. Washington*, 20 How. 135. In *Transportation Co. v. Chicago*, cited above, this doctrine is very clearly stated. Justice Strong sums up the discussion by saying:

"The remedy, therefore, for a consequential injury resulting from the state's action through its agents, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred were made in view of Magna Charta, and the restriction to be found in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority. Those who are curious to see the decisions will find them collected in Cooley on Constitutional Limitations (page 542 and notes). The extremest qualification of the doctrine is to be found, perhaps, in *Pumpelly v. Green Bay Co.*, 13 Wall. 166, and in *Eaton v. Railroad Co.*, 51 N. H. 504. In those cases it was held that permanent flooding of private property may be regarded as a 'taking.' In those cases there was a physical invasion of the real estate of the private owner, and a practical ouster of his possession."

One difficulty in all such cases is to determine what are consequential damages, when a part only of a larger parcel belonging to the

same owner is sought to be condemned, and another grows out of the varying terms of statutes prescribing the nature of the damages which are to be ascertained as a condition upon which the right of eminent domain may be exercised. In this case there is no statute prescribing the damages to be assessed. The Kentucky statute concerns only the damages which are to be allowed as a condition upon which railroad corporations are allowed to condemn lands or materials necessary in railroad construction. The provision in the act of congress heretofore cited, requiring condemnation proceedings to be prosecuted "in accordance with the laws relating to suits for the condemnation of property of the states wherein the proceedings may be instituted," has no application to a condemnation for river improvement purposes instituted by the United States, other than to require that the practice and proceeding shall, "as near as may be," be in accordance with like causes in the courts of record of the state within which such circuit or district court is held. It is not to be conceived that congress intended that a legislative requirement, giving to an owner consequential damages when his land was sought to be appropriated by a railroad company, should have application when the United States undertakes to condemn land necessary for the improvement of navigation. The right of eminent domain is a common-law right, inherent in every sovereignty unless denied by its fundamental law. It is a right which exists in the federal government, and may be exercised by it within the states, so far as necessary to the enjoyment of the powers conferred upon it by the constitution. *Cooley*, Const. Lim. 526; *Kohl v. U. S.*, 91 U. S. 367; *U. S. v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346. Congress may create a special tribunal for condemnation purposes, adopt the tribunals of the states, or authorize purely common-law proceedings in the courts of the United States. In the absence of direction by congress, as to the tribunal or mode of procedure, an action at common law will lie in the name of the United States in the district in which the land to be condemned lies. *Kohl v. U. S.*, 91 U. S. 367; *U. S. v. Jones*, 109 U. S. 513, 3 Sup. Ct. 346. The only constitutional limitation upon this right of eminent domain is found in the provision which forbids the taking of private property for public purposes without just compensation. That congress may delegate to state tribunals the power to fix and determine the amount of compensation to be paid by the United States for private property taken by them for public purposes, or adopt the rules of law prescribed by the state for that purpose, is not to be doubted. The case of *U. S. v. Jones*, heretofore cited, arose under an act of congress which assumed all liability theretofore or thereafter incurred, both on account of the taking and overflowing of lands in the prosecution of the Fox River improvements, when the same should be "ascertained in the mode provided by the laws of the state." The Wisconsin statute expressly provided for compensation for lands "overflowed or otherwise injured or taken." There was, therefore, no doubt about the liability of the United States for any judgment which might be pronounced by a Wisconsin court acting under the Wisconsin statute. The act of congress under which this action was begun may be said to adopt

the law of Kentucky, so far as applicable to a condemnation proceeding of this kind. But the law of Kentucky does not prescribe any rule of damages applicable to a condemnation for any other than railway construction purposes. We are, therefore, to determine under the principles of the common law what is "just compensation," within the meaning of the fifth amendment of the constitution of the United States, for the land here sought to be condemned.

We have already seen that, under the well-settled common law applicable to such cases, damages not directly consequent upon the "taking," but incident to or consequent upon the construction and operation of a public improvement in a prudent and skillful manner, are *damnum absque injuria*, unless such injuries are to be compensated by the terms of the statute under which the work was prosecuted. But the insistence of the plaintiff in error is that, if the increased cost of insurance or the diversion of the current of the stream from one side of the stream to the other be consequential, the injury from overflow will be a "taking," within the meaning of the constitution. For this the case of *Pumpelly v. Green Bay Co.*, 13 Wall. 181, has been much relied upon. That case does undoubtedly hold that a permanent flooding of private property may be regarded as a "taking." But that case was subsequently characterized as "the extreme qualification of the doctrine," as to non-liability for consequential injuries resulting from a public improvement and without negligence. *Transportation Co. v. Chicago*, 99 U. S. 642. The opinion just cited likewise calls attention to the fact that there was in that case an actual "physical invasion" of private property amounting to a "practical ouster." In this case there has been no present appropriation or physical invasion of any part of the remainder of the lands of plaintiff in error. There may never be such a permanent flooding as, under the *Pumpelly Case*, will amount to a "taking." If, as apprehended, the level of the river shall be raised, so as to flood the remaining lands of plaintiff in error, but not of such a permanent character as to amount to a permanent flooding and a practical ouster of the owner, then, under the general rule, the owner, as a riparian proprietor affected by such extraordinary or temporary flooding, will have sustained only such consequential damages as any and all other riparian proprietors will sustain as a consequence of the improvement of the river in the public interest. On the other hand, if the construction of the dam shall result in such permanent flooding as to amount to a "taking," the right of action for the value of the land then taken will for the first time arise, and could not be regarded as barred by the present proceeding.

What we hold is: First, that a mere temporary flooding, not amounting to a "taking," and not the result of negligent construction or maintenance, is an injury consequential upon the proper and lawful improvement of a navigable river, and is not such an injury as would be actionable. That such injuries are apprehended in respect of lands of plaintiff in error not condemned gives no greater right to recover than if the purpose was to construct the proposed dam on the land of a third person. Second. To now seek

compensation for the remainder of the land on the theory that the dam will be so constructed and maintained as to permanently flood the remainder, and amount to a "taking" of such land, is premature. The remainder has not yet been "taken," and until it has been appropriated in fact, by permanent flooding, no right to be compensated will accrue. Third. Neither the anticipated change in the current of the river, nor the anticipated increase in danger from fire during the work of construction, are proper subjects for compensation. Both are injuries purely consequential, and constitute no actionable claim against the government.

The case of *Van Schoick v. Canal Co.*, 20 N. J. Law, 249, was a case where a statute controlled the condemnation, and gave the right only upon compensating the owner for all damages sustained. The case turned upon the meaning of the language of the statute requiring an assessment of all "damages sustained by the owner." The court construed the phrase as contemplating a recovery by the owner of "all damages accruing to the owner of lands from any and every physical effect produced by the construction and use of the canal, * * * whether they arise from the alteration or destruction of a public or private way, the exclusion or the overflowing of waters, the alteration or change in the current of streams or in the destruction of crops, the deterioration of adjacent lands by leakage, or whatever other damages may result from the natural and physical effects produced by the canal." The cases cited from the Kentucky courts, including *Asher v. Railroad Co.*, 87 Ky. 391, 8 S. W. 854, likewise turn upon the construction of the statutes prescribing the damages recoverable. Where there is a statute requiring compensation in condemnation cases for consequential injuries to property not taken, all such damages will presumptively be paid for by the amount awarded in the condemnation proceeding. *Pearce*, R. R. 203; *Railroad Co. v. Thillman*, 143 Ill. 135, 32 N. E. 529; *Van Schoick v. Canal Co.*, 20 N. J. Law, 249.

The conclusion we reach is that the judgment must be affirmed.

UNITED STATES v. WOLFF et al.

(Circuit Court, S. D. New York. June 3, 1895.)

No. 1,721.

CUSTOMS DUTIES—CLASSIFICATION—METALLIC PINS.

Hat and lace pins having heads of glass or similar material (metal being of chief value in the hat pins, and glass or glue in the lace pins) are dutiable as "metallic" bonnet and lace or belt pins, under paragraph 206, Act Oct. 1, 1890, and not as manufactures of metal, under paragraph 215.

This was an application in behalf of the United States for a review of the decision of the board of general appraisers reversing the action of the collector of the port of New York as to the rate of duty on certain merchandise claimed by H. Wolff & Co.

James T. Van Rensselaer, Asst. U. S. Atty.

Albert Comstock (of Comstock & Brown), for defendants.

TOWNSEND, District Judge (orally). The articles in question are hat and lace pins having heads of glass or similar material; metal being of chief value in the hat pins, and the glass or glue of chief value in the lace pins. The collector classified them for duty at 45 per cent., as manufactures of metal, under paragraph 215 of the tariff act of 1890. The importers claimed that they should be assessed for duty at 30 per cent. ad valorem, under paragraph 206 of said act. The board of general appraisers reversed the action of the collector, and classified them for duty as "metallic" bonnet and lace or belt pins, respectively, under said paragraph 206. From this decision the government appeals.

This case presents a different question from those referred to and relied upon by counsel for the government, where no evidence was before the court as to any meaning attached to the article in question, other than the natural one. Here it appears from the evidence of experts that every one in the trade understood the term "metallic pins" as a class term, under which were included pins with metallic shanks, as distinguished from pins not made in any part of metal. It furthermore appears that the word "metallic" primarily signifies "pertaining to," or "containing," or "consisting in part of," metal, and in this sense was used in the subsequent act of 1894, where the language is, "metallic pins," etc., "including pins with glass heads." The decision of the board of appraisers is affirmed.

DRAKE v. PAULHAMUS.

(Circuit Court of Appeals, Ninth Circuit. June 24, 1895.)

No. 180.

ASSIGNMENT FOR BENEFIT OF CREDITORS—VALIDITY.

In Error to the Circuit Court of the United States for the Western Division of the District of Washington.

This was an action by W. H. Paulhamus against James C. Drake for wrongfully taking a stock of goods from plaintiff's possession. The defense was that Drake was a United States marshal, and took the property under a writ of attachment as being the property of one W. R. Lindsay; and that Lindsay had conveyed it to Paulhamus unlawfully and fraudulently, in trust for the payment of debts. In the circuit court there was a judgment for plaintiff, and defendant brought error to this court, by which the judgment was heretofore affirmed. 66 Fed. 895. Plaintiff in error now moves for a rehearing.

Doolittle & Fogg (C. O. Bates and Le Roy A. Palmer, of counsel), for plaintiff in error.

Frederick A. Brown, for defendant in error.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

PER CURIAM. In the petition for rehearing it is urged that the court overlooked the distinction between an assignment directly to

creditors, and one in trust for creditors. The distinction was not overlooked. If there was a trust created between Paulhamus and the creditors, whose assignee he was, it was not created by Lindsay, the debtor. *Lockhart v. Stevenson*, 61 Pa. St. 64. The rehearing is therefore denied.

WANAMAKER et al. v. COOPER, Collector.
(Circuit Court, E. D. Pennsylvania. June 25, 1895.)

No. 21.

CUSTOMS DUTIES—APPRAISEMENT—PROTEST AND APPEAL.

In appraising certain goods, the appraiser made an addition to the entered value of the invoice by disallowing a commission of 2½ per cent. claimed as a discount for cash paid on the purchase. This was done, as the appraiser said, "to make market value," the discount being considered as excessive. Against his action the importers protested. *Held*, that it must be assumed that the discounts were not arbitrarily rejected by the appraiser, but that the same were taken as the measure of the "advance" which he deemed it his duty to make in ascertaining actual market value, and that, therefore, the remedy of the importer was not by protest, but by an appeal for reappraisalment.

This was an application by John Wanamaker, importer of certain merchandise, for a review of the decision of the board of general appraisers sustaining the decision of the collector of the port of Philadelphia in respect to the dutiable value of such merchandise.

The imports consisted of certain dress goods, and the appraiser made "an addition to the entered value of the invoice" by disallowing a commission of 2½ per cent. claimed as a discount for cash paid on the purchase. This was done, as the appraiser said, "to make market value," the discount being considered as excessive. The importer protested on the grounds (1) that the goods "were not appraised at their actual market value in the principal markets of the country of exportation at the time of exportation," as required by law; (2) "that the practice of the appraiser in making additions to petitioner's invoices by disallowing certain discounts appearing on the same" was at variance with the treasury regulations and the decisions of the courts.

The collector affirmed the decision of the appraiser on the ground that there should have been an appeal for reappraisalment, and not a protest. The collector's decision was affirmed by the board of general appraisers, which held that the appraiser had disallowed the discount, "to make market value," as stated by him, and that he did not decide "that discounts for cash, if properly charged, could not affect market value, or the amount of duty chargeable." They further said that where the "appraising officer proceeds upon a wrong principle, contrary to law," his decision may be assailed by protest, but that this was not such a case.

Frank P. Prichard, for importer.

Ellery P. Ingham, U. S. Atty., for the Government.

DALLAS, Circuit Judge. Irrespective of the explanatory letter written by the appraiser some time after he had made his report,

it must be assumed that the discounts which were "disallowed" by him were not arbitrarily rejected, but were taken as the measure of the "advance" which he deemed it his duty to make in appraising "the true and actual market value * * * of the merchandise." This understanding of the appraiser's official action reconciles it with the law. There is, at least, no evidence that he intended to exceed his powers, and the presumption is that he did not. This view of the present case is, I think, rendered necessary by the recent judgment of the court of appeals for this circuit in the case of *U. S. v. Kenworthy*,¹ which, as yet, has not been officially reported. It follows that the board of appraisers was right in holding that "the remedy of the appellant * * * was by appeal for reappraisement, not by protest"; and therefore its decision is affirmed.

Ex parte HOUGH.

(Circuit Court, W. D. North Carolina. July 29, 1895.)

INTERSTATE COMMERCE—LICENSES.

Acts N. C. 1895, c. 116, § 25, requiring every one, before engaging in selling pianos or organs by sample, list, or otherwise, in the state, to pay \$250 for a license, is, in the case of one selling by sample and list, as agent for a manufacturer and dealer located in another state, void, as a regulation of interstate commerce.

Petition of W. I. Hough for writ of habeas corpus. Granted.

Tucker & Murphy, for petitioner.

Solicitor R. S. McCall, for the State of North Carolina.

SIMONTON, Circuit Judge. This case comes up on the petition of W. I. Hough, praying a writ of habeas corpus. He is in the custody of the sheriff of Buncombe county, N. C., charged with the violation of the revenue law of that state. The following is an agreed statement of facts:

"It is agreed between Robt. S. McCall, solicitor for the state of North Carolina, and Tucker & Murphy, attorneys for the petitioner, W. J. Hough, that the facts in this case are as follows: The W. W. Kimball Company are manufacturers and wholesale dealers in pianos and organs in the city of Chicago, in the state of Illinois, and with no place of business in North Carolina; that the petitioner is the duly-authorized soliciting agent of said Kimball Company for the sale of pianos and organs in North Carolina; that, as such agent, the petitioner has engaged in the business of selling and offering to sell pianos and organs in said state, by sample and by list; that on the 1st day of July, 1895, the petitioner, as such agent and representative of said Kimball Company, sold, by sample and by list, an organ of the said Kimball Company to Stephen Smith, in Buncombe county, North Carolina; that neither the petitioner nor said Kimball Company paid a tax of two hundred and fifty dollars to the state treasurer of North Carolina before engaging in said business and making said sale, as required by the acts of the general assembly of North Carolina (chapter 116, § 25), enacted at the session of 1895."

The prisoner is charged with the violation of section 25, c. 116, Acts 1895, of the general assembly of North Carolina. The section is as follows:

¹ 68 Fed. 904.

"Every person, company or manufacturer who shall engage in the business of selling pianos or organs by sample, list or otherwise in the state, shall before selling or offering for sale any such instrument, pay to the state treasurer a tax of two hundred and fifty dollars, and obtain a license which shall operate one year from its date and all such licenses shall be countersigned by the auditor and no other license tax shall be required by counties, cities or towns."

At the argument of the case, while I have not had the benefit of any argument on the part of the state, I have been assisted by an exhaustive collection of authorities on the part of the counsel for the petitioner. He has clearly shown that in cases like this the uniform conclusion of the supreme court of the United States is that such a tax law is in conflict with the interstate commerce provisions of the constitution of the United States. It is a regulation of commerce,—to that extent a restriction upon it,—notwithstanding that congress, whose control over commerce is supreme, has elected that it should be free and unrestricted. *Brown v. Maryland*, 12 Wheat. 436; *Welton v. Missouri*, 91 U. S. 275; *State Freight Tax Cases*, 15 Wall. 232; *Robbins v. Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592; *Corson v. Maryland*, 120 U. S. 502, 7 Sup. Ct. 655; *Leloup v. Mobile*, 127 U. S. 640, 8 Sup. Ct. 1380; *Stoutenburgh v. Hennick*, 129 U. S. 141, 9 Sup. Ct. 256. In the late case of *Brennan v. Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, the cases are reviewed and confirmed. The section in question is in conflict with the constitution and laws of the United States, and the imprisonment of the petitioner thereunder unlawful. Let him be discharged, and go hence without day.

AMERICAN PNEUMATIC TOOL CO. v. FISHER et al.

(Circuit Court, S. D. New York. August 12, 1895.)

1. PATENTS—PATENTABLE INVENTION—PNEUMATIC TOOLS.

There is patentable invention in bringing together and adapting in size, proportion, and relation the various parts necessary to form a cylindrical pneumatic drilling tool which may be held in, and guided by, the hand while at work, even though like parts, operating by steam or air in similar ways in engines of various sorts, were previously known.

2. SAME—PNEUMATIC DRILLING TOOLS.

The Bates patent, No. 364,081, for a pneumatic drilling tool, shows patentable invention, and is infringed by a tool made substantially in accordance with the Drawbaugh patent, No. 472,495.

This was a suit in equity by the American Pneumatic Tool Company against Robert Fisher and others for infringement of a patent for a pneumatic drilling tool.

Thomas B. Kerr and Leonard E. Curtis, for plaintiff.

Edward H. Brown, for defendants.

WHEELER, District Judge. This suit is brought upon patent No. 364,081, dated May 31, 1887, and granted to Albert J. Bates for a pneumatic drilling tool; and upon No. 373,746, dated November 22, 1887, and granted to James S. MacCoy, but not now claimed to have been infringed. These tools are for doing work done by hand tools with a mallet. They are cylindrical, for being held in, and guided to

the work by, the hand, with the working tool held by it at one end, hammered by a piston moved very rapidly by air forced in at the other end, and directed automatically by a valve working transversely, and air passages, into the cylinder alternately at one side and the other of the piston, and out at exhausts. Such tools for general use in such work appear to have been originated by MacCoy, as shown by his patents Nos. 323,053, dated July 28, and 326,312, dated September 15, 1885. Others for particular uses were originated by other persons, and among them that for a dental plugger, by Benaiah Fitts, as shown by his patent No. 265,950, dated October 17, 1882. These are nearest of any to the tool of the Bates patent; and that of the MacCoy patent is nearest of either of these. In the Fitts plugger the valve is in a separate cylinder, and mechanically operated; and in the MacCoy tool it is in the piston. The Fitts device was specially adapted to dental work, and could not be made to take the place of the hand and mallet in other work. Making room for the valve in the piston of the MacCoy tool weakened it as a hammer, and the operation of the valve in it made it wear out the cylinder irregularly. Bates arranged the valve in a separate chamber in the same cylinder, and strengthened the piston as a hammer, and improved its operation, by making it solid. The specification and drawings of his patent show and describe the valve so located in a separate chamber in the same cylinder with the solid piston, and set forth the air passages about, and the operation of, the several parts with much intricacy, not necessary to be followed here. There are nine claims, one only being relied upon, which is:

"3. In the pneumatic drilling tool described, and in combination with the case having an inlet and exhaust port, the cylinder having a piston chamber and a valve chamber arranged separate from each other and connected by means of ports and air passages, the piston, and valve for controlling said piston through the medium of said ports and air passages, substantially as and for the purpose set forth."

The Bates patent thus appears to be for a useful invention of an improvement upon the MacCoy tool. The valve is located and operated so differently from that of the Fitts plugger that invention would be required to adapt that, like this, to the MacCoy tool; and, as to that, this appears to be also a new improvement, for which Bates was well entitled to a patent. *Railway Co. v. Sayles*, 97 U. S. 554. Many patents of steam and air engines, and devices, are set up and proved as anticipations and limitations which would, if applicable, overthrow or make avoidable the MacCoy patent on the pneumatic tool itself, as well as this one for this improvement; and if prior like parts, operating by steam or air in engines of various sorts, in similar ways, would anticipate the use of such parts in the employment of such power everywhere, that result would be well accomplished. But the bringing, adapting in size, proportion, and relation, and so inclosing such parts as to form a tool of such power, capable of guidance to such work by hand, would seem to involve high and most useful inventive skill, well worthy of a patent upon the tool itself, or improvements of that kind upon it. *Potts & Co. v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194. The combinations of parts similar to those of this third claim may be found in such engines

and devices, operating in a similar way, in relation to the other parts of those machines, but unadapted to the places and uses of such a tool. The same quality of inventive skill would be required for so bringing in and adapting these parts to the others as to constitute this very useful improvement. The claim is expressly for this combination in such a tool, and so exclusive of it elsewhere; and it seems to well cover, and to be valid for, this improvement. The defendants make pneumatic tools of this kind, substantially in accordance with the specifications of patent No. 472,495, dated April 5, 1892, and granted to Daniel Drawbaugh, for such a pneumatic tool. The valve chamber is separate from the piston chamber, and the valve, although it works longitudinally instead of transversely, does the same thing in substantially the same way as that of this claim of the Bates patent. So Bates' improvement appears to have been taken by Drawbaugh, and to be used by the defendants.

Decree for plaintiff.

AMERICAN SODA-FOUNTAIN CO. v. GREEN et al.

(Circuit Court, E. D. Pennsylvania. June 4, 1895.)

PATENT INFRINGEMENT SUITS — PLEADING — DEFENSES — COMBINATIONS AND MONOPOLIES.

In a suit for infringement of a patent relating to soda-water fountains, the answer alleged that complainant company was an illegal combination or trust, formed by a great number of manufacturers of soda-water apparatus for the purpose of monopolizing and controlling the business in soda-water apparatus, fixing the price thereof, and restraining and crushing out competition; that in furtherance of this purpose it had acquired a large number of patents, some of which were about to expire, and many of which covered unpatentable matter; and that in bringing the suit complainant sought to harass defendants, and destroy their business, because they refused to join in the combination. *Held*, that these allegations constituted no defense, and were irrelevant and immaterial, and must be stricken out as impertinent, on motion.

This was a bill by the American Soda-Fountain Company against Robert M. Green, Frank D. Green, and Robert M. Green, Jr., trading as Robert M. Green & Sons, for alleged infringement of certain letters patent relating to soda-water apparatus, granted to one Witting. The answer denied the infringement, set up some of the usual statutory defenses, and, in addition thereto, set up certain other matters, which complainant has challenged by exceptions. The paragraphs excepted to were as follows:

"(9) They allege that the American Soda-Fountain Company, the complainant herein, if it be an incorporated body, is formed by an illegal combination, in the form of a trust, of a great number of manufacturers of soda-water apparatus, who have incorporated said company, combination or trust, and combined and conspired together for the purpose of monopolizing or controlling the manufacture and sale of a staple and necessary article of manufacture, such as soda-water apparatus, within and through the United States, and for the purpose of fixing the prices at which such soda-water apparatus should be sold, and the purpose of limiting and restraining the production of soda-water apparatus, and for the purpose of restraining competition, and for the purpose of harassing and destroying the business of the manufacturers of and dealers in soda-water apparatus not forming part of said company, combination, or trust; wherefore, those defendants allege that the complainant herein is a company, combination, or trust unlawful in its relation or organization,

and unlawful in its objects, purposes, and methods; and specifically charge the fact to be that said company, combination, or trust, is unlawful, in that it is formed and operated in restraint of trade, and that its objects and purposes are unlawful as against public policy.

"(10) And these defendants allege that the combination or trust formed under the name of the American Soda-Fountain Company, the complainant herein, has, in furtherance of its object of harassing and destroying the business and trade of its rivals, acquired a great number of letters patent of the United States, many of which are about to expire, and many of which cover unpatentable subject-matter, and has and does circulate and cause to be circulated among dealers in soda-water apparatus through the United States statements (not founded upon any adjudication of any court, but purely gratuitous, and, as these defendants allege, baseless) to the effect that soda-water apparatus manufactured and sold by those defendants is an infringement of patents owned by it, and threatening suit against purchasers and users of defendants' soda-water apparatus."

"(12) And those defendants further allege that the purpose of the complainant in bringing this suit against these defendants, under said patent, is to harass, suppress, and destroy the business of those defendants, for the reason that these defendants, having refused to become a part of the company or trust, carried on under the name of the American Soda-Fountain Company, are rivals of the said company."

The foregoing paragraphs were excepted to as impertinent, "because the same are wholly immaterial, irrelevant, and cannot be properly put in issue in the cause."

Joshua Pusey, for complainant.

The complainant alleges that it is a corporation, and is, of course, obliged to prove the fact at the very outset. The point of the matters excepted to is that the complainant company is a combination of a great number of manufacturers of soda-water apparatus, formed for the purpose of monopolizing the manufacture and sale of a staple and necessary article of manufacture, to wit, soda-water apparatus; wherefore the complainant company is unlawful in its creation or organization, and unlawful in its purposes, etc. Now, laying aside what would seem to be the absurdity of terming soda-water apparatus as a staple and necessary article of manufacture (a manufacture in which any citizen of the United States is at liberty to engage in open competition with the complainant), the legality of the charter or organization of the corporation cannot be questioned in a collateral proceeding, and certainly not by defendants in a suit for infringement of letters patent owned by the corporation. Be the public or private wrongs done by the complainant corporation what they may, they cannot here be the subject of inquiry. The sole questions to be determined by the court at the final hearing on the bill, the material parts of the answer and the proofs, are whether the complainant is a corporation, whether the patent was duly granted, whether the complainant has the sole title thereto, whether the patent is valid, and whether the defendants infringe the same. These questions, if determined in favor of the complainant, will entitle it to the usual decree for an injunction and an accounting. In principle this case is similar to that of *Strait v. Harrow Co.*, 51 Fed. 819 (Wallace, J.), as also *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 3 C. C. A. 605, 53 Fed. 598.

Defendants' counsel will probably refer in support of their position to *Harrow Co. v. Quick*, on page 608, 71 O. G. (issue of April 23, 1895), also reported in 67 Fed. 130 (issue of May 21, 1895). In the first place, the facts and defenses in that case were not the same as those alleged in the parts of the answer excepted to in the present cause. The Harrow Company was not organized for the manufacture and sale of the harrows under the patents assigned to it, nor had it ever engaged in their manufacture and sale; whereas, in clause 9 of the answer in this cause, it is alleged that the complainant is a combination of a great number of manufacturers of soda-water apparatus, etc., combined, etc., for the purpose of monopolizing the manufacture, etc. In the second place, although Judge Baker, in the cited case, said that &

seemed to him that the court could not sustain the bill without giving aid to the unlawful combination or trust represented by the complainant, he goes on to remark that the question is not free from doubt, and then proceeds to decide the case in favor of the defendants on the ground that they did not infringe the patent. At most, that part of the opinion upon which the defendants here may rely is but a dictum, and a doubting one at that.

It is finally submitted that the defendants should not be permitted to lengthen and retard the cause, and increase the burden of and costs to the complainant, by taking their testimony touching the matters excepted to, and thus oblige the complainant to take testimony in rebuttal thereto; and that the exceptions should be sustained.

W. C. Strawbridge, for defendants.

The paragraphs excepted to do not fall within the accepted definition of impertinent matter. *Woods v. Morrell*, 1 Johns. Ch. 105; *Daniell*, Ch. Prac. p. 349. They are not "long recitals," or "long digressions of matter of fact," within the meaning of the above cases. They are comparatively brief paragraphs, setting forth succinctly certain matters of defense which may have a material bearing upon the decision of the cause. "It has been held that a short sentence, inserted out of abundant caution, will not be expunged as impertinent." *Fost. Fed. Prac.* p. 217. The said paragraphs, moreover, constituting, as they do, substantive defenses to the bill, are not the subject of exception, but fall within the ruling in *Adams v. Iron Co.*, 6 Fed. 179. Where there appears to be any doubt as to the pertinence of an allegation, it should be allowed to stand. *Chapman v. School Dist.*, *Deady*, 108, Fed. Cas. No. 2,607; *Davis v. Cripps*, 2 *Younge & C.* Ch. 443. A defense similar to that set forth in paragraph No. 9 of the answer was held a valid defense in *Harrow Co. v. Quick*, 67 Fed. 130. This matter having been held, in one court of competent jurisdiction, to constitute a valid defense, should not be expunged from the pleadings in another court, at the threshold of the litigation, as being a defense which can in no event become material.

DALLAS, Circuit Judge. I have considered the arguments submitted upon the plaintiff's exceptions to defendants' answer, but adhere to the view which I entertained upon the hearing, and for the reasons then indicated the exceptions are sustained.

BONSACK MACH. CO. v. ELLIOTT.

BONSACK MACH. CO. et al. v. NATIONAL CIGARETTE & TOBACCO CO. et al.

(Circuit Court of Appeals, Second Circuit. June 28, 1895.)

1. PATENTS—CIGARETTE MACHINES.

The Hook patent, No. 184,207, for a cigarette machine, covers a patentable and primary invention, and its second claim is infringed by a machine made in accordance with reissue No. 11,104, to Robert Hardie, assignor to Henry C. Elliott. 63 Fed. 835, affirmed.

2. SAME.

The Emory "belt patent," No. 216,164, for a cigarette machine, construed, and held not infringed as to claims 10, 12, 14, and 15, by the Elliott machine (reissue No. 11,104). 63 Fed. 835, reversed.

3. SAME.

The Bonsack patent, No. 238,640, for a cigarette machine, construed as to claims 6 and 7, and the same held not infringed by the Elliott machine (reissue No. 11,104). 63 Fed. 835, reversed.

4. SAME.

The Emory "packing-bar" patent, No. 308,556, for a cigarette machine, construed as to claims 1 and 2, and the same held infringed by the Elliott machine (reissue No. 11,104). 63 Fed. 835, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

These were suits in equity by the Bonsack Machine Company against Henry C. Elliott and by the Bonsack Machine Company and the American Tobacco Company against the National Cigarette Company and others, for infringement of four patents for cigarette machines. In the circuit court, certain claims of each patent sued on were sustained, and found to be infringed, and a decree was entered for complainants accordingly. 63 Fed. 835. Defendants appeal.

Duncan & Page, M. B. Phillipps, A. H. Burroughs, and W. W. Fuller, for complainant.

Glenn & Manley, Mr. Baldwin, and Mr. Watson, for defendants.

Before BROWN, Circuit Justice, and LACOMBE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The Bonsack Machine Company brought a bill in equity in the circuit court for the Southern district of New York against Henry C. Elliott, which charged infringement of four letters patent for cigarette machines, viz.: No. 184,207, granted to the assignees of Albert H. Hook, on November 7, 1876; No. 216,164, granted to Charles G. Emory and William H. Emory, on June 3, 1879, and known as the "Emory belt" patent; No. 238,640, granted to James A. Bonsack, on March 8, 1881; and No. 308,556, granted to Charles G. Emory, on November 25, 1884, and known as the "packing-bar" patent. Upon proofs taken for "final hearing," the circuit court granted an injunction against the infringement of the second claim of the Hook patent, of the tenth, twelfth, fourteenth, and fifteenth claims of the Emory belt patent, of the sixth and seventh claims of the Bonsack patent, and of the first and second claims of the packing-bar patent. After this interlocutory decree, the circuit court for the same district, in the bill of equity of the Bonsack Machine Company and the American Tobacco Company, its licensee, against the National Cigarette & Tobacco Company and others, enjoined the defendants, *pendente lite*, against the infringement of the same claims of the Emory belt and Bonsack patents, by the use of the machine known as the "Baron Machine." The defendants in each case appealed from the respective decrees. The Hook invention, which was made in the early part of 1872, was for the manufacture of a "continuous" cigarette, of indefinite length, to be cut up, as it left the machine, into separate cigarettes of the ordinary length. Previously, cigarettes had been made singly by hand, and machines existed which were designed to manufacture them automatically in the same way. Hook's machine embodied the result of the first known attempt to manufacture a rolled and wrapped cigarette of indefinite length. It was never used to manufacture for sale, and probably never could have been a commercial success, but as a wrapping device it contained the rudimental mechanism which has reappeared in each of its successors. In this machine a ribbon of paper, as it was unwound from a spool, passed over a gum wheel, which placed a narrow streak of paste upon one edge of the lower side of the ribbon. Thence the paper passed into a

trough, which, starting from a flat surface, gradually curved more and more upward until it terminated in a tube former, and thus the paper was formed into a tube, which passed into and through a hollow cylinder, in which the two edges of the tube were made to adhere together. Before the ribbon was formed into a tube, a bucket wheel delivered tobacco upon the flat surface of the paper. The filler was thus made, and the wrapper was rolled about the filler simultaneously in the same trough or tube-forming die. The French patent of Abadie & Co., antedated July 10, 1874, was issued on October 5, 1874, and describes a mechanism which, like the Hook machine, was a commercial failure. The French machine contained a pump plunger, by means of which loose tobacco was compressed and moved onward through a metallic molding tube, which had an interior diameter equal to the thickness of the cigarette which was to be manufactured, and molded the tobacco into cylindrical form. It also contained a "helical mold, which incloses the orifice of the molding tube, supports the paper in trough form, and also bends the paper into tubular form, with one edge of the band of paper overlapping the other so that the paper incloses the tobacco filler delivered by the forming tube." The operation of the various elements of the machine was described in another case by Mr. Edward S. Renwick, as follows:

"The said principal members of the Abadie machine are so combined that the band or strip of paper is drawn from the spool past the gum-wheel, and past the hopper and through the helical mold, by whose action the ribbon, partially bent against the rounded side of the hopper, is formed into a tube, with one edge overlapping the other, and, simultaneously with these drawing and tube-forming operations, the tobacco is delivered in a regulated quantity, is compressed into a cylindrical filler, and is fed upon the band of paper during its formation into a continuous tube, the said band being gummed previously, and having its edges finally pasted together, and the continuous cigarette being wound on the reel."

The paper is gradually folded into a tube around the previously compressed filler, and, the edges of the wrapper having been gummed, the filler is enveloped, and the wrapper is pasted in the helical mold. The Emory belt patent was an advance upon the Hook machine. It adopted the principle of forming the filler before beginning the wrapping operation. The filler was continuously formed, before it reached the wrapper, in an endless traveling belt, curved around the tobacco by the walls of a chamber through which the belt passes.

"This endless belt separates from the tobacco filler as it delivers it to the paper wrapper and disappears beneath the table, but, after the paper strip has been wrapped around the filler, and the overlapping edge pasted down, the belt, reappearing above the table, comes into action again, and is caused to encircle the sealed cigarette rod with a close frictional contact, by passing with it through a hollow cylinder or guide tube."

In the movement through this tube, the cemented edges of the wrapper are pressed together until the paste has set.

It was contended in the circuit court, and the court found, that a third and unpatented Hook machine, made prior to the date of the Emory invention, contained an endless ribbon, which was drawn through the machine under the paper ribbon, to support it, and re-

lieve it from strain. The circuit court therefore found the thirteenth claim of the Emory patent, which was for "an endless belt and a guide tube, whereby a continuous filler in a sealed wrapper is inclosed and carried forward," to be invalid. Upon this appeal, it is not necessary to determine the question of the existence of the third Hook machine as a completed mechanism.

The Bonsack machine is a commercially successful improvement upon the Emory belt machine, its main difference being that the belt, which underlies paper and filler, passes with both through the wrapping mechanism. The minor particulars, which are described in the claims which are in controversy, are improvements in the specific rolling and wrapping devices. An open trough, having side guides for the belt, receives the filler, and belt and tobacco and paper are conveyed into a former, which is a tapering tube having a spiral groove extending from one of the side guides to the end of the tube, when the edges of the tube lap past each other so as to form a flange continuous with the spiral groove. The object of these particular devices is to perfect the folding and wrapping mechanism so that the edges of the tube and the tube itself, while being pasted and folded, may be controlled and kept in place.

The invention described in the packing-bar patent consists, in the language of the specification, "in the combination with the filler-forming belt of a tamping and compressing bar, having vertical adjustment, and acting intermittently upon the tobacco, to tamp, compress, and pack the same within the upwardly curving belt at the point where it passes through the packing chamber, and previous to its entering the filler-forming tube."

The Elliott machine, which is the device alleged to be an infringement, is described in reissued letters patent No. 11,104, dated August 19, 1890, and issued to Robert Hardie, assignor to Elliott. It is a complex machine, and is described by Judge Wheeler, in his opinion in the circuit court, as follows:

"The stock for the filler is first deposited in a thin layer upon a feed table provided with a traveling feed belt. A blade then carries a row of the stock along the table toward jaws, between which the mass is clamped. A tongue then compresses the material between the jaws into a solid block or rod, against a support, the material being thus molded in a four-part mold, so that it forms a rod or section of the filler in its fully-compressed state before the application of the wrapper, thereby rendering unnecessary any further compression after the application of the wrapper. Meanwhile, the wrapper, in the form of a continuous strip, is bent to a U shape, transversely, and is then conducted with a traveling belt through a grooved support guide or receiving chamber, and the jaws then convey the rod to a position above the curved wrapper, and the tongue descends and moves the rod from between the jaws, discharging it into the wrappers, where, in some cases, it will expand slightly, the end of the rod overlapping that previously deposited, and the tongue pressing the overlapped portions together to form a continuous filler. The belt travels continuously, so that, while the tongue is in contact with the rod, the tongue and the receiving chamber travel longitudinally, together with the belt, wrapper, and rod; but, as soon as the tongue rises, the chamber and tongue move longitudinally back to their former positions. The wrapper and filler are then carried by the belt from the reciprocating chamber to a folding chamber, where one edge of the paper is turned in, the paste applied to the standing edge, and the latter is then turned down and secured, the belt conducting the wrapper and rod until these operations are accomplished, after which it is

deflected and the filled wrapper passes through a holder, which serves as a support, and as an edge, against which a revolving cutter shears the same into short sections or cigarettes. The tongue is given two principal motions, an up and down reciprocating motion between the jaws, and a longitudinal reciprocating motion with the receiving channel. The up and down motion serves to compress the tobacco into a rod, to clean the jaws, and force or deliver the rod of tobacco stock down into the receiving channel. The longitudinal motion is applied, and the tongue carried forward simultaneously with the receiving channel at the same time that such tongue is being forced between the grippers down into the receiving channel, 'giving it sufficient pressure at the lapping end to form with that portion which has passed forward in the channel a continuous cigarette rod.' The peculiar shape and arrangement of the former in relation to the receiving channel and the paper ribbon, as it is fed off from the reel and passes below an adjustable roller, causes the paper ribbon to be evenly and neatly folded up in the U-shaped form shown in the receiving channel. It travels through the receiving channel with its edges under hooks, or turned down flanges of guides; and the ribbon is maintained in such shape with the tobacco rod resting in it throughout the length of the receiving channel, and until it is acted upon by beveled folding rollers above the folding channel. The tape is also folded into a U shape by the former, and travels through the receiving channel below the paper ribbon, so as to protect it and to assist in carrying it forward. After leaving the receiving channel, the paper ribbon is folded over, first at one edge, while the other edge is pasted, and then the pasted edge is folded over to form a complete wrapper for the filler rod, as heretofore described, with reference to the folding channel and its beveled rollers. As the wrapped and completed rod passes forward through a tubular holder in the cutter carriage, it is cut into cigarette lengths by a rotating cutter blade." 63 Fed. 838.

The only claim of the Hook patent which is in issue upon this appeal is the second, which is as follows:

"2. The combination of spool, A, gumming wheel, B, trough, C, cylinder, D, with a mechanism for charging with tobacco and drawing the ribbon, a, through the trough and cylinder, as set forth."

The elaborate effort of the defendant to show that the different elements of the Hook machine existed in scattered form in mechanism relating to arts remote from that of the formation of a continuous cigarette rod was superfluous. It is admitted by the complainant that each element per se was old, and it is practically admitted by the defendant that the combination of the several elements was new.

The question of the existence, in the Hook machine, of patentable invention, was also raised; but time was wasted in attempting to show that machines relating to diverse and nonanalogous arts, in which some sort of an envelope was wrapped around some sort of a core, prevented the exercise of invention in the formation of a previously unknown machine which could wrap loose tobacco in thin, delicate paper, and, by various molding and pasting devices, produce a continuous and usable cigarette rod. The Hook machine was a patentable and primary invention, and its wrapping mechanism exists, with many improvements, in the machines of the present day, and is found in the Elliott machine, which folds the paper ribbon in the general way which Hook crudely pointed out. But it is said that Hook's invention was a combination of means whereby the tobacco was deposited upon a slip of paper and drawn through a trough adapted to perform simultaneously the office of forming the filler and wrapping it in the paper, while the principle of Elliott's machine consists in forming the filler and wrapping it by separate opera-

tions. This is true, but the conclusion does not follow that Hook's trough, or any trough having its functions, has been dispensed with. Elliott does not use the original trough for both making and wrapping the filler simultaneously. He uses it simply for wrapping; and Hook's invention being a primary one, it is not vital, upon the question of infringement, that Elliott does not scatter the tobacco loosely upon the paper, but presents it to the paper in the form of a compressed filler. He uses the Hook wrapping device, although experience has taught the wisdom of not attempting to use it as a filler-forming device. We concur in the opinion of the circuit court that the second claim of the Hook patent was, during its lifetime, infringed.

The 10th, 12th, 14th, and 15th claims of the Emory belt patent are as follows:

"10. In combination with an endless belt, a filler-forming chamber, and a guide for applying a wrapper around a filler, a conductor or chamber through which the continuous filler and wrapper are conveyed to a suitable pasting device, whereby the swelling of the filler is prevented and the wrapper is held in form while the edges are secured by pasting, substantially as described."

"12. The combination of a gauge or former for uniting the edges of the wrapper with a paste supplying and distributing disk, and mechanism for operating the same, a guide for wrapping a wrapper around the filler, a filler-forming chamber, and an endless flexible belt, all to operate in a manner substantially as described."

"14. In combination with devices for forming a continuous cigarette of any desired size, an endless belt, a guide tube, and a delivery tube, whereby a continuous cigarette is presented to the action of suitable cutting mechanism for division into desired lengths, substantially as described."

"15. The combination of an endless belt and guide tube with a delivery tube and suitable cutting devices, whereby a continuous cigarette of any desired diameter can be advanced and severed into desired lengths, substantially as described."

The question of the infringement of the Emory belt patent is the one of most importance in the case and depends upon the construction which shall be given to the tenth and twelfth claims. The complainant considers that the essence of the combinations of these four claims is that the filler of the cigarette is formed in one set of devices and wrapped with the wrapper in another set of devices, and that the endless belt, as a carrier or conveyer, connects the two sets together, and therefore that the particular kind of filler-forming chamber is unimportant. If a machine has a filler-forming chamber and a guide for wrapping the filler, but has an endless belt connecting the two sets of devices, and a chamber which prevents the swelling of the filler, through which the filler, however formed, and wrapper, are conveyed to a pasting device, the tenth claim is, in the opinion of the complainant, infringed. This construction, as we understand, was substantially acceded to by the circuit court, and would seem to have strength, unless account is taken of the Abadie invention.

The French machine had separate devices for filler forming and wrapping, and the formed filler was led, upon the paper strip, during its formation, into a continuous tube, after it had been gummed, but before its edges had been pasted together. The essence of the Emory belt invention was disclosed by Abadie & Co. in an imperfect

form, the main defect being in the set of devices which formed and delivered the filler; but, in view of this machine, the Emory patent is not entitled to a broad construction, so as to include within its terms machines in which a filler, however formed, is delivered by an endless belt to a paper strip, to be wrapped, by the aid of a guide, and then passed through a pressure tube while being pasted. The Emory belt was not a mere carrier. It was continually a forming and encircling tube. An endless belt to serve simply as a carrier has a different character, and performs a different office, from the belt of the Emorys. The complainant's construction gives to its belt a scope wide enough to include a support which should do the simple work which the ribbon of the third Hook machine is said to have done. Such a construction gives to the patent a priority which it did not historically possess, improperly broadens the patentable character of the belt, and extends the control of the patent over all subsequently developed devices for the formation of a filler. The endless belt of the tenth and twelfth claims is curved, so as to compress the tobacco and form the filler, and the filler-forming chamber is one in which the filler is molded by the curved belt. The two claims are to be limited to the endless belt, which is curved transversely into tubular form, to constitute a mold, which compresses or molds the tobacco into a filler, and to the filler-forming chamber, which operates to bend or curve the belt into the tubular form,—not merely to enable it to receive or to carry, but to enable it to form a filler by the power conveyed by it. Neither the belt nor the filler chamber of the Elliott machine possesses these characteristics. The tobacco is clamped between jaws, and then compressed against a support into a compact block or rod. The jaws then convey the rod to a position above the previously curved wrapper, into which the filler is discharged. The fourteenth and fifteenth claims are for the minor details of mechanism by which the completed cigarette rod is presented to cutting mechanism. That it was to be drawn along and to be presented to cutting devices was shown in the Hook patent, and therefore the need of some sort of guide or delivery tube or conveying mechanism was obvious. If the claims for these minor and indispensable details disclose any patentable invention, they must receive a narrow construction, and be limited to the mechanism which is shown. In this event, the Elliott machine is not an infringement, for its grooved rollers are not the delivery tube of the Emorys; but we think that the claims do not contain any patentable improvement.

The Bonsack machine contained both the principle and the general method of construction of the Emory belt machine, but with improvements in detail which make it capable of producing a large and accurately made product; and it is therefore a commercially valuable machine. The sixth and seventh claims are as follows:

"6. In a cigarette machine which rolls a continuous cigarette in an endless belt by passing through a tapering tube, the combination of an open trough having side guides for the belt, a tapering tube having a spiral groove extending from one of said side guides and a terminal section to the tapering tube, having its edges lapped past each other, but not united, so as to form a

flange continuous with the spiral groove, substantially as and for the purpose described.

"7. In a cigarette machine which rolls a continuous cigarette in an endless belt by passing through a tapering tube, the combination of an opening trough having side guides for the belt, a tapering tube having a spiral groove extending from one of the side guides of the trough, and a terminal section having its edges separated to form a flange, b', to give access to the paste wheel and then closed again, as and for the purpose described."

In the Bonsack wrapping mechanism, the filler, paper, and belt pass from an open trough with overlapping edges, called "side guides," and which can hold down the edges of the belt, into a tapering tube, in which a spiral groove extends from one of these side guides, and as the edges of the end of the tapering tube lap over each other, the spiral groove terminates in what the sixth claim calls a "flange." The operation of this part of the mechanism is described in the patent as follows:

"Now, as the tobacco roll and paper strip pass on the belt into the trough, the curved edges of the latter give the incipient curve to the paper, and, after they have entered the tapering tube, the curving and wrapping of the paper around the roll proceed upon one side only, by reason of the spiral guide groove, a' (Fig. 8), for the edge of the belt. As soon as the complete circumference is made the guide groove, a', opens, in the form of a longitudinal flange or lip, b', which allows the upper or lapping edge of the paper to be exposed long enough to receive paste on its underneath edge from a paste wheel or brush (shown in Fig. 10), after which the tube closes again, as in Fig. 9, to force the pasted and lapping edge down upon the body of the cigarette."

The Elliott machine has no tapering tube having a spiral groove extending from one of the side guides of the open trough. It has an open trough with side guides for the belt, which is continued into a tube which is not tapering, and contains no spiral groove. The first and second claims of the packing-bar patent are as follows:

"1. In a cigarette machine, the combination, with a traveling filler-carrying belt and a packing chamber, of a tamping, packing, and compressing bar, and mechanism, substantially as described, for giving said bar intermittent action upon the tobacco, substantially as and for the purpose set forth.

"2. In a cigarette machine, the combination, with a filler-carrying belt and a packing chamber, of a tamping, packing, and compressing bar, and mechanism, substantially as described, for giving said bar motion toward and with the belt at intervals, substantially as and for the purpose set forth."

The molding device of the Elliott machine consisting of a tongue which compresses the tobacco, clamped between jaws, into a compact rod, which is then conveyed above the curved wrapper, and discharged into it, is an infringement of these claims. The bill in equity against the National Cigarette & Tobacco Company was brought after the expiration of the Hook patent, and did not allege an infringement of the packing-bar patent. The following description, in outline, of so much of the Baron machine as is important with reference to the tenth and twelfth claims of the Emory belt patent, and the sixth and seventh claims of the Bonsack patent, is condensed from the affidavit of Mr. Hannan, a former machinist of the defendant corporation:

"Directly beneath the hopper is placed a trough, in the bottom of which runs an endless conveyor belt, over pulleys. In front of the hopper are two pairs of horizontal grooved compressing wheels, one pair being set so that:

their peripheries are nearer together than those of the other pair. The conveyor belt runs beneath these wheels, in contact with the under side thereof, resting upon the upper side of the supporting table or bed. Immediately above these compressing wheels is located a short endless compressor belt, which passes over pulleys. The under portion of this belt runs in contact with the upper surfaces of the compressing wheels. The endless conveyor belt, which runs through the trough, receives the tobacco as it is discharged from the bottom of the hopper, and conveys it, between the two pairs of grooved compressing wheels, underneath the short belt, and then delivers it, fully shaped by the compressing wheels into the form of a rod, to the strip of paper to be wrapped. The folding and wrapping devices are as follows: The paper strip which is used for wrapping the filler is taken from a reel, below the bed of the machine, and is brought up through a guide slot, and then led into an open trough, so as to overlie a belt. The slots through which the belt and the paper strip thus pass are formed in small pieces of metal, which, by means of screws seated in the bed of the machine, are made laterally adjustable, independently of each other. These slots serve as side guides for the paper and the belt respectively. The trough, starting from nearly a flat form, has its sides gradually bent up and drawn in, until it takes on a U shape in cross-section. The first end of the tubular channel, which lies just beyond the trough, is provided with an overhanging hood, which is concave on its under side. One end of this hood is in contact with the grooved periphery of the guide wheel, the function of this guide wheel being to insure the proper introduction of the filler rod beneath this hood. This channel is tapering, vertically. A portion of the channel piece is gradually curved over, so as to overhang the channel in which the belt, the paper, and the tobacco are moving, so as to fold one edge of the belt and paper over, until they are taken by a wheel, which folds them over still further. Beyond the folding wheel lies the paste wheel, which delivers a film of paste upon the standing edge of the paper. The overhanging part of the channel piece continues to hold the first edge of the paper down in position on the filler, while the paste is being applied to the standing edge. Beyond the paste wheel, the standing edge of the paper and belt encounter a folding wheel, and are gradually turned over thereby, so as to overlap the first edge of the paper, which has previously been folded down into contact with the filler."

As the Emory belt patent has been construed, this machine does not infringe either of its claims. While it has the tapering tube, and may be considered to have the side guides, of the sixth and seventh claims of the Bonsack patent, it does not have the tapering tube having a spiral groove extending from one of the guides, or a flange continuous with a spiral groove, and does not infringe either of those claims.

The defendant in the Elliott Case moved the circuit court to strike out questions 10, 12, and 68 to 72, in the second deposition of H. F. Newbury, and the answers thereto, these questions and answers having been seasonably objected to before the examiner when the deposition was taken. The circuit court did not make any formal ruling upon the motion, but received the whole deposition. One of the assignments of error is that the court therein erred. The last paragraph of the answer to question 12, the second paragraph of the answer to question 69, the entire answers to questions 71 and 72 are inadmissible, because they are statements admittedly made from hearsay, and not from the knowledge of the witness. The attention of the bar of this circuit is again called to the inexpediency of allowing irrelevant matter in depositions in patent causes.

The interlocutory decree of the circuit court in the case against Henry C. Elliott is directed to be modified, without costs of this court to either party, so as to decree against an infringement only of

the first and second claims of patent No. 308,556, and to direct an accounting with respect to the infringement of said claims and of the second claim of the Hook patent, and to find that said three claims only have been infringed. The interlocutory order of the circuit court, *pendente lite*, in the case against the National Cigarette & Machine Company, is reversed, with costs of this court.

GINNA et al. v. MERSEREAU MANUF'G CO.

(Circuit Court, D. New Jersey. July 3, 1895.)

PATENTS—CAN-MAKING MACHINES.

The Hipperling patent, No. 281,508, for an improvement in machines for manufacturing tin cans, and relating "particularly to a machine for double seaming the head and bottom of rectangular shaped cans," must, in view of the prior Atkinson patent, No. 279,853, be confined to the particular form of construction shown. *Held*, therefore, that the second and third claims are not infringed by a machine made in accordance with the Adriance patent, No. 472,284.

This was a bill by Stephen A. Ginna and Richard A. Donaldson against the Mersereau Manufacturing Company for alleged infringement of a patent relating to machines for manufacturing tin cans.

Rowland Cox, for complainants.

Edwin H. Brown, for defendant.

ACHESON, Circuit Judge. The bill charges the defendant with infringement of letters patent No. 281,508, dated July 17, 1883, issued to the complainants as assignees of the inventor, William Hipperling, upon an application filed May 23, 1883, for an improvement in machines for use in the manufacture of tin cans. The invention, the specification states, has relation "particularly to a machine for double seaming the head and bottom of rectangular shaped cans." The machine comprises a revolving table, adjustable vertically, by means of a treadle and a platen, to engage with the head of the can, seaming rollers, m and n, secured in a swinging block, k, which is pivotally mounted on a sliding carriage, f, and a cam, w, arranged on a vertical shaft, E, which is geared to rotate in unison with the shaft that carries the platen. When the can is in position between the revolving table and platen, the operator, by the movement of a cam, b', advances the revolving shaft, E, and cam, w, and thereby also the carriage, f, with its seam-forming rollers, towards the platen. One of the rollers is thus forced up against the metal flange, and as the can rotates this roller bends over the metal, and completes the first stage of the fold. Then the cam, b', is released, and by moving the swinging block, k, the other roller is brought into position to press the seam, and the cam, b', being again manipulated by the operator, the seam is flattened and finished. As the machine of Hipperling is organized, the operator has to keep his hand on the handle connected with the cam, b', so that he may accomplish the above-mentioned results gradually. Infringement of the second and third claims of the patent is alleged. Those claims are as follows:

(2) In a can-seaming machine, the revolving table and platen between which the can to be treated is held, the platen conforming in outline to that of the

can in cross section, in combination with a movable carriage, a revolving can whose edges agree with those of said platen, and which can is adapted to actuate the carriage, and a seaming device sustained by said carriage, and having grooves adapted by their separate contact with the can to complete the seam, substantially as set forth.

(3) In a can-seaming machine, the revolving table and platen between which the can to be treated is held, in combination with a movable carriage, a revolving can whose edges agree with those of said platen, and which can is adapted to actuate the carriage, a seaming device sustained by said carriage, and having grooves of suitable form to (by their separate contact with the can) complete the seam, and a pawl and ratchet mechanism whereby the separate grooves may be brought into position to engage the seam, substantially as set forth.

The defendant company is manufacturing under letters patent No. 472,284, dated April 5, 1892, granted to it as assignee of the inventor, Benjamin Adriance. In the defendant's machine there are two carriages, each in the form of a lever or swinging frame, and to each of these carriages is pivoted another lever, one of them carrying a forming roller and the other a locking roller, and these rollers are alternately and automatically put into operative relation with the metal flange by means of cams. Thus, cam 32 acts to move the forming roller to its working position, and, after the seam has been formed, a spring moves that roller away from the chuck, when immediately cam 33 acts to move the locking roller into operative position, and when its work is done another spring moves the locking roller away from the chuck, and to a position such as will permit the operator to remove the headed can and put in another piece of work. This machine is strictly automatic. The operator simply puts the can and its head or cap in place and starts the machine, and, without the exercise of any skill or judgment on his part, the whole work is done by the machine.

It is admitted that machines for double seaming round cans and for single seaming rectangular shaped cans were in common use before Hipperling's invention; and it is shown, also, that all the elements of the two above-quoted claims of the patent in suit were old in can-seaming machines. The complainants, however, assert that Hipperling was the first to devise and describe a successful machine adapted for the double seaming of cans of irregular shape in cross section. But the proofs, I think, fail the complainants here. It appears that on June 19, 1883, letters patent No. 279,853 were issued to Somers Bros., assignees of William H. Atkinson, the inventor, upon an application filed April 23, 1883, for improvements in machines for seaming irregular shaped cans. That patent contemplates the double seaming of rectangular cans, and describes a machine to accomplish that result. Now, this Atkinson patent was anterior to the patent in suit as respects both date of issue and date of application. Then, if we turn to the proofs touching the time of invention, the clear weight of evidence on the question of priority is found to be with Atkinson. There was, indeed, no denial of the priority of the Atkinson machine upon the argument of this case, the complainants' contention being that his machine was a failure. But to that proposition I am not able to assent. It is, I think, established that this Atkinson machine was not only practical in the sense that it would double seam rectangular cans, but that

it was successful, for manufacturing purposes, in a commercial sense. True, it was susceptible of improvement, and to that end Atkinson, in 1885, took out a second patent. The machine of this later patent gave better results, because it was automatic, and therefore was much more rapid in operation. This is all that can fairly be affirmed. A patient study of the case has brought me to the conclusion that if, after what had already been done in this art, the devising of a machine for double seaming rectangular cans involved invention at all, the merit of the achievement belongs to Atkinson, and not to Hipperling. The relation of Hipperling to the art of double seaming cans of rectangular shape was that of an improver only, and therefore he must be confined to his own form of construction. *Railway Co. v. Sayles*, 97 U. S. 554; *Duff v. Pump Co.*, 107 U. S. 636, 2 Sup. Ct. 487; *Caster Co. v. Spiegel*, 133 U. S. 360, 10 Sup. Ct. 409; *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1; *Johnson Co. v. Steel Works*, 5 C. C. A. 412, 56 Fed. 43. The differences between the complainants' machine and the machine of the defendant are not colorable, but substantial. In conformity, then, with the rule established by the above-cited cases, it must be held that the charge of infringement is not made out. Let a decree be drawn dismissing the bill of complaint, with costs.

PALMER PNEUMATIC TIRE CO. v. LOZIER.

(Circuit Court, N. D. Ohio, E. D. July 23, 1895.)

No. 5,404.

1. PATENTS—BILL BY INTERFERING PATENTEE—REV. ST. § 4918.

The right given by Rev. St. § 4918, to any person "interested in" a patent which interferes with another patent to file a bill in equity to procure an adjudication determining the rights conferred by the patents, respectively, is not affected by the fact that complainant has surrendered his patent for the purpose of procuring a reissue. Especially is this true where pending the suit the application for a reissue has been rejected, and complainant has thereby acquired a right to again receive possession of the surrendered patent. *Burrell v. Hackley*, 35 Fed. 833, distinguished.

2. SAME—JURISDICTION OF COURT—INJUNCTION.

Where a bill is filed under Rev. St. § 4918, to determine the rights of interfering patentees, the court has jurisdiction to grant relief by injunction, when necessary to protect the rights of a party.

3. SAME.

Where a bill was filed, under Rev. St. § 4918, between persons claiming under interfering patents, *held*, that defendant would not be enjoined from prosecuting an action at law previously begun in the same court for infringement of his patent, where it appeared that the equity suit could, by due diligence, be brought to a hearing as soon as the action at law, in which case the court would give precedence to the equity suit.

This was a bill filed, under Rev. St. § 4918, by the Palmer Pneumatic Tire Company against Henry A. Lozier, to procure an adjudication determining the rights of the parties under certain interfering patents for inventions.

E. S. Thurston, Dyrenforth & Dyrenforth, and L. L. Bond, for complainant.

Wm. A. Redding, John R. Bennett, and Gilbert & Hills, for defendant.

RICKS, District Judge. This is a proceeding instituted by the Palmer Pneumatic Tire Company, authorized by section 4918 of the Revised Statutes of the United States, which reads as follows:

"Sec. 4918. Whenever there are interfering patents, any person interested in any one of them, or in the working of the invention claimed under either of them, may have relief against the interfering patentee, and all parties interested under him, by suit in equity against the owners of the interfering patent; and the court, on notice to adverse parties, and other due proceedings had according to the course of equity, may adjudge and declare either of the patents void in whole or in part, or inoperative, or invalid in any particular part of the United States, according to the interest of the parties in the patent or the invention patented. But no such judgment or adjudication shall affect the right of any person except the parties to the suit and those deriving title under them subsequent to the rendition of such judgment."

The complainant avers that, by assignment of John Fullerton Palmer, it is the owner of letters patent No. 489,714, dated January 10, 1893, and letters patent No. 493,220, dated March 7, 1893. These patents cover "a new and useful improvement in fabric suited to the manufacture of pneumatic tires, and in such pneumatic tires, and the method and apparatus for producing the same, fully described in the letters patent mentioned." The bill further avers that on the 9th of October, 1893, Rudolph Huss applied for letters patent as an inventor of the fabric described in patent No. 493,220, above referred to. Letters patent were refused him by the patent office, because of the prior patent allowed to Palmer. An interference was declared by the patent office, on the application of Huss, between his patent and No. 493,220. Testimony was taken, so that on December 3, 1894, a hearing was had, and on March 4, 1895, the examiner of interferences decided that Huss was the original inventor of said fabric. The bill alleges that this decision of the examiner was erroneous, contrary to the evidence, and should not have been made. An appeal was allowed from said decision, but by an oversight of the solicitors for Palmer the appeal was not perfected in time, although afterwards allowed and perfected by leave of the patent office. But pending this action on the part of the patent office, by an error of the primary examiner, letters patent No. 539,224, were granted to Henry A. Lozier, as assignee of Rudolph Huss, on May 14, 1895. The bill alleges that this patent was accepted by the defendant, although his solicitors well knew that an appeal was being perfected by complainant, and that the issuance of this patent to Lozier was an oversight and an error. Thereupon the complainant filed this bill, and now prays, after setting forth the above facts:

"That the said Henry A. Lozier may, if he can, show why your orator should not have the relief herein prayed; that he may, but not upon oath (answer on oath being expressly waived), and according to his knowledge and belief, full, true, and perfect answer make to all and singular the premises; and that the said letters patent No. 539,224, granted to the defendant, May 14, 1895, as the assignee of said Rudolph W. Huss, may, by the decree of this court, be adjudged and declared to be null and void and of no effect whatsoever; and that the defendant may be decreed to pay the damages sustained by your orator by reason of his said fraudulent and unlawful acts, and the costs of this suit; and that the said Henry A. Lozier, his employes and workmen, and all others claiming under, by, and through him, or operating under and by his direction, or with and by his consent, may, during the pendency of this suit, be enjoined, by the order of this court, from directly or indirectly exercising any rights or privileges under and by virtue of said fraudulent

letters patent No. 539,224, or threatening or instituting suits for alleged infringement thereof against the licensees or customers of your orator, or any other person or persons whatsoever, or advertising, or pretending in any overt manner whatsoever, that he, the said defendant, is justly entitled to the exclusive rights which by said fraudulent letters patent appear to be conferred, and from directly or indirectly disposing of any right, title, or interest therein; and that your orator may have such other and further relief as to this court may seem meet, and as may be agreeable to equity."

The first contention urged by the defendant is that the complainant, having surrendered his patent, under section 4918, for the purpose of obtaining a reissue, cannot maintain this action upon it while it is in the hands of the commissioner of patents, awaiting his decision. The complainant admits that the letters patent sued upon have been surrendered to the commissioner for reissue, but claims that said commissioner has already acted upon said application, and refused the same, and that the complainant is now entitled to the manual possession of said original letters patent. If this were a suit brought to assert the validity of the letters patent, and averring an infringement thereof by a defendant, the contention of defendant's counsel would be correct, and the case cited by him in 35 Fed. 833 [Burrell v. Hackley], decided by Judge Coxe, would be directly in point. But the proceedings authorized by section 4918 require only that the persons instituting the same shall be "interested" in any one of the patents. Since the hearing of this case the complainant has recovered possession of its letters patent from the commissioner of patents, and has filed the same in this case as evidence of its full control and possession, and its title thereto. Section 4918 is construed by Judge Treat, in the case of *Foster v. Lindsay*, in the circuit court for the Eastern district of Missouri (being Case No. 4,976, in the ninth volume of Federal Cases, originally reported in 3 Dill. 126), as being peculiarly a statutory proceeding, authorized for the purpose of determining the priority of interfering patents. The sole purpose is to determine which inventor of the two or more interfering patents was prior in his discovery or invention. Further light as to the scope of the jurisdiction conferred upon the circuit courts by this section is given in the case of *Potter v. Dixon*, 5 Blatchf. 160, Fed. Cas. No. 11,325. That case was decided on the circuit by Mr. Justice Nelson. In that case, he spoke as follows:

"It is argued on this motion by the learned counsel for the defendants that the sixteenth section of the act of 1836, as amended by the tenth section of the act of 1839, did not authorize this court to grant an injunction, and that the power was confined to the specific remedy pointed out in that section. I do not assent to this view. It has been frequently decided that the power conferred upon the circuit court to entertain bills in equity in controversies arising under the patent act is a general equity power, and carries with it all the incidents belonging to that species of jurisdiction. The power conferred not only enables the court to decree a final remedy, but to take care that the subject of the controversy shall not be rendered valueless pending the litigation."

Since that construction of the statute it has been further amended. As it originally stood, the statute read: "And the court, on notice to adverse parties, may adjudge and declare either of the patents void," etc. As the law now stands in the Revised Statutes, that sentence reads: "And the court, on notice to adverse parties, and

other due proceedings had according to the course of equity, may adjudge," etc. This construction of the act by Mr. Justice Nelson, when considered in connection with the amendment above referred to, it seems to me, makes it very clear that pending any proceedings instituted under this section the court, upon proper showing, has the power to grant relief, by injunction or otherwise, to protect either party in any rights conferred by law.

The only question to determine, therefore, is whether, under the allegations of the bill, and the facts as therein averred, there is any occasion for an injunction to protect the complainant in its rights under the interfering patent pending the prosecution of this suit. The defendant has in his possession letters patent regularly and validly issued, according to the face thereof. Before the filing of complainant's bill in this case, and exercising the right conferred by reason of said letters patent, the defendant instituted a suit at law in this court against the sole licensee of the complainant, being a corporation doing business within this district, and subject to the process of this court. This suit is now pending; and it is this proceeding which the complainant asks to have enjoined. So far as the rights of the parties are concerned, they seem to me to be concurrent. Each has its letters patent, regularly issued by the patent office. The defendant has instituted a suit at law to determine what rights he has under his letters patent. The complainant has instituted this proceeding in equity to determine whether its patent, or that of the defendant, is prior in date, according to the authority conferred under the section which we have been considering. While I think that this section provides the more complete and appropriate remedy, and while, under these proceedings, the rights of these parties could be more fully determined, I am not clear that, under the particular facts of these cases, there is any reason why the complainant should be protected by the extreme remedy of an injunction. Both cases are in this court. Both are under the control of the court. I assume that both parties are acting in good faith to protect their rights under their patents. This case in equity, if properly speeded, under the rules, can be brought to trial as soon as the action at law which the defendant has instituted. While, as I have said, the remedy under section 4918 seems to be most complete and appropriate, it is nevertheless true that the complainant can have a complete defense to the action at law by pleading the fourth defense defined in section 4920, to wit, that the plaintiff in the suit at law was not the original and first inventor or discoverer of any material or substantial part of the thing patented. While I do not, under these circumstances, deem it proper to grant an injunction against the prosecution of the action at law, I will nevertheless suggest to complainant that it proceed by due diligence to prepare the equity case for hearing. If this is done, and the law case should be first reached for trial, it may then be proper for the defendant in that suit to ask that the trial thereof be postponed until the equity case be heard. The court can then pass upon that application upon its merits, and, if it then seems that a speedier and more appropriate remedy can be had by hearing the equity case first, that case will be

given the precedence; but if the complainant fails to speed the preparation of its case with due diligence, so that the action at law, by ordinary course of proceeding, is first reached for trial, the failure to act with proper diligence by the complainant in this case may entitle the plaintiff to a prior hearing upon the suit at law. In the meantime an injunction will be allowed against the defendant, from prosecuting any other or further suits against any of the users or dealers with the complainant.

THE ARTHUR ORR.

LEATHAM & SMITH TOWING & WRECKING CO. v. THE ARTHUR ORR.

(District Court, E. D. Wisconsin. July 15, 1895.)

1. COLLISION BETWEEN STEAMERS—EXCESSIVE SPEED IN FOG.

Where two steamers on opposite courses collided at night in a dense fog on Lake Michigan, and in the path of commerce between Chicago and Milwaukee, *held*, that both were in fault for excessive speed, it appearing that one was going at 10 and the other at 12 miles an hour.

2. SAME—SIGNALS IN FOG—CHANGE OF COURSE.

It is a fault in a steamer running in a dense fog to make a radical change of course immediately on hearing a fog signal which is barely on one of her bows. The proper course is to slow down or stop, until, by signaling, the other vessel can be accurately located.

3. SAME—LEAVING PORT IN FOG.

Quære, whether it is negligence per se for a steamer, in the absence of any imperative necessity, to leave port while her course is covered by a dense fog.

This was a libel in rem by the Leatham & Smith Towing & Wrecking Company against the steamer Arthur Orr to recover damages resulting from a collision.

Geo. G. Greene and M. C. Krause, for libelant.

Geo. C. Markham and C. E. Kremer, for claimant.

SEAMAN, District Judge. In this action, the libelant, as owner of the steamer Thomas H. Smith, seeks to recover for the loss of that vessel by collision with the steamer Arthur Orr. The collision occurred in a fog off Wind Point, near Racine, on the west shore of Lake Michigan, at about 3 o'clock in the morning, November 11, 1893. The Smith was sunk in 15 fathoms of water, and was a total loss. There is much of irreconcilable conflict in the testimony respecting the speed, signals, lapse of time, directions of sound, and distances, but the facts which are either undisputed or are well established by the evidence are sufficient, in my opinion, to show that there was negligence in the navigation of both steamers, and that the fault of both directly contributed to the disaster. The Orr was a steamer of 3,000 tons burthen. She left Milwaukee in a thick fog, without either cargo or charter, and for an hour immediately preceding the collision, and up to within a few moments of its occurrence (stated by its officers at not more than five minutes), was driving through the fog on her regular course, south by east, at a speed of 12 miles per hour, according to all the reliable testimony in her behalf;

this with the fog so thick that a light could not be distinguished for a distance in which the various statements place the maximum at 400 feet, and running "wild" directly in the path of the traffic to and from the great commercial port of Chicago. The Smith was a steamer of 198 tons, and had in tow the schooner Aldrich, of 182 tons. They left Chicago at 8 p. m., light, bound for Sturgeon Bay, and were on their compass course north, but did not encounter the fog until about 2 a. m. There was no appreciable wind or sea. Neither vessel was under sail, and they were making about 10 miles an hour, both before and after entering the fog.

The three-blast fog whistle of the Smith, indicating a tow, was heard on the Orr three or four times before it is claimed that there was any order to check her speed, or that any signal was given other than her one-blast fog whistle. The witnesses on the Orr locate the first sound of the Smith's fog signal about one point on their starboard bow, and say that it seemed to broaden there as it neared. Upon this observation they claim to have given a two-blast signal for passing starboard to starboard, and that her speed was then checked. The uncertainty, and the well-known aberrations of sound in a fog, should have warned the master of the Orr that entire reliance could not be placed upon it for locating the approaching steamer; and it is my opinion that even the appearance claimed was too nearly end on to venture the signal thereupon for passing starboard to starboard. The testimony on behalf of the Orr is positive that her course was not changed, but that she kept on with the same helm, and under some check, waiting for an answering signal; and I do not think there is sufficient in the circumstances upon which it is alleged on the part of the libelant that she came up on the starboard helm to overcome this direct testimony. She should therefore be acquitted of that fault. Whether it was negligence, for this steamer to leave port in the dense fog which then covered her course, and in the absence of any imperative necessity, is an important question, and is strongly pressed for consideration in favor of the libelant. There are English cases which seem to so hold, notably *The Otter*, L. R. 4 Adm. & Ecc. 203, 2 Asp. (N. S.) 208, 8 Eng. R. 674. And in *The Orange*, 46 Fed. 408, Judge Brown remarks: "Unnecessary navigation in such a fog was, in itself, imprudent and unjustifiable." Again, in *The Battler*, 62 Fed. 612, the question was urged before Judge Brown in reference to a tug starting, with her tow, out of the Kennebec river, for New York, during the temporary lightening up of a prevailing fog, which shut down upon them, however, before reaching the open waters; and upon the testimony of navigators it was held that "the start was one that would be considered justifiable and reasonably prudent by skillful and prudent pilots accustomed to navigate these waters." No American authority is cited which would sanction a ruling that it was negligence per se to leave port or to proceed in a fog, and that liability for injury could be predicated on that fact alone, without other showing of fault. But there is no requirement to determine this question in the abstract, because it is well settled that in proceeding under such circumstances the steamer "was bound to ob-

serve unusual caution, and to maintain only such rate of speed as would enable her to come to a standstill, by reversing her engines at full speed, before she could collide with a vessel which she could see through the fog" (The Nacoochee, 137 U. S. 330, 11 Sup. Ct. 122; The Colorado, 91 U. S. 692); and this interpretation of the navigation rules is sufficient to place gross fault upon the Orr in the instant case. Whatever right she had to proceed in the fog was subject to the condition that she could and would run at a rate under which she could be controlled against the infliction of injury to the numerous craft she was liable to meet or overtake in the great thoroughfare upon which her course was laid. Her fault was in the speed maintained, and any checking down which was attempted after the warning of the approach of a steamer incumbered with a tow was manifestly insufficient for the necessary control to avoid collision under the known conditions. The warning was in ample time, and, if her speed had been moderated as rule 21 intends, she could have been stopped when the tow was sighted; or, if her power or bulk made this control uncertain, she should have stopped before reaching immediate proximity, to await an exchange of signals for passing.

On the part of the Smith there was also gross fault. She kept up her speed of about 10 miles an hour after entering the fog, and up to within a few moments of the meeting. She was not even checked down until after her wheel was ported. The combined speed of the steamers was such that there was not sufficient opportunity to ascertain their relative positions, or exchange signals intelligently and seasonably. From the libellant's testimony it appears that the fog signal of the Orr was not heard on the Smith as early as those on the Orr claim to have heard that of the Smith, and that they did not hear the first two-blast passing signal claimed to have been given by the Orr. The mate was on watch, and says he heard the fog whistle, which he located on his port bow, and immediately put the wheel a-port, and blew the passing one-blast whistle accordingly. The captain then rushed on deck and ordered the speed checked, which was too late for safety. They heard the supposed cross signal from the Orr after these orders. Almost immediately she loomed in sight, under considerable headway, and struck the port side of the Smith about amidship, the blow "angling slightly from aft forward." The vice in this maneuver of the Smith was the hasty porting of the helm. Instead of checking down or stopping until the position of the Orr could be known, they acted prematurely. This radical change of position was apparently made in reliance upon the location of the sound in a fog, and when even that semblance was barely on his port bow. They should have signaled, and waited for an answer on which to act intelligently. She thus ran directly across the bows of the Orr and brought on a collision. It is not claimed of this maneuver that it occurred in extremis. It was deliberate, and cannot be held entitled to that excuse. The speed of both steamers undoubtedly produced confusion and prevented intelligent action. There was mutual contributory negligence, and the damages must be equally divided. There will be a reference to ascertain the amount.

CENTRAL TRUST CO. OF NEW YORK v. EAST TENNESSEE, V. & G. RY. CO. (MITCHELL, Intervener).

(Circuit Court, N. D. Georgia. Feb. 25, 1888.)

1. FEDERAL COURTS—CONSTRUCTION OF STATE STATUTES—FOLLOWING STATE DECISIONS.

A decision by a state supreme court that a statute of the state making railroad companies liable for injuries caused to their employes by the negligence of coemployes does not apply to the case of an injury to an employe of a receiver operating a railroad under direction of a court of equity, is binding upon the federal courts.

2. RAILROAD RECEIVERS—LIABILITIES FOR INJURIES TO EMPLOYEES—NEGLIGENCE OF COEMPLOYEES.

The Georgia statute (Code, § 3036) making railroad companies liable for injuries caused to their employes by the negligence of coemployes does not apply to the case of an injury to an employe of a receiver operating a railroad under direction of a court of equity; and in such case the common-law rule is still in force. *Henderson v. Walker*, 55 Ga. 481, followed.

3. SAME.

An injury to a railroad employe by a dangerous structure placed too near the track is not an injury caused by negligence "in the running of trains," within the meaning of the Georgia statutes relating to the liability of railroad companies "as common carriers" (Code, § 2083), or within the act of 1876, providing for payment of claims out of income in the hands of a railroad receiver.

4. SAME—VIOLATION OF RULES.

A railroad employe injured by being brought in contact with a structure at the side of the road while standing on the side of a car instead of on top thereof, where the company's rules required him to be, cannot recover damages for the injury.

This was a petition of intervention filed by Lane Mitchell in the case of the Central Trust Company of New York against the East Tennessee, Virginia & Georgia Railway Company, whereby he seeks to recover from Henry Fink, receiver of said company, damages for injuries received while in the employment of said receiver. Verdict for intervener. Motion for new trial.

Hoke Smith and Burton Smith, for intervener.

Bacon & Rutherford and Mynatt & Carter, for the receiver.

NEWMAN, District Judge. This motion has been elaborately argued, and carefully prepared briefs have since been furnished me by counsel on both sides. I do not clearly see how one question which was argued at considerable length is in this case, namely, as to whether the statute of Georgia which makes an employer liable for an injury to one employe by the negligence of a coemploye is applicable to a suit against a receiver of a court operating a railroad. While it is true that the question of the liability of the employer to an injured employe by the negligence of a coemploye, and the question of the liability of the employer for injuries received from dangerous structures and the like, erected by the employer, grew out of the same general principle originally,—that the servant assumed the natural and obvious risks of the master's service,—yet the two branches of the subject, viz. fellow servants' negligence and dangerous structures and the like, are in many respects distinct. While

in Georgia, under the statute, a railroad company would be liable to an employé for an injury caused by the negligence of a coemployé, if the injured party be free from fault, yet I am not aware of anything in the Georgia statutes changing the common-law rule as to the assumption by the servant of the patent dangers of the master's service. I am inclined to think that this case comes within the latter class, and am not sure, therefore, that any ruling is necessary upon the question as to whether, under the statute and the decisions of the supreme court of the state, a receiver is liable to an employé injured by the negligence of a coemployé; but, if the question is involved in this case, I am clearly of the opinion that the decision of the supreme court of Georgia in the case of *Henderson v. Walker*, 55 Ga. 481, must control. In that case it was held that receivers of a railroad holding possession for a court of chancery, and operating the road under the orders of the court, are not subject to suits in their official capacity for a personal injury to one of their employés resulting from the negligence of other employés in the same service. The replies made by counsel for intervener in this case to this decision were, first, that this was not a construction of the statutes (Code Ga. §§ 2083, 3036), but, as I understand the argument, that it is an application of the common law to the statute, rather than a construction of the statute, and that being such, it is merely advisory to a United States court, and would not control it. I do not concur in this view of the decision. The court, in the decision named, uses this language: "Doubtless the receivers, as common carriers, bear a relation to the public very similar to that of other common carriers; but the difference between the public and this plaintiff is that the public can appeal to a general law applicable as against all common carriers, whereas the plaintiff must invoke a special statutory provision, which will not reach all employers alike, but only railroad companies." And again, this language: "Still it is clear that employés of receivers are not within the words of the Code,"—showing that the court is construing the language and meaning of the statute, and not simply holding that under the common law the receiver is not liable to the same extent as the railroad company would be. In the language first quoted from this decision the court recognizes the fact that the receiver is a common carrier, and bears a relation to the public very similar to that of other common carriers. It goes on to say, however, that the plaintiff, an employé, must invoke a special statutory provision which will not reach all employers alike, but only railroad companies. The effect of this decision, of course, is that receivers do not stand in the place of the company as to employés; but it is clearly arrived at from a construction of the language of the statute. This is a statute peculiar to Georgia. It is a departure from the common law; and a court of the United States, called upon to construe it, will adopt the ruling of the highest court of the state as to its meaning. The decision in 55 Ga., *supra*, was recognized and reaffirmed in *Thurman v. Cherokee R. Co.*, 56 Ga. 376, and may be considered the settled doctrine of that court.

The second reply made to this decision is that an act of the legislature of Georgia (Acts 1876, p. 122) has changed the law as announced in the decision quoted, if that decision be held applicable here. It is contended that that act makes the receiver liable in cases like this, to the same extent as a railroad company would be. The act named, after providing that the income of a railroad in the hands of a receiver shall be applied to the payment of certain other things, immaterial here, proceeds: "And for injuries to persons and property caused by the running of the cars on said road, and for which said road is now liable, as common carrier, by the laws of this state." It will be seen that the "injuries to persons" for the payment of which the receiver shall apply the income of the road, and for which a lien is given, are such injuries as are inflicted on persons to whom it would owe a duty as a common carrier. Now, it is contended, as I understand the argument, that under the statutes of Georgia (Code, § 2083) the liability of the company in a case such as we are now considering is in its capacity as a common carrier. An examination of that section will show that this position cannot be sustained. The language of the section is as follows: "Railroad companies are common carriers, and liable as such. As such companies necessarily have many employes who cannot possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employes as to passengers for injuries arising from the want of such care and diligence." It will be seen from its language that this section is applicable to injuries to the employe arising from the want of care and diligence on the part of another employe in the running of trains; and if it should be held that in a proper case coming within this statute (Code, § 2083),—as, for instance, a brakeman injured by the negligence of an engineer in running a train so as to cause a collision,—the receiver under the act of 1876 would be required to make payment out of the income of the road, it is obvious that it does not include the case now before the court. This injury is said to have been caused by a dangerous structure on the side of the track, and no complaint is made whatever as to the manner in which the train was run. So the discussion of this section of the Code of Georgia (section 2083) is almost unnecessary, because by its language the act of 1876 itself only provides for the payment out of the income in the receiver's hands, as a first liability, for injuries to persons "caused by the running of the cars on said road"; and the injury received by this complainant cannot, as I have stated, be said in any fair sense to have been caused by the running of the cars upon the road. It is true that the train was in motion when the intervener was knocked from its side, but the complaint is of the structure by the side of the track with which he came in contact, and which caused his injury. It is unnecessary, therefore, to decide the question as to whether the liability of the railroad company to an employe injured by want of care and diligence of another employe in the running of the trains is a liability "as a common carrier" under the act of 1876, or whether it is only the same degree of liability it would owe to a passenger, and not within the

terms of the act. This reasoning applies only to section 2083, which is invoked here, as stated, in connection with the act of 1876. Section 3036 of the Code, which makes the employer liable for an injury to an employé caused by the negligence of a coemployé generally, and without reference to running of trains, is not involved. The last-named section creates a liability for the lack of ordinary and reasonable care, and the former for a liability "as to passengers," namely, for slight neglect, or the absence of extraordinary care.

Some importance was also attached by intervenor's counsel in argument to the language of the title of the act of 1876, namely, "An act to fix the liability of receivers appointed for railroad companies," etc. Of course, the liability fixed must be found in the body of the act, and that is, so far as applicable here, "for injuries to persons and property caused by the running of the cars on said road, and for which said road is now liable as a common carrier by the laws of this state"; so that I do not see the force of this position. My conclusion is that, if the question of negligence of a coemployé is in this case at all, the common law is applicable, and must control it. The intervenor was injured by coming in contact with a coal chute, which it is claimed was erected dangerously near to the side of the track, and the real question is as to whether the ruling of the court in reference to it was correct. That is to say, conceding it to be a dangerous structure, was it such a patent, visible, and open danger as that the intervenor assumed the risk when he entered the employer's service, or was the law correctly stated in my instruction to the jury, that the intervenor was held to reasonable and ordinary care in ascertaining that it was there, and that, if he knew, or by exercise of reasonable and ordinary care ought to have known, that it was there, he could not recover? The decision of the supreme court of the United States in the case of *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, which I had not seen, and to which my attention was not called on the trial of this case, has caused me to doubt the correctness of my instructions. I do not pass finally upon the question, however, as another view I have of the case will control in the present decision.

The intervenor in this case was undoubtedly violating the printed rules of the company when he was injured, and he had the rules in his pocket at the time. The rules of the company required him to be on top of the car while the train was in motion, and he was on the side of the car when he was knocked therefrom by the coal chute. Plaintiff attempted to relieve himself of the effect of this violation of the printed rules by showing a custom which had grown up with the knowledge and consent of the employer, varying the rule. The only custom which seemed to me to be established by the proof with any such certainty and clearness as to give it the effect claimed was one which it seemed plaintiff was disregarding and violating when he was hurt. So that he appeared to be violating both the rule and the custom, if custom there was. I think, therefore, the verdict was contrary to the evidence, and upon this ground there must be a new trial. Let it be so ordered.

CENTRAL TRUST CO. OF NEW YORK v. EAST TENNESSEE, V. & G. RY. CO. (MITCHELL, Intervener).

(Circuit Court, N. D. Georgia. April 23, 1895.)

No. 829

MASTER AND SERVANT—RAILROAD RECEIVERS—LIABILITY FOR INJURIES TO EMPLOYEES—NEGLIGENCE OF COEMPLOYEES.

The Georgia statutes making railroad companies liable for injuries caused to employes by the negligence of coemployes (Code, §§ 2083, 3036) do not apply to the case of an injury to an employé of a receiver operating a railroad under direction of a court of equity. Nor is such receiver made liable in such cases by the act of February 28, 1876, which defines the duties and fixes the liabilities of railroad receivers. *Henderson v. Walker*, 55 Ga. 481; *Thurman v. Railroad Co.*, 56 Ga. 376; and *Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co.*, 69 Fed. 353, —, followed.

This was a petition of intervention filed by William Mitchell in the case of the Central Trust Company of New York against the East Tennessee, Virginia & Georgia Railway Company, whereby he seeks to recover from the receiver of the defendant railway company damages for personal injuries sustained while in the employment of such receiver.

Ellis & Jordan, for intervener.

De Lacy & Bishop, for defendant.

NEWMAN, District Judge. Receivers are operating a railroad under appointment of this court. Intervener seeks to recover damages for an injury to an employé, caused by the negligence of a co-employé. At common law it is well understood that there is no liability in such a case. The right to recover, if it exists at all, must be by virtue of the statutes of the state of Georgia. Those statutes, embraced now in the Code of Georgia, sections 2083 and 3036, are as follows:

"Sec. 2083: Railroad companies are common carriers, and liable as such. As such companies necessarily have many employes who can not possibly control those who should exercise care and diligence in the running of trains, such companies shall be liable to such employes as to passengers for injuries arising from the want of such care and diligence."

"Sec. 3036: If the person injured is himself an employé of the company, and the damage was caused by another employé, and without fault or negligence on the part of the person injured, his employment by the company shall be no bar to the recovery."

The supreme court of Georgia in the case of *Henderson v. Walker*, 55 Ga. 481, reaffirmed in the case of *Thurman v. Railroad Co.*, 56 Ga. 376, decides that these statutes do not embrace or extend to receivers engaged in the operation of railroads under the orders of a court of chancery. In the opinion by Bleckley, J., in the case of *Henderson v. Walker*, supra, the view of the court will appear from an extract as follows:

"He [the plaintiff] shows by his declaration that he is not such an employé. He rests his case on the statutory right, and yet does not put himself in the class to which the right belongs. The company owning the road was not in possession. It had no employes. There was no privity between it and the

plaintiff. He was not its servant; it was not his master. It had nothing to do with selecting his coemployés whose negligence caused the injury. The court of equity, by its officers, the receivers, had possession of the road; and the plaintiff, instead of hiring himself elsewhere to a railroad company or corporation, voluntarily hired himself to these ministers of the law. We think the letter of the situation is the law of it; and as he was not, in fact, in the employment of the railroad company, he is not to be considered in such employment by construction."

So that at common law there should be no liability on the part of the receivers in this case, and when we go to the law of the state we find that the statutes which must be invoked, as construed by the highest court of the state, give no greater right than would exist at common law.

The intervener contends that an act of the legislature "To define the duties and fix the liability of receivers appointed for railroad companies in certain cases," etc., approved February 28, 1876, establishes a different rule from that announced by the supreme court of Georgia in the decisions referred to. The effect of these statutes on these decisions, as well as the decisions themselves, has been before this court in the case of *Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co.* (Feb., 1888) 69 Fed. 353. The opinion appears not to have been published, but is of file in the clerk's office. The court in that case decided adversely to the intervener the same questions that are raised in this case, and a repetition of the reasons there given is unnecessary. None of the decisions cited by counsel for the intervener are directly in point, and nothing has been offered to change the view entertained by the court when this question was elaborately discussed in the case referred to.

It is evident, from the facts set out in the intervening petition, that this case must stand or fall on the negligence of the engineer. It is clearly the proximate cause of the injury. That the engineer was the fellow servant of the brakeman is well settled by the authorities. Unless the receivers are liable, therefore, for the negligence of the coemployé of the intervening petitioner, they are not liable in this case. The demurrer to the petition must be sustained.

BALTIMORE TRUST & GUARANTY CO. v. ATLANTA TRACTION CO.
(BENNETT, Intervener).

(Circuit Court, N. D. Georgia. June 6, 1895.)

No. 766.

1. RAILROAD RECEIVERS—LIABILITY FOR INJURIES TO EMPLOYEES—COEMPLOYEES.

The Georgia statutes (Code, §§ 2083, 3036, and Act Feb. 28, 1876) do not give to the employés of a railroad receiver a right of action for injuries caused by the negligence of coemployés. *Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co.*, 69 Fed. 353, 357, followed.

2. FELLOW SERVANTS.

The conductors of two electric railway cars on the same road are fellow servants, and the common employer is not liable for an injury to one of them, resulting from a collision caused by the negligence of the other.

This was a petition of intervention filed by Smith Bennett in the case of the Baltimore Trust & Guaranty Company against the Atlanta Traction Company to recover from the receiver of the latter company damages for personal injuries sustained while in the receiver's employment.

Marshall J. Clark and T. J. Ripley, for intervener.

Rosser & Carter and King & Anderson, for defendant.

NEWMAN, District Judge. The question in this case is as to the liability of a receiver of a court operating a railroad to an employé injured by the negligence of a coemployé. I must determine, as I have heretofore done, that there is no such liability. It is unnecessary that the reasons should be given again, as they have been fully set forth in the opinions of the court in the cases of *Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co.*, 69 Fed. 353, 357.

It is further insisted that the question of fellow service is not in this case. The injury was to the conductor of one electric car, who was injured, as is assumed in the argument, by the negligence of a conductor of an opposing electric car, he being responsible for a collision which occurred and which was the accident causing the injury. The question is raised as to whether the two conductors are fellow servants, as applicable to the question of employer's liability. My opinion is that they are. I think they are such under the general law and under the decisions of the supreme court of the United States. Any other conclusion cannot be reached from the later decisions of the supreme court. Much more clearly would they be fellow servants in the case of conductors on the same line of street and suburban cars of a city than on a long line of steam railroads running from city to city. The intimacy of their relations is greater, and they come more closely in contact, in the one case than in the other, and the fact of fellow service for the purpose of applying it to the case at bar is more apparent.

SOUTHERN RY. CO. v. CITY OF ASHEVILLE.

(Circuit Court, W. D. North Carolina. August 24, 1895.)

1. INJUNCTION—JURISDICTION—RESTRAINING LEVY OF TAX.

Injunction will lie to restrain the levy of a tax, where the complainant is a common carrier, and the tax is made a lien on its real estate, though its personal property is first to be resorted to by the tax collector, and the remedy at law, by payment and action to recover back, is not as efficient as the remedy by injunction.

2. INTERSTATE COMMERCE—RAILROAD COMPANIES—LICENSE TAX.

Act N. C. March 13, 1895, § 42, subd. 6, authorizing a city to levy, on every railroad company doing business or having an office in the city, a license tax, not to exceed 1 per cent. of the gross receipts of its business, is invalid, in the case of a railroad whose business extends to points out of the state, as a regulation of interstate commerce, and therefore a tax levied under it is invalid, though it is limited to business of the railroad done within the state.

Bill by the Southern Railway Company against the city of Asheville to enjoin levy of a license tax. Decree for complainant.

Fab. H. Busbee, for petitioner.
Julius C. Martin, for defendant.

SIMONTON, Circuit Judge. This is a bill filed by the complainant, a citizen of the state of Virginia, and engaged in the business of a common carrier, against the defendant, a municipal corporation of the state of North Carolina, praying an injunction against the levy of a tax because it violates the interstate commerce law. Upon filing the bill, a rule to show cause was issued with the usual restraining order. The respondents filed their answer, and the case has now come up, using the answer as a return to the rule. The answer is a strong presentation of the position of the defendant. It challenges the jurisdiction of the court on every ground of equitable cognizance, and on the merits insists that there is no violation of the interstate commerce law,—the ground set up by complainant as the foundation of the prayer for an injunction. The complainant, a railroad company doing business in and having an office in the city of Asheville, has been required to pay to said city a privilege tax, being the amount of 1 per cent. of the gross receipts on its said business in that city. The business upon which this is estimated the city council limited to the business done within the state of North Carolina.

The first question to be met in this case is as to the jurisdiction of the court. An injunction will not lie against an illegal tax on the sole ground that the tax is illegal. *Shelton v. Platt*, 139 U. S. 591, 11 Sup. Ct. 646; *Allen v. Car Co.*, 139 U. S. 658, 11 Sup. Ct. 682. The circumstances must bring the case within some recognized branch of equitable jurisdiction, such as where the enforcement of the tax would lead to a multiplicity of suits or produce irreparable injury, or, in case of real estate, would throw a cloud upon the title. *Robinson v. Wilmington*, 25 U. S. App. 147, 13 C. C. A. 177, 65 Fed. 856. Under the charter of the city of Asheville the fiscal year begins on the 1st of June. The lien of the tax attaches to all real property of the taxpayer from that date, and is paramount to all other liens, and continues until the tax is paid. It is true that, in the collection of the tax, the tax collector must first seek personal property out of which the tax may be paid. But that lien on the realty exists and continues and is finally put in active operation if there be an insufficiency of the personalty. The tax therefore from the 1st of June creates a cloud on the title of all the realty of the taxpayer. Again, a railroad company is a common carrier. Its plant consists of rolling stock of every description, designed for use in performing its functions as a carrier. The real estate is subsidiary to the use of the plant. The existence of a tax execution under which any part of this rolling stock can be levied on and stopped, its business and traffic interrupted, at the hazard of grave responsibility to the public, involves a threat of irreparable injury, and an exposure to a multitude of suits. *Allen v. Railroad Co.*, 114 U. S. 311, 5 Sup. Ct. 925, 962. It is said that the statutes of North Carolina give to the complainant a plain, adequate, and complete remedy at law. Apart from the question whether this court, sitting in

equity, can be deprived of jurisdiction because a remedy exists in some other tribunal in another jurisdiction, it does not seem that the remedy tendered by this statute is plain, adequate, and complete. Equity jurisdiction may be invoked though there be a remedy at law, unless the remedy at law, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy in equity. *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594. The remedy under the statute requires the payment of the disputed amount in full, a suit against the official receiving it, a trial in a state court, with the uncertainty both as to the recovery and the mode of enforcing it, as well as of the person against whom it may be enforced. It can hardly be said that this remedy is either plain, adequate, or complete. This seems to be conceded under the statute of North Carolina, for section 76, c. 119, Laws 1895, permits an injunction to lie if the tax is levied for an illegal or unauthorized purpose, or be illegal or invalid. The issue in this case is, is this tax illegal or invalid?

This brings us to the merits of the case. The tax in question is levied by the city of Asheville under the authority of the legislature. As municipal corporations in themselves have no authority to levy taxes, and derive all their authority to this end from the legislature, we must look to the act of the legislature, and determine whether or not that is in conflict with the constitution and laws of the United States. If the action of the legislature be invalid, nothing that the municipality can do under it can cure the invalidity or restore it to life. Were this not so, the municipality, the creature of the legislature, could amend and control the act of its creator. The act of the legislature of North Carolina giving the charter powers to the city of Asheville authorizes the city to levy on "every express company, telegraph company, telephone company, gas company, electric light company, power company, street-railroad company and railroad company, doing business or having an office in said city, a license tax." Act March 13, 1895, § 42, subd. 6. This is a tax on the business or calling of the several classes mentioned, and is imposed because of that business. The amount of the tax is limited. It must not exceed in amount 1 per cent. of the gross receipts of the business during the year. Now the business of the complainant corporation is that of common carrier between Asheville and points within and without the state of North Carolina; that is to say, of interstate and intrastate commerce. And this act taxes all this business. The complainant is taxed, not because some of its business is between points within the state of North Carolina, but because it does business and has an office in Asheville. Its business may be wholly interstate, yet, under the terms of this act, it must pay the license tax. It is true that, in estimating its license tax, the city council only took into consideration the intrastate business of the company. But under the terms of the act they could have made the estimate upon the whole business of the company, and we deal not with what the council did do, but with what they could have done, under the authority conferred on them. The validity of this authority, not of their action under it, is the question before us. This case is on

all fours with the case of Webster v. Bell, 68 Fed. 183, decided by the circuit court of appeals, Fourth circuit, at its May term. Let the temporary injunction issue, as prayed for in the bill.

THE NEW MARY HOUSTON.

KINEON v. THE NEW MARY HOUSTON et al.

(District Court, S. D. Ohio, W. D. July 10, 1895.)

No. 1,723.

1. ADMIRALTY PLEADING—EVIDENCE—VARIANCE.

Proof, in a collision case, that the cables of a river steamboat which went adrift were not bent to her anchors, *held* proper to be considered, although the fact was not averred in the libel; it appearing that there was no surprise, and that the attention of counsel had in fact been called to the variance before the hearing.

2. COLLISION—DRIFTING STEAMER—NEGLIGENCE.

That the cables of a river steamboat moored to a wharf, which broke loose, went adrift, and collided with coal barges, were not bent to her anchors, *held* no proof of negligence.

3. SAME—DRIFTING STEAMER AND WHARF—NEGLIGENT MOORING.

Where a wharf and river steamboat moored thereto went adrift, and collided with coal barges, *held*, that the question of the steamer's liability was one of negligence in respect to the fastenings, and that such negligence would consist in a failure to adopt all precautions suggested by skill, experience, and careful, prudent, and intelligent forethought.

4. SAME—NEGLIGENCE OF MASTER.

Where a river steamboat went adrift on a dark night at a place where there was great danger of striking bridge piers, *held*, that it was not negligence or bad seamanship for the captain, before going on deck, to first see to extinguishing lamps and stoves, for the purpose of preventing the breaking out of fires in case of collision.

This was a libel in rem by Sol P. Kineon against the steamboat New Mary Houston to recover damages resulting from a collision.

William Worthington, for libellant.

Stephens, Lincoln & Smith, for respondents.

SAGE, District Judge. This is a libel for damages by collision which occurred about 2 o'clock in the morning of Saturday, January 16, 1892, on the Ohio river, at Cincinnati. The New Mary Houston was plying regularly between Cincinnati and New Orleans. She came up the river on the evening of Thursday, January 14th, and moored at the wharfboat of the Southern Wharfboat Company, her usual landing place at the Cincinnati public wharf between Broadway and Sycamore streets. After she was fastened to the wharfboat the fires were extinguished, the "wrist" from the "doctor" (an essential part of her operating machinery when in motion) was taken out for repairs, and she began to discharge her inbound cargo and to receive her outbound cargo. About 2 o'clock on Saturday morning the wharfboat broke loose from its moorings, and, together with the steamboat, drifted down stream. At the foot of Elm street, about half a mile below where the wharfboat was moored, a collision occurred with the coal fleet of the Pittsburgh Coal Com-

pany, resulting in the breaking loose of the barge C. Jutte No. 22, owned by the interveners C. Jutte & Co., and the loss of its cargo, consisting of 12,850 bushels of Youghiogeny lump coal, owned by the interveners, the Pittsburgh Coal Company. Whether this loss resulted from the collision of the barge with the steamboat, or with the wharfboat, is in dispute, upon the evidence; the interveners claiming that it was by collision with the steamboat, while the claimants of the steamboat contend that it was from collision with the wharfboat. Another collision, which occurred about half a mile down the river, at the foot of Smith street, between the wharfboat and the coal fleet of the libelant, Kineon, caused the loss of the Walton Barge No. 539, with its cargo of 13,461 bushels of coal, and the Advance Barge No. 35, with its cargo of 12,964 bushels of coal. The Walton barge was owned by the interveners Walton & Co.; the Advance barge, by the interveners the Advance Coal Company; the cargoes, by the libelant, Sol P. Kineon. Each coal fleet was moored securely to the shore of the river. The fleet of the Pittsburgh Coal Company consisted of eight barges, in tiers of four abreast. The outside barge of the upper tier was struck. Each barge was 25 feet wide by 120 feet in length. Between the barges and the shore were floats 20 feet wide. The distance between the water's edge and the outside of this fleet was about 125 feet. The barges of Kineon's fleet were in three tiers. The upper tier was five barges abreast; the middle tier, four barges abreast,—the outside barge being on a line with the outside barge of the upper tier; and the third tier consisted of but a single barge, which was strung behind the outside barges of the other tiers. The barges were 25 feet wide. Between them and the water's edge were floats 26 feet wide, and these were sparred out from the shore about 15 feet. The outer line of the barges was about 170 feet from the water's edge. The outside barge of the middle tier, and the sole one of the lower tier, were struck. The libel sets forth, among other things, that on the morning of the 16th of January, 1892, and for some little time prior thereto, the water in the Ohio river was, and had been, rapidly rising. The testimony is that when the Mary Houston was tied to the wharf there was considerable ice and drift in the river, and that it was rising fast. According to the statement of the superintendent of the waterworks, taken from the waterworks gauge, the river reached the following stages at the dates and hours named: January 15th, 6 a. m., 20 ft. 1 in.; 11 a. m., 23 ft. 7 in.; 5 p. m., 28 ft. January 16th, 6 a. m., 33 ft. 6 in.; 11 a. m., 35 ft. 4 in.; 5 p. m., 37 ft.

The libelants aver that, by reason of the rapid rising of the river, it became necessary, in the exercise of prudent and careful seamanship, for those in charge of the steamboat and wharfboat to use great care in fastening the wharfboat to the shore, and the steamboat to the wharfboat and the shore, and to other fixed and stationary objects, to prevent the steamboat and the wharfboat, or either of them, from breaking loose from their fastenings, or floating down stream.

They further aver that it was necessary, in the exercise of prudent seamanship, for those having the management of the steamboat to

keep up steam, so that if the steamboat should break loose from its fastenings its motion could be controlled and directed; also, that after the steamboat was moored to the wharfboat those in charge suffered the steam to go down, and the fires under the boilers of the steamboat to go out, and that the persons in charge of the wharfboat failed to use proper care in the fastening of the wharfboat to the shore, and the persons in charge of the steamboat failed to use proper care in fastening the steamboat to the wharfboat and to the shore, and to other fixed and stationary objects.

The libel then sets forth the breaking loose of the steamboat and wharfboat from their fastenings, their drifting, and the collision above referred to. It is charged that the collisions were occasioned by the negligence, inattention, and want of proper care and skill on part of the steamboat, her master and crew, and on the part of the wharfboat, her master and crew, and not from any fault, omission, or neglect on the part of the barges injured, or of any of the persons having charge or care thereof, or of either of them. The claims for damages are then set forth.

As to the stage of the river, and its rising, there is no conflict in the evidence. Nor is there any question that, when the steamboat and the wharfboat broke from their fastenings and went adrift, the steamboat was held by her fastenings to the wharfboat until they were parted by the shock of the collision with the Elm street fleet. This fact is sufficient evidence that the steamboat was securely moored to the wharfboat, especially as the testimony is that due care was exercised, and that all precautions usual and customary in such stage and condition of the river as is shown by the evidence were taken. The testimony is that it was customary and necessary to clean out the boilers on each trip, and for that purpose the fires were suffered to go down. The wrist of the doctor was at the same time taken out for repairs. It was proper to do this, in the exercise of due care of the machinery of the boat. There was nothing extraordinary in the stage of the river, nor in the rate of its rising. Under such conditions, driftwood, and, at that time of the year, floating ice, might have been expected. The evidence does not indicate that the ice was in such quantities as to endanger the safety of vessels, or to require that steam should be kept up.

Counsel for libelant relies upon the fact that the cables of the steamboat were not bent to the anchors. Counsel for the claimants objects that there is no averment in the libel of the fact, and cites *The Marpesia*, L. R. 4 P. C. 212, 213, etc. The court there held:

"If a plaintiff in a collision suit intends to rely upon a particular act of negligence by the defendant, he is bound specifically to allege that act in his pleadings; and it is not sufficient that the act may be included generally in an allegation in the pleadings which does not clearly state such particular act, as it is likely to mislead the defendant, and prevent his being prepared to meet that particular case."

That case was decided, and such was the rule, before the enactment of the judicature acts. *The Ann*, Lush. 55; *The North American*, Swab. 358; *The Haswell*, Browning & L. 247. See, also, *The Hochung and The Lapwing*, 7 App. Cas. 512. The rule has, however,

been so modified as now to apply only as far as its nonobservance has made it impossible for the respondent to meet the case brought by the libellant. *The Alice and Rosita*, L. R. 2 P. C. 214; *Mars. Coll.* 307. In this case there has been no surprise on this point. More than the usual time was devoted to the taking of testimony, and the variance in the evidence was brought to the notice of claimants long before the cause was brought to hearing. It cannot now be recognized as open to objection. But while prudent seamanship requires that the cables of a seagoing or lake vessel should be bent to the anchors, which may at any moment be required for use, and are often necessary for mooring purposes, on river steamers anchors are seldom brought into requisition. The river steamer is within easy reach of the shore, to which or to a wharfboat it is moored. The anchors are comparatively small and light. Those on the *Mary Houston*—so the captain testifies—were rated at 900 pounds, but actually weighed less. They were carried on the forecastle, and the lines were stowed under the barricades, as is usual on river steamers, so that their strength may be preserved. They can be quickly made fast to the anchors, as is evident from the fact that they were made fast, by order of the captain, before the first coal fleet was struck, and were cast after the steamer and the wharfboat were parted by the force of the collision. Besides, it may be doubted whether the anchors, although heavy enough to hold the steamer, would have been sufficient to hold both steamer and wharfboat. Whether so or not, that the cables were not bent to the anchors was not negligence.

The fastenings of the wharfboat are shown upon a diagram verified by the testimony of George E. Osborn, night watchman on that boat, and attached to his deposition. He testifies that, in addition to a head chain and a breast chain, he had out a line abreast, and two stern chains, all of the best material and made fast. The head chain was fastened by six or seven turns to two bitts on the port or shore side of the forward end of the wharfboat. These bitts were close together,—not two feet apart. That chain was to hold the wharfboat up; that is to say, to prevent it from moving down stream. The other end of the chain was fastened to one of the rings of a "deadman" (which is a heavy timber sunk in the ground some 15 or 20 feet), to which were permanently attached, by a chain, three iron rings, about a foot and a half in diameter. The testimony as to the thickness of the iron of the rings varies from one to three inches. Upon the principle that authorizes a judge at law to send a jury to inspect the premises, I proceeded to the spot, and, by inspection and measurement, found that the iron of the rings is two inches in diameter. There was also a breast chain which led, quartering from the capstan, near and outside the bitts on the forward end of the wharfboat, up the slope of the landing, and was there made fast to the ring of a "deadman." These and other deadmen were placed in the public wharf by the city to enable wharfboats and other craft to make their fastenings. On the wharfboat end of the breast chain was a frog hook, by means of which it could be made taut, the chain being too heavy to be pulled by hand. As

it was pulled in, it was given six or seven turns around the capstan, and fastened by the hook and an iron belt. Then there was a breast line,—an inch and a half cable,—which ran out to the bank, and was fastened there, having been made fast around a stanchion forward on the wharfboat. At the stern of the wharfboat there were two chains made fast to bitts on the boat, and to deadmen rings on the shore. These were tightened by the use of the capstan. The boat was made fast by tightening all the chains and the breast line about 11 o'clock p. m. of the 15th, which was about three hours before she went adrift. The testimony is overwhelming that the fastenings were ample, and that the chains and cable were properly placed and secured. Such fastenings had been found sufficient to hold the wharfboat through the floods of 1883 and 1884, and they had held it when four steamers were moored at one time to it. At another time they had held on a rising river the wharfboat and the Thomas Sherlock,—a much larger boat than the Mary Houston, and having on board 800 tons of freight, whereas the wharfboat and the Mary Houston together did not have over 300 tons of freight. The evidence of witness after witness—experienced river men, some of them called for libellant—is that the fastenings were everything that skill and experience and prudent forethought could suggest, and that there was nothing lacking in care and attention on the part of those in charge of the boat. The head chain was one of the heaviest and strongest on the river. It was permanently attached to the ring of the deadman by means of a clevis. It was customary to use it when the ring was under water, and such use was in accordance with the general usage in such cases. It is suggested that some of the witnesses are interested, and that they are clannish, and biased by their employment in and relations to river navigation, and that, therefore, their testimony should be disregarded. But, since the law has almost everywhere reversed the old rule which made interest a disqualification, it will hardly do to discard testimony because it is given by interested witnesses. We can only look to their interest or bias that we may properly weigh and test their evidence. In this case the consensus of opinion, as expressed in regard to the fastenings, is so general as to carry conviction that it must be veritable and well founded. The only satisfactory conclusion that can be drawn from it is that there was no negligence or want of care in providing or arranging and securing fastenings to hold the wharfboat. But the claim for the libellant is that as the coal fleets were moored to the shore, and the steamboat and wharfboat were vessels in motion, the latter are liable for damages caused by collision with them, respectively, unless they can show that the collision resulted from inevitable accident; citing *The Louisiana*, 3 Wall. 164, and quoting from Justice Grier's opinion, at page 173, that the *Louisiana*, having drifted from her moorings, must be liable for the damages resulting from the consequent collision, unless she could show affirmatively that "the drifting was the result of inevitable accident, which human skill and precaution, and a proper display of nautical skill, could not have prevented." The case of *The Baltic*, 2 Ben. 452, Fed. Cas. No. 823, is also cited, where Judge

Blatchford quoted with approval the definition of "inevitable accident,"—that, as respects a colliding vessel, it means a collision notwithstanding such vessel has endeavored, by every means in her power, with due care and caution, and a proper display of nautical skill, to prevent it.

In *The Grace Girdler*, 7 Wall. 196, the supreme court said that "inevitable accident is where a vessel is pursuing a lawful avocation in a lawful manner, using the proper precautions against danger, and an accident occurs. The highest degree of caution that can be used is not required. It is enough that it is reasonable under the circumstances, such as is usual in similar cases, and has been found by long experience to be sufficient to answer the end in view,—safety of life and property." Dr. Lushington, in *The Thomas Powell and The Cuba*, 2 Marit. Law Cas. 344, says, "We are not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty." Mr. Marsden, in his work on *Collisions at Sea* (page 3), defines negligence as "the failure to exercise that skill, care, and nerve which are ordinarily found in competent seamen."

In *The Olympia*, 9 C. C. A. 393, 61 Fed. 120, the circuit court of appeals for the Sixth circuit said that by the expression "inevitable accident" was meant only "an occurrence which could not be avoided by that degree of prudence, foresight, care, and caution which the law requires of every one under the circumstances of the particular case. The rule in maritime law does not differ from that at common law, where there is no contractual relation between the parties." Negligence, which is, after all, the foundation of liability, consists, in such a case as this, in the failure to adopt all precautions and means suggested by skill, experience, and careful, prudent, and intelligent forethought. It is not to be ascertained or measured by applying afterthought, subsequent to the occurrence of the disaster, and suggested by reference to its incidents, unless it appear that the suggestions should have occurred prior to the disaster to those in charge. Although the watchman on the *Mary Houston* and two watchmen on the wharfboat were on duty at the time, neither they nor any other witnesses are able to state what caused the boats to go adrift. One of the watchmen on the wharfboat testifies that not more than five minutes before the accident occurred he had examined all the fastenings of the wharfboat, and found them secure. At 11 o'clock p. m. the wharfboat had been drawn in to the shore, and the fastenings tightened. Seven men were employed in that service. The river was rising rapidly. At 5 p. m. of January 15th,—seven hours before the accident,—the stage of water was 28 feet. At 6 a. m. of the 16th of January it was 33 feet and 6 inches. If the rise was steady, it was over five-thirteenths of a foot, or nearly five inches, per hour. It is attempted to be shown for the claimants that the wharfboat and steamer were broken from their moorings by the steamer being struck by a floating raft or by floating logs. It is shown that some damage had been done up at the waterworks, some half mile above, by floating logs. It does not appear that any

raft had broken away at any point above, or was seen drifting in the river. It is shown that the starboard wheel of the *Mary Houston* was damaged, probably by floating logs, and that quite a number of logs were found under her hull, as she lay at the Kentucky shore, the day after the accident. The evidence is, as is remarked by counsel for the libellant, altogether too inconclusive to support the theory that they, or that a drifting raft, struck the steamer and tore her and the wharfboat from their moorings. That such a collision could have occurred without breaking through, or at least seriously damaging, the hull of the steamboat is incredible. Besides, the *Houston* was 280 feet long, and the wharfboat some 300 feet long and from 20 to 40 feet wide,—a heavy unwieldy, flat-bottomed craft. There were not more than 300 tons of freight on the steamboat and on the wharfboat, and it is not to be believed that any blow against the hull of the steamer which would have been sufficient to suddenly force the wharfboat against the landing, and cause it to surge back and break its fastenings, could have struck without crushing through, or at least seriously damaging, the hull of the steamer, and the hull of the steamer was not broken or damaged.

Now, let us look into the facts as they appear in evidence, and see if it is possible to arrive at an intelligent and at least probable explanation of the breaking away of the wharfboat from its moorings. The head chain, which, as has been already stated, was one of the heaviest on the river, was fastened to the wharfboat at the forward end, and near the port or shore side. It was attached at the other end by a clevis to the outer one of three links of a deadman, which, it is in testimony, would be under water at an 18-foot stage of the river. It had been under water three or four days. It was taut, and made fast to the wharfboat by six or seven turns around the bitts. Then there was a breast chain fastened also at the forward end of the wharfboat, around the capstan, and leading quartering up the bank, to where it was fastened to the ring of a deadman. Next a breast line, a cable an inch and a half in diameter, and leading from a little further back on the wharfboat directly, or at right angles with the boat, up the bank, to where it was fastened to a deadman. At the stern were two chains firmly fastened to the boat and to the links of deadmen at right angles with the boat on the shore. These fastenings held the boat so tightly that it could not move either up or down the river. As the river rose the tendency of the boat, by its buoyancy, was to rise with it; but the head chain, which being under water, was holding it down, and at the same time holding it from moving down stream,—that is to say, was pulling against the lifting power of the buoyancy of the boat, and preventing its rising with the water. The only possible relief against the tension thus resulting would be by easing the breast and stern fastenings so as to allow the boat to move up stream, and so ease the head chain. But those fastenings were so strong, and made so taut and secure, that it could not so move. The rings of the deadman to which the chain was attached were about a foot in diameter, and composed of iron two inches in diameter. The tensile strength of wrought iron is from 20 to 40 tons per square inch, according to the

quality of the iron. The testimony is that the iron of the rings was of the best quality. Against this tensile strength was being constantly exerted the force of the current upon the wharfboat and the steamer, and the continually increasing force resulting from the fact that the chain was holding the boat down in the water, and preventing its rising with the river,—in other words, against a force constantly increasing by reason of the buoyancy of the boat and the rapid rising of the river. That force would be measured by the amount of tonnage which would be required to sink the boat in the water as low as the chain held it. The great force of the strain would come upon the link; for, as to the clevis and the chain, it would be distributed, while, as to the link, its diameter of a foot gave a leverage to the pull which would make the link the first thing to give way.

I have carefully considered the evidence, and am satisfied that right here is the solution of the mystery of the accident. Whenever the combined force of the current against the wharfboat and the steamer, and of the down pulling of the chain against the uplifting power of the water upon the wharfboat, would exceed the tensile strength of the iron of the ring, the ring would break; and that, in my opinion, is what happened. The watchman on the steamer says that just as the wharfboat broke away there was a shock against the whole side of the Mary Houston, which was like a heavy blow reaching from one end of the boat to the other. It first struck the steamer aft, about the wheel house, and then, immediately, it was felt all along the side of the steamer. Upon which side the blow fell, he does not state. One of the watchmen on the wharfboat testifies that less than five minutes before the wharfboat broke away from its moorings he examined the lines, found them to be secure and taut, when suddenly there was a noise like a shot from a cannon, and then he saw the breast chain running out from the capstan, round which six or seven turns had been made, and at the same time he discovered that they were adrift. That sound, as of a shot from a cannon, can be best explained by supposing that just then the tensile strength of the iron of the ring was overcome, and the ring snapped. It could hardly have come from the breaking of the ring, for the water was deep enough to muffle the sound. It may have come from the sudden loosing of the head chain, or from the surging of the wharfboat against the steamer. It is in evidence that the head chain was not broken, and that, while no broken link was found, one of the three links of the deadman was missing. The immediate result of the breaking of the link would be that the wharfboat would surge up, and, as the chain was fastened near the port or shore side of the forward end of the wharfboat, the holding down of that part would tend to lift correspondingly the stern of the wharfboat on its starboard side. When the link gave way, and the boat surged, the blow would instantly come against the part of the steamer where the witnesses say it did come,—at about the wheel house. It is also in evidence that if the head line were suddenly broken, or suddenly let loose, and the wharfboat surged, the sudden jerk would break her loose from all the other fastenings,

which would be insufficient to hold her. This solution of the casting adrift of the wharfboat seems to be the only one to which all the circumstances detailed in evidence can be made to fit. The fact appears to be, not that there were not enough fastenings to hold the wharfboat, but rather that there were more than enough. It may have been a disaster resulting from overcare,—from excessive precaution. Had the fastenings been stronger or more secure, the disaster might have been delayed, but not averted; for the force or power which caused it was constantly and rapidly increasing, and bringing the strain to a point where something must give way. Possibly, if there had been no stern chains, which, according to the evidence of witnesses, are used to prevent a boat from moving up the river, the wharfboat would have moved up, and eased the head chain, which might have prevented the accident. However this may be, no expert—not a single witness, either for the libelant or for the claimants—has referred to the theory of the case here suggested, nor does it seem to have occurred to any of them, nor to counsel. If the theory be correct, it is a forcible illustration of afterthought, not chargeable to forethought, nor furnishing the standard of responsibility by which to measure the conduct of those in charge of the wharfboat. The only suggestion made anywhere in the case with reference to the submergence of the head chain was by counsel for libelant,—that as the boat was drawn further up the wharf the tendency of the chain would be more and more to pull its head out into the stream. As to that, the uncontradicted testimony is that the head chain was permanently attached to the ring of the deadman, to which it was attached that night. Upon the evidence, it seems to be reasonably certain that the shore fastenings were strong enough and secure enough to hold the wharfboat against the out-pulling force, if there was an out-pulling force, or against any other force excepting a sudden jerk caused by the surging or lurching of the wharfboat.

Bad seamanship is charged against the captain of the New Mary Houston, on the ground that it appears from his own deposition that when roused from sleep, at the time of the accident, instead of staying on deck, giving orders, and taking measures that would lead to the stoppage of the drifting boats, he went into the cabin, and looked after the fires, occupying himself there until after the collision had occurred at the foot of Elm street, and that only then did he concern himself to go on deck and order the anchors overboard. Counsel for libelant submits that, in time of danger and peril such as that, the place for the captain was not in looking after stoves and lamps, but to the navigation of his vessel. The captain's explanation of his conduct is that the whole thing came upon him suddenly and unexpectedly, and that his first thought was to extinguish the lamps and see to the stoves, so that, if they should strike a pier of the bridge, which was the danger he feared, the steamer would not take fire, and a loss of life ensue. Everybody knows that the river steamers are as inflammable as tinder, and this was the danger that, when confronted with the emergency, presented itself to the captain's mind. In *Marsden on Collisions at Sea* (page 4), it is laid

down as the law that in all cases of sudden and great danger, not caused by a man's own negligence, he is required to exhibit ordinary presence of mind and ordinary skill, "but it is manifest that in such a case he may do, or omit to do, something which may contribute to the collision, without thereby showing himself deficient in ordinary skill, care, or nerve." Such an act of omission is held not to be negligence. In support of this statement of the law, the author cites *The Sisters*, 1 Prob. Div. 117; *The Jesmond and The Earl of Elgin*, L. R. 4 P. C. 1, 7; *The Marpesia*, Id. 212; *Vennall v. Garner*, 1 Crompt. & M. 21; *The City of Antwerp and The Friedrich*, *Inman v. Reck*, L. R. 2 P. C. 25,—and illustrates the principle by a statement of other cases. That rule applies in this case. The captain was below but a short time,—not longer than was necessary for the purpose he had in view. When he came on deck he at once gave the order to fasten the cables to the anchors. The night was foggy, and pitch dark. They could not see where they were, nor where they were going. They had been cast adrift in the night, suddenly, without their fault, and the captain was doing the best he could under the circumstances. He was not guilty of bad seamanship, or of negligence. Upon the whole case, and even if the theory above advanced be wholly untenable, the conclusion of the court is that the casting adrift of the steamer and the wharfboat was by a vis major, that the collisions resulted from inevitable accident, and that the decree should be against the libellant and the interveners, with costs; and it is so ordered.

MCCORMICK HARVESTING MACH. CO. v. C. AULTMAN & CO. et al.

SAME v. AULTMAN, MILLER & CO. et al.

(Circuit Court of Appeals, Sixth Circuit. July 2, 1895.)

Nos. 171, 172.

1. PATENTS—INTERPRETATION.

It is not material that a patentee has not described in full all the beneficial functions to be performed by the parts of his machine, if those functions are evident in the practical operation thereof, and are seen to contribute to the success of his device. *Eames v. Andrews*, 7 Sup. Ct. 1073, 122 U. S. 40, followed.

2. SAME—PIONEER PATENTS—INFRINGEMENT.

The rule as to infringement of patents for pioneer inventions, which point the way to new products or results, is analogous to that applied to cases involving process patents, in which the discoverer is only required to point out one practicable method of using his process, and may claim tribute from all who thereafter use the process, whether with his apparatus or with a different or improved means.

3. SAME — LIMITATION OF CLAIMS—USE OF REFERENCE LETTERS — PIONEER PATENTS.

The mere use of reference letters in the claims of a combination patent does not of itself, where the invention is really of a primary and pioneer character, limit the scope of the claims to the exact form shown. On the contrary, nothing will restrict a pioneer patentee's rights, save the use of language in his specifications and claims which permits no other reasonable construction than that he positively intended to limit the scope of his invention to the particular form shown, thus indicating a willingness to abandon to the public any other form. 58 Fed. 773, reversed.

4. SAME—INFRINGEMENT SUITS—ESTOPPEL BY GRANTING LICENSES.

Defendants set up, as anticipating the patent sued on, another patent owned by complainant. It appeared that this patent, together with numerous others relating to the same art, owned by complainant and other parties, had by agreement been conveyed to a trustee to issue licenses to others for the use of all the patents, and that in this way licenses had been granted under the alleged anticipating patent, but not to the defendant. *Held*, that complainant was not estopped by reason of such licenses from showing, as against the claim of anticipation, that the patent in question was inoperative; and that the fact of such licenses was only evidential in character, as an admission, and its force as evidence was rebutted by the character of the arrangement under which the licenses were granted.

5. SAME—SURRENDER FOR REISSUE—REJECTION OF REISSUE CLAIMS—EFFECT ON ORIGINAL PATENT.

Quære: If a patentee applies for a reissue of his patent, and includes among the claims under the new application the same claims as those which were included in the old patent, and the examiner of the patent office rejects some of such claims, and allows others, both old and new, does the patentee, by abandoning his application for a reissue, and by procuring a return of his original patent, hold his patent invalidated as to those claims which the examiner rejected? (The above question is certified by the circuit court of appeals to the supreme court for decision.)

6. SAME—AUTOMATIC GRAIN TWINE BINDERS.

The Gorham patent, No. 159,506, for an automatic grain twine binder, was not anticipated by the Spaulding patent of 1870, or any other patent; nor was it strictly limited by anything in the prior art to the exact forms of construction shown. On the contrary, it was a primary invention of high merit, obtaining results wholly new, and in a different way. The patent is therefore entitled to a liberal construction. Claims 3, 10, and 11 analyzed and construed, and *held* infringed, and claims 25 and 26 *held* not infringed, by the Appleby binder. 58 Fed. 773, reversed.

7. SAME.

The Baker reissue, No. 110,106, for an improvement in twine binders, is void for want of invention.

Appeals from the Circuit Court of the United States for the Western Division of the Northern District of Ohio.

Robert H. Parkinson, for appellant.

Thomas A. Banning (Edmund Wetmore, U. L. Marvin, and Ephraim Banning, of counsel), for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. These are appeals from decrees dismissing two bills brought to restrain the future infringement of two patents, and to recover damages for past infringements. See 58 Fed. 773. The complainant, the McCormick Harvesting Machine Company, is the owner of patent No. 159,506, for an automatic grain twine binder, issued to Marquis L. Gorham, February 9, 1875, and of patent No. 110,106, for an improvement in twine binders, reissued May 9, 1892, to W. R. Baker. The principal defendant in one action was C. Aultman & Co., and in the other was Aultman, Miller & Co. As there was a close business relation between these two defendant corporations, the actions were by agreement of counsel treated as one suit, and heard as one cause.

The court below dismissed the bill as to the Gorham patent—First, because the examiner of the patent office had refused to allow the claims of the old patent, here alleged to be infringed, on an application for a reissue of the patent made by Gorham's executrix in 1881, whereupon the application was withdrawn, and the old patent was returned to the patentee; and, second, because, in view of the prior art, the language of the claims involved must have a construction so limited as not to embrace the defendants' machines. The bill, so far as it sought relief from infringements of the Baker patent, was dismissed on the ground that the patent was invalid for want of novelty and invention. 58 Fed. 773.

In the discussion of the Gorham patent and its infringement, for a reason which will become obvious, we shall first consider the second ground upon which the conclusion of the circuit court rested, namely, that, even if the application for a reissue be disregarded as an estoppel, the machines of the defendants do not infringe the claims of the Gorham patent. The object of the Gorham invention was stated in his specification as follows:

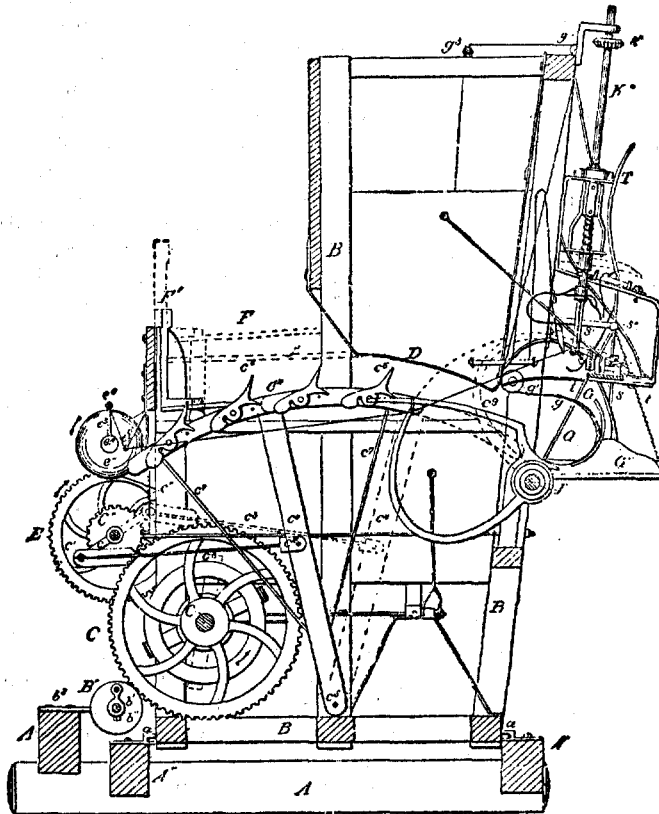
"The object of this invention is to produce a machine for binding grain that will automatically receive the cut grain from the harvester, determine the size of the gavels or bundles, perfectly and securely tie the bundles, and, when so tied, discharge them from the machine, without any interference or agency other than the machinery that operates it."

In 1874, when Gorham filed his application, there had been upward of 200 devices patented which had the object thus stated, but not one had successfully accomplished it in a practical way in the harvest field. There were two or more machines, patents for which had been taken out at an earlier date, which bound bundles of varying sizes automatically with wire, but they were wholly useless for twine, because of the great tension upon the binding cord necessarily involved in the principle of their operation. The disadvantages connected with the use of the wire as the binding material hardly need to be stated, because so obvious, and were shown with emphasis by the fact that, until automatic twine binders were invented, nearly all binding was done by hand, and when automatic twine binding became practicable, the few wire binders went entirely out of use. Grain, as it is cut by the knives of the harvester, usually falls on a platform moving at right angles to the direction of the horses and master wheel, and, after it crosses the space behind the knives, is automatically elevated over the master wheel by endless apron or otherwise, and is thence discharged downward onto a binding table. Until a practicable automatic twine binder was made, the binding was done by hand. In many cases the binders rode on the harvester, taking the gavel from the binding table and binding it there. In other cases, what was called a "hand binder" was used. In using this, an operative adjusted the gavel for the machine, then actuated it by his hand, and this bound the bundle. The great aim of all inventors was to produce a machine which should automatically form the gavels, bind them with twine, and should discharge them, thus bound, by the same power which pulled the harvester, cut the grain, elevated it, and cast it on the binding table, to wit,

the horses. The difficulties to be overcome in reaching this result were principally in the condition of the grain as it was delivered up the elevator of the harvester onto the table. It was rarely, if ever, presented to the binder with the stalks regularly arranged in parallel lines. The heads, waists, and butts seldom reached the gavel-forming and binding mechanism at the same time. The stalks were so intermingled often as to form a tangled web. The diameter of a gavel cut off from the mass by a separator cleaving down through it the entire length of the stalks at right angles to its line of movement would vary greatly at the heads, butts, and waists, and therefore any automatic devices which, in forming and sizing the bundles, acted on the butts, waists, and heads at the same time, failed to produce bundles of the same size at the waist, where the binding was to be done, and where uniformity in size was essential to secure a proper operation of the binding mechanism if twine was used.

Having said so much about the problem which Gorham sought to solve, we come to his machine, a vertical sectional view of which is given in Fig. 5 of the drawings of his patent.

Fig. 5.



The Gorham binder is supported on the longitudinal sills of the harvester, which are extended for the purpose, so that the grain receptacle of the binder is brought into position to receive the grain as discharged from the harvester elevator. It is supported on ways with an adjusting lever, by which it can be slid backward and forward, by the hand of the driver, for the purpose of bringing the packing and tying mechanism into such a position with respect to the elevator of the harvester that the grain shall be received by this mechanism at the proper distance from the butts and heads of the grain, whether the grain be long or short. The grain is first delivered from the elevator of the harvester into a trough-shaped receptacle (F in the drawing) lying beneath and forming the front of the binder. In the bottom of this receptacle are two curved ribs, onto which the grain drops. Between the ribs lie two segments of a circle, designated in the drawing as C⁴, each of which is mounted on arms pivoted at their lower end to the frame of the binder. In front of the machine, and beneath the receptacle above described, is an iron shaft extending the entire width of the machine, with two cranks on the shaft set 180 degrees apart. Each of these cranks is connected by a pitman with the arm of one of the segments. When the shaft is revolved, as it is by a gear connection with the master wheel of the harvester, the two segments are forced to reciprocate in opposite directions, one advancing while the other is retreating. Each segment is provided with teeth, marked C³ on the drawing, which are pivoted upon it near their centers in such manner that the point or acting part of the teeth will catch against the grain which is dropped upon the curved ribs when the teeth are moving from the front towards the rear of the binder, and will drop down and not disturb the grain when they are moving from the rear to the front of the binder. The result of the movement of the shaft is that the teeth on one of the segments are going forward while those on the other are retreating, and their operation is to seize wisps of grain and force them towards the rear of the machine. And this effect will continue so long as the shaft revolves and any grain is lying upon the curved ribs. At the back of the receptacle above described into which the grain flows from the elevator of the harvester, and immediately over the path of the teeth-bearing segments, are two flat strips of iron, described in the specifications and drawings as the guides, D, secured at each end to upper cross bars of the binder frame. These guides, D, extend in a curved line, parallel and concentric with the line of the ribs and segments beneath, to what is called the binding or bundle receptacle, G, of the machine. The wisps of grain seized by the teeth pivoted on the segments are carried into the throat or passageway formed by these guides, D, and the ribs and segments beneath, and are pressed through the throat into the bundle receptacle. This receptacle is nearly circular in form, being formed on one side of a curved end of a piece, C², extending from between the ribs towards the receptacle, G, and, on the side opposite, of a flexible strap, g, with a stiff metal curved piece, G', immediately behind it. The strap at its upper end is attached to a cord, g', which, by a system of pulleys, passes up over the machine,

and is secured to the upper end of an arm called the "trip lever." The trip lever is held in position by a coiled spring, so that the flexible strap takes an upright or nearly an upright position against the incoming grain, and is held there by the yielding pressure of the spring until the force of the grain against the strap as it is pressed rearward, by the segment teeth overcomes the tension of the spring and trips the lever. Thereby a clutch is operated, and the binding mechanism proper is thrown into gear with the master wheel of the harvester. The binding mechanism consists, first, of the needle or cord-bearing arm working on a rock shaft beneath and in front of the binding receptacle. The needle is a curved arm of sickle shape, one end secured to the rock shaft, L, and the other having an eye in it, and a grooved path back of the eye, in which lies the cord which it carries. The point or eye of the needle, when not in operation, is just below the two ribs and the two teeth-bearing segments, and between them. When the needle or binding arm is set in motion, it pierces the grain moving in the throat above described, and passes through the slot between the two strips of iron, called the "guides," D, which form the roof of the throat, and which strip the point of the needle of any grain which may adhere thereto. The point of the binding arm passes rearward over the binding receptacle, registers with a knotting bill which forms another important part of the binding mechanism, deposits the cord which it carries upon this bill, and fastens it in a cord holder located just beyond the bill in the path of its movement. The rearward movement of the needle carries its sickle-shaped arm across the mouth of the binding receptacle, and compresses the grain therein contained against the stiff resisting arm, G', forming the back of that receptacle.

The cord with which the grain is to be bound extends from a reel suspended on the front part of the binder, through the eye of the needle or binding arm, across the binding receptacle, to the cord holder beyond the knotting bill above referred to, so that the grain, as it is forced into the binding receptacle by the segment teeth, lies on the cord, and the movement of the needle upward through the grain carries the cord completely around the grain which is to be bound in the bundle receptacle, and back again to the knotting bill and cord holder, where the knot is tied. By a system of cams on the knotting-bill shaft and otherwise, the movements of the various parts of the binding mechanism are so timed that, after the powerful compression by the binding arm of the gavel or bundle, the slack of the cord thus caused is used to make the knot, and then an arm actuated by the revolution of the knoter shaft, and carrying a knife and a stripping device, cuts the cord and strips it from the knotting bill. Immediately two clutches, securing the floor of the platform, upon which rests the back part of the binding receptacle, to the machine, are released, the binding receptacle opens outward at the bottom, swinging on a shaft above it, to which it is hinged. Two bent arms or fingers, attached to the platform on each side of the binding receptacle, by the swinging of the platform strike downward against the bundle hanging in the opening thus made, and throw it to the ground. The motion imparted to the binding mechanism continues

by the same system of cams, and returns the floor of the platform to its former place, the clutches resuming their hold, while the needle arm swings back to its place beneath and between the ribs and the teeth of the segments, with the cord again extending through the needle eye to the knotting bill and the cord holder, and lying as before in the bundle receptacle, so that the grain is again packed over it therein. To prevent the teeth of the segments from continuing to thrust the inflowing grain forward in the throat after the needle rises and the binding begins, a cut-off, F', is provided, which lifts all the grain not embraced within the sweep of the rising binding arm out of the range of attack by the segment teeth. It consists of a vertically moving rack, suspended in the primary receptacle, F, where the grain flows in from the harvester. The iron rods forming the rack are made parallel with each other and with the line of the ribs and segments, and are open towards the needle arm, and, when the rack is in its usual position, rest on the floor of the primary receptacle below the ribs and segments; but, when it is lifted, the rods, as they rise, take up the grain from off the ribs and hold it suspended out of reach of the teeth of the segments. After the platform has risen, the segment teeth carry all the grain that remains on the ribs between the needle and the binding receptacle into the latter, and thus clear the ribs. This effects the complete separation of the gavel or bundle to be bound from the unbound grain flowing into the primary receptacle from the harvester elevator. When the needle returns to its place beneath the throat between the two receptacles, the gear connection by which the cut-off was elevated is detached, and the cut-off falls of its own weight, bringing the grain which has accumulated on it during the binding operation within the reach of the teeth of the segments, and the operation of seizing the grain wisp by wisp, compressing it in the throat, and forwarding it to and packing it in the binding receptacle proper, is resumed. The binding mechanism of Gorham's binder is set in motion by the pressure of the grain in the binding receptacle against the flexible strap. This pressure is at the waist of the bundle, and is necessarily in direct ratio to the size of the waist, the pressing and packing force of the segment teeth being substantially uniform. From the time the grain is delivered from the harvester elevator, with the center of its stalks opposite the tying mechanism, until the bundle is bound, the entire power of the master wheel of the machine is applied at the middle of the grain stalks, and only there, to secure compactness and uniformity of size in the waist of the forming bundle. The steps are three: First, the segment teeth separate the tangled grain into the wisps which are snatched at their middle from the mass; second, the teeth reunite these wisps at their middle by forcing them through the throat formed by the segments and the guides, D, and into the bundle receptacle, against the strap, g, where the forming waist overcomes the spring and trips the lever; third, and finally, the binding arm compresses the bundle at its waist against the sturdy resistant, G', just before the knot is tied. The result of this treatment of the grain is that the bundles are always of the same size at the waist, whether the grain being cut is thin

or thick, short or tall. There is little, if any, tension of the binding cord in forming or compressing the bundle.

It is strenuously objected that none of the functions, except that of conveying, which we have attributed to the segmental teeth and the guides, D, are performed by them, and that Gorham did not intend they should be. It is true that Gorham does not describe the wisp by wisp seizing function of the segmental teeth, and he does not allude specifically to the fact that the guides, D, would compress the wisps of grain as they were forced forward through the throat into the binding receptacle at their waist, and thus effect an initial or preliminary compression. The court below held that, in the mind of the inventor and in fact, the segmental teeth were only conveyors, and had no function to perform in connection with the packing of the grain at its waist. We cannot concur in this view, nor do we think that the patentee in his specifications limits himself to this one function. The specifications describing the operation are as follows:

"The binding cord being in place, by passing it from the spool through the guides, over the cord carrier, and through its eye, over and beyond the hook of the knot tier to the cord holder, and there securely held, the binder adjusted properly upon the frame of the harvester to deliver the grain centrally with the line of the knot-tying device, the machine is put in motion by the forward movement of the harvester. The cut grain flows into the receptacle of the binder, and is fed towards the bundle receptacle by the movement of the feed dogs and against the curved holder, binding cord, and adjustable binding strap, which, when the unbound grain is pressed against the strap sufficiently, causes the trip lever to which it is attached to move and allow the other parts of the device to operate. As the movement of other parts is now effected, a vertically working rack in the receptacle is raised, which holds back the inflowing grain, while that which has passed off the rack is advanced by the feed dogs to make a clear open space behind it, so that the cord carrier can grasp it and compress it in the binding receptacle while the knot is tied on the cord that surrounds it. * * * The feed dogs force the grain from the point where the long central finger of the rack parted the grain forward of and beyond the end of the cord carrier, opening a space through which the cord carrier and cord safely pass without obstruction by the straw."

It seems to us manifest from this language and the necessary operation of the machine that Gorham intended that his feed dogs should discharge, not only the function of conveying the grain, but also that of packing it under the guides and into the binding receptacle. Their movement reached quite beyond the head of the needle, and down towards the receptacle. No other means for creating the pressure against the triggering resistant is shown or suggested. It is not stated that the grain is compressed against the guides, D, but their form and direction make it a necessary result of the mechanism described. The same thing is true of the wisp by wisp snatching function of the segmental teeth. The evidence satisfactorily shows that this is, and must be, the operation of these teeth. It is not material that Gorham did not describe in full all the beneficial functions to be performed by the parts of his machine, if those functions are evident in the practical operation thereof, and are seen to contribute to the success of his device. *Eames v. Andrews*, 122 U. S. 40, 7 Sup. Ct. 1073. It is difficult to believe that a man of Gorham's inventive genius did not perceive the useful functions which the parts

of his machine so well performed, even though he did not specifically mention them all.

An argument is made by counsel for the appellees that there is nothing in the Gorham patent which would prevent an infringement of that patent by the use of three conveyers with toothed segments. Whether such a device would be operative, and, if operative, would be an infringement of the Gorham device, is entirely aside from the point. The machine described by Gorham in his patents is a machine in which the conveying, the packing, the compressing, and wisp snatching are all done at the waist of the bundle, as well as the binding, and it is the size and pressure at the waist of the bundle which determines the time of the tripping. It is a plainly unsound argument to say that, because Gorham does not expressly limit his patent to the device which he actually shows, with only one system of conveyors, packers, and compressors at the waist of the bundle, therefore he is not entitled to the benefit of the invention involved in the use of one. The whole structure of the patent, with the manifest principle of its successful operation, excludes the possibility that Gorham did not rely on the waist compression and treatment of the grain as a main feature of his patent.

As already stated, the prior art before the Gorham invention embraced some 200 patents for the automatic binding of grain. In this large number of patents, the Gorham patent was the first which successfully bound grain with twine in the field. It is vigorously contended, however, that in this very extensive history of the art there was much so suggestive of Gorham's forms that he is entitled to nothing but a literal construction of his claims. For the purpose of fully considering the weight of this argument, we propose now to examine those forms in the prior art which are relied on as anticipations or suggestions of the parts of Gorham's machine.

The first patent relied upon as an anticipation of the segmental teeth is the Glover patent of 1858. It was a machine for conveying or elevating grain. It consisted of a frame within which were arranged three pairs or more of toothed parallel bars, so connected to two crank shafts that when the shafts were revolved they gave to the bars in each series an alternating vertical and longitudinal motion, which carried the grain resting on the bars in the direction of the rotation of the shafts. The bars were bent upward at one end beyond the second crank shaft, so as to elevate the grain; and to prevent the slipping back and entangling of the grain, as it was being elevated, a shield was suspended by a spring over the elevating part of the bars and parallel to the upward movement of the grain. The shield held the grain to the spikes of the bars as it was carried up, but when it was necessary, to avoid choking, it yielded and allowed the excess to pass through. The shield was curved outward at the lower end, to allow the grain to pass under it. The Jones and Low & Adams patents were very similar to the Glover patent. They each had three pairs of alternating bars with teeth. In the Jones patent, a covering to the elevating bar was provided, quite like the shield of Glover. Instead of a shield, Low & Adams provided what are called "grates," secured to the frame by springs,

and pressing the grain to the teeth. In these devices, also, the grain was delivered to the binding table to be bound by hand. The Whitney patent was for the same purpose, but was somewhat differently arranged. The bars were in three pairs or series, but the crank shaft was used to give them a reciprocating sliding motion forward and back, but no vertical motion. Teeth were pivoted to them, so that when the bars were sliding forward they would catch the grain and push it on, but when retreating the teeth would be lowered, and would pass under the grain. Many other forms of grain elevators are shown in the prior art, some with endless belts with spikes in them, and others with two endless canvas aprons with cleats athwart them, working in the same direction, and carrying the grain between them, but none of them is as much like Gorham's toothed segments as those already mentioned.

None of these patents can, it seems to us, narrow the scope of the invention of Gorham in the use of his toothed segments in his organization. The prior devices were merely for elevating and conveying the grain. They neither effected nor were intended to effect the compression of the bundle at the waist, and the pressing and packing of the same against a triggering resistant. They effected no wisp by wisp separation, for this is impracticable in any device which attacks the tangled mass of cut grain at both ends and the middle. Manifestly, a snatching at the tangled mass of irregularly deposited grain at the same time at the heads, butts, and waists would pull the whole as a mass, rather than separate wisps therefrom. Gorham's toothed segments undoubtedly had a conveying function, and to this extent these prior devices suggested his different form; but the segments with the guides, D, also had the waist separating and packing functions, which were absent in the prior art. The shield of the Glover device and the grate of Low & Adams had some apparent likeness to the guides, D, of the Gorham patent, but in function there was but little resemblance. In the two prior patents, these coverings of the conveying devices were spring yielding, and were used to hold the grain to the straight teeth of the conveying bars on the inclined plane up which they elevated the grain. They were made with springs for the express purpose of allowing choking masses of grain of unequal size to pass up from the harvester platform. They were not intended to compress the grain into a narrow throat with a view to uniformity of size at its waist, and they did not in fact accomplish this result. The guides, D, have two functions. They form the rigid roof of the compression throat, to co-operate with the packing function of the segment teeth, and they strip the needle arm of adhering grain as it passes between them on its way to the knotting bill and cord holder. Neither of these functions is performed by the shield of the Glover patent or the grate of the Low & Adams. It is said that it involved nothing but mechanical skill to reduce the three pairs of conveying bars to one, and that, this being done in the old patents, Gorham's device would be shown. This is a palpably fallacious argument. The invention consisted, not in devising means for effecting the wisp by wisp attack and compression at the waist,—the advantage of these

steps being known,—but in hitting upon a machine which for the first time showed that advantage, and made it clear that such an attack and compression would give an important initial step in the formation of a bundle which should be uniform in size at the point where uniformity alone was needed. After Gorham had shown by the successful operation of his machine this mode of properly preparing a bundle, it then became a matter of mechanical skill, or, it may be, tributary invention, to discover in the prior art other conveying devices, which, when applied only at the waist of the bundle, would effect the same wisp by wisp separation and packing in even a more satisfactory way than that of Gorham.

Reference was made by defendants' experts and the court below to certain prior patents for automatic binders which were supposed to limit the scope of Gorham's invention, and some consideration must be given to them.

The first is that of Watson & Renwick, patented in 1853. In this the grain was carried from the harvester platform by two endless aprons and deposited on an elevated platform, whence it slid down freely and uncompressed into the receptacle, semicylindrical in form, where it was compressed and bound. The compression was effected by the lowering upon the grain lying loosely in this receptacle of a semicylindrical frame of inverted crutches, which squeezed the bundle from end to end. The cut-off was swung across the grain passage, and the size of the bundle was determined by a certain number of revolutions of the master wheel of the harvester. The machine was not operative, and certainly embraced none of the essential features of Gorham's bundle-forming, sizing, and compressing mechanism.

In the McPhetridge patent, which was a wire binder, the grain was delivered by four endless belts upon the binding wire stretched across the orifice of a receptacle. The weight of the grain caused the wire to belly down into the receptacle. At intervals of time measured by the revolutions of the master wheel, a binding arm closed about the gavel suspended in the wire, knotting or twisting the wire and cutting it. In this patent the grain accumulating after the binding arm had crossed the mouth of the bundle receptacle was cut off by a segmental offset from the back of the arm, which is almost literally reproduced in defendants' machine as a substitute for Gorham's cut-off rack. It is evident that here we have not a single feature of the binding and compressing devices of Gorham. Such compression as there is in McPhetridge's device is effected by the wire, and this is manifestly entirely unadapted to a twine binder, where the tension must be slight or the cord will break.

In the Carpenter patent, which is a wire binder, the same thing is true. In that, the grain is elevated by two endless aprons to a point above the binding mechanism, whence it is carried down by one of the aprons, under a series of loosely swinging rollers, arranged to keep the grain from becoming entangled in the binding mechanism, and to straighten it, into a cradle, where it lies unconfined, and is taken up by a revolving rake, which sweeps it into a passageway against the binding wire. The passageway is formed on one side

by two or more compressor rods, which yield and open as the rakes sweep the gavel against the wire and press it onto the point where the binding arm, actuated at regular intervals, measured by the revolutions of the master wheel, embraces the bundle with the wire and knots and cuts it. There is no wisp by wisp separation and packing of the grain at the waist in this device. The wire itself is used to effect the waist formation, and no twine could stand the tension thus made necessary. There is no self-sizing of the bundle at the waist or elsewhere. The action of the rake is on the whole length of the bundle, and all the peculiarly Gorham features are absent.

A patent for bundling kindling wood is also relied upon as showing an anticipation of some of the elements of Gorham's patent. In it the wood is carried by two endless belts onto a series of curved plates, pivoted one above the other in a circular opening corresponding in size and opposite to a so-called bundling tube. As the wood is delivered the curved plates yield by its weight until the opening is full and the plates are bent back against the periphery of the opening, where a lever is tripped, and mechanism is set in operation which forces a plunger endwise against the wood secured in the opening, carrying the wood into a tube, where it is subsequently bound. This device does suggest the use of the weight of the material to be bound to spring a lever and to set binding or other mechanism in motion, but it has no relation to Gorham's device, and certainly has no bearing upon his mode of forming and compressing the waist of his bundle.

Another patent referred to by the court below and alluded to for various purposes by defendants' experts is the Gordon binder. This is a wire binder in which the grain is carried up an elevator and through a curved passageway into an open receptacle where it first falls or slides onto a series of bars, called "gavellers," revolving on a shaft, which are actuated at regular intervals, and so deposit the grain on them, and, turning round, are ready to receive another gavel. The gavel deposited falls on the binding wire stretched across below it, and is bound by the swinging across of a binding arm. Some pressure is effected between the binding arm and a reciprocating arm, and a cord between them, which is supposed to relieve some of the tension on the wire, but it is obvious that the original compression is almost wholly by the wire, and that this device could not be used as a twine binder. Moreover, the wisp by wisp action, the preliminary packing at the waist by the toothed segments and the guides, D, and against the triggering resistant, are none of them found here. It is sought to make the gullet of the Gordon patent, operating in conjunction with the Gordon pickers, an anticipation of the toothed segments and the guides, D, in the Gorham patent, or, at least, a justification of the use by the defendants of their pickers and their breast. The complete answer to this claim is that the roof of the grain passage in the Gordon patent was only as a means of holding the grain to the pickers as the pickers cleared the grain from the passage. Neither the pickers nor the roof had any effect to pack the grain, nor were they intended to do so. The roof extended from one end of the grain to the other

as the pickers operated on the waists, the butts, and the heads, and the effect of their co-operation was merely to throw the loose grain out of the mouth of the grain passage into a loose heap on the surface of one of the gavellers below it. They had nothing to do with the formation of the bundle or its compression at its waist.

Finally we come to the Spaulding patent of 1870, upon which the defendants have most relied as anticipating and suggesting much in Gorham's patent. The Spaulding device was for a wire binder. It had an endless apron, with cleats, to convey the grain as it fell from the knives to the foot of a vertical elevator apron with straight teeth. Opposite the elevator apron was a swinging board or flap to hold the grain to the teeth. At the top of the passageway between the flap and the elevator apron was a curved hood of thin metal, mounted on the shaft from which the flap swung. Its other end rested on the so-called binding table at the head of the grain passage. Three slots in this hood, one at each end and one in the middle, afforded to two discharging arms and a binding arm in the middle an opportunity to swing from a position of rest on the rock shaft of the hood across the passageway to the surface of the binding table opposite. The proposed action of the machine was this: The grain was to be elevated into the receptacle above the elevator passage by the elevator apron, against the binding wire stretched across the passage from the end of the binding arm on the rock shaft of the hood to the twisting and cutting device on the other side. The grain was to press up against this wire and under the hood until the hood should be lifted and the rock shaft turned. The turning of the rock shaft, by a system of levers, set in motion the mechanism holding and supporting the binding arm and the discharging arms, and swept them across the grain passage and through the flow of the upcoming grain, forming a gavel and inclosing it in the wire which the binding arm carried to the twisting and cutting device, and then sweeping the gavel on off the table. A counterweight is shown in the patent, intended to lift the shaft which carries the discharge and binding arms, after the bundle is swept off, up above the grain accumulating in the hood behind them, and to restore them to their place of rest on the rock shaft of the hood, ready to begin the binding and sweeping of another gavel. This device was claimed by the patentee to self-size every bundle with exact uniformity, and properly to bind and discharge it. In the first place, the machine suggested by the patent was a wire binder, and the use of the cord to compress the bundle at the waist would be quite out of the question in a twine binder. In the next place, the binding mechanism is conceded to have been wholly inoperative. The defendants were given full opportunity to show an operative machine for binding, and did not even attempt it. It appears further in evidence that the Spaulding machine never bound a bundle. It was an abandoned experiment. This is most clearly shown by the fact that thereafter Spaulding took out one or more patents for devices for hand binding. But, while this is hardly denied, it is said that the Spaulding patent suggested the possibility of self-sizing uniform bundles by pressure against a triggering resistant, and that the de-

vice of Spaulding was operative, to the extent, at least, of such self-sizing. After a careful examination of the Spaulding patent, we are convinced that the only suggestion contained in the Spaulding patent was the possibility that by some future invention the increasing size of an incipient bundle might be used to effect a proportionate pressure upon a trigger or trip lever, so that when the gavel was of a certain size the pressure would increase to the point of tripping the lever and operating other mechanism, till then at rest. How this possibility could be really made valuable and practicable the Spaulding patent does not show. The means provided in it for its avowed object were wholly inadequate. It is demonstrable that the vertical elevator provided in the patent will not elevate the grain to the binding table unless the flap, which is loose, is changed in form so that it flares at its lower end, and is there secured by spring connection with the frame of the machine. Unless the teeth or spikes which are shown as straight in the drawings are bent downward, the elevating apron will carry the grain around the upper roller, and down on the other side. If the teeth are bent back, then the elevating power of the apron is so much reduced that it cannot force the grain upward against the wire stretched across the passage so as to overcome the tension which the wire must have to make the mechanism operative. But even suppose that the grain is forced against the wire with sufficient force to belly the wire, and assume an incipient bundle form, the irregular mode in which the cut grain will reach the hooded chamber from the elevator apron (as to which all the witnesses agree)—sometimes heads first, sometimes butts first, and never waist first, because of the resistance of the wire at the waist—will lift the hood now at one interval and then at another, and never with any uniform relation to the size of the bundle at the waist, where it is to be bound. The experiments of the defendants to show the utility and operativeness of the Spaulding patent were limited to elevating straw, on a different elevator from that shown in this patent, into a chamber, without the wire across its entrance made necessary by his patent, onto a table differently constructed from that in his patent as to the angle of its plane. When the hood was lifted by the grain thus accumulated, and its rock shaft actuated a series of levers which swept three arms from the rock shaft across to the binding table through the slots in the hood, this was said to show the practical character of the Spaulding patent. The arms would not even sweep the dry straw from the table, and the machine became completely choked unless the operator took out each gavel with his fingers after the arms had swung onto the so-called binding table. All that the experiment demonstrated was that, if one could force grain enough under a hood mounted on a rock shaft which would yield on slight pressure, one could thereby trip a lever attached to the rock shaft, and set in motion any desired mechanism properly arranged for actuation by the tripping of the lever. The Spaulding patent showed nothing more of value to Gorham than this, if, indeed, it can be said to have furnished to him the practical means for illustrating even this not very complicated mechanical phenomenon. There was nothing in the

Spaulding patent which showed the treatment of the bundle at the waist by segment teeth and the guides, D, or their equivalent, or by compression at the waist in a receptacle like that of Gorham. The tripping feature alone is present in both, but its use is so different in mode and result, in the sizing of the bundle and its binding, that the suggestion of the feature by Spaulding to Gorham was very remote from Gorham's application of it. It is said that it would take no mechanical skill to reduce Spaulding's hood to the width of a single narrow arm operated on by the waist of the gavel, and as little to reduce the teeth on the elevator apron to a single line or belt. Thus changed, the Spaulding machine would not do Gorham's work, and would be inoperative as a binder. But concede that it would, still the change involved the highest order of invention. It would not involve invention if one knew what Gorham first showed the world, namely, that the only successful twine binder was one which, from the reception of the grain from the harvester to its deposit in a tied bundle, would apply all available power to the preliminary and final forming and compressing of the waist of the bundle, and should use such waist in its progressive growth as the measure of the alternations of the necessary intermittent mechanism.

The complainant company is the owner of the Spaulding patent, with a great many others in the same art. Some time before bringing this suit, it made an arrangement with the owners of other patents by which all were conveyed to a trustee to issue licenses to others for the use of all their patents. In some of these licenses the Spaulding patent was included as one of a number, and it is now argued that the complainant company cannot be heard to deny the operativeness of the Spaulding patent. As the defendants were not among complainant's licensees, no estoppel arises in this suit, and the fact is only evidential as an admission against complainant which can be explained or rebutted. The evidence in the case as to the Spaulding patent, and its inoperative character, in our view, completely overcomes any inference thus sought to be drawn, while the omnibus character of the licenses, including so many patents, much weakens the evidential force of the otherwise natural implication of a license that the licensor asserts the operativeness of the device licensed.

Defendants' experts maintained that the Spaulding device had been shown to be operative in a binder, known as the "Miller Binder," made and sold in considerable quantities in 1881 and 1882. The description of the Miller patent showed a wide difference from the Spaulding device, which was emphasized by the admission elicited from defendants' witnesses that, when these machines were made, the defendants who made them had no license to use the Spaulding patent.

The Gorham binder was, as already stated, the first one in the history of the art which successfully bound grain in the field with twine automatically. There is abundant evidence to show that the binder did actual and satisfactory field work on farms in 1874, in 1875, and in later years. After 1875 Gorham made one or two changes in the machine. He dispensed with the flexible leather

strap, and substituted a metallic trigger or finger in its stead, operating the trip lever by a rock shaft, upon which this finger was mounted, instead of by the cord attached to the leather strap. He reduced the number of teeth on each segment from four to three. From 1878 until the present time, automatic twine binders have been in the most extensive use throughout the civilized world. They have been called the "Appleby Twine Binder," because Appleby in 1879 secured a patent on such a binder. And this binder, with improvements, is practically the only one now in use. The defendants manufactured the Appleby binder, and the question in the case is whether the Appleby binder does not find its substantial prototype in the Gorham binder. Every manufacturer of the modern Appleby binder became a licensee of Gorham, except the present defendants, and after the complainant became the owner of the Gorham patent the defendants made a written contract with Mrs. Gorham, the executrix of Gorham, by which they agreed that if she would obtain a retransfer of the patent to herself they would buy it from her, and pay her therefor \$100,000. The original Gorham binder was a heavy, crudely-constructed machine, and bore little superficial resemblance to the modern lightly-constructed but strong and smoothly-running twine binder. But an examination of its parts and their operation convinces us that in it is the modern twine binder, modified only by the mechanical and economical skill of the manufacturer and the tributary inventive faculty of a mere improver. On the whole case, we are satisfied that the Gorham binder was a primary or pioneer patent of the highest merit, that it attained a result wholly new in a new way, and that, in the consideration of alleged infringements of it, the patentee is entitled to all the liberality of treatment accorded to that comparatively rare class of patents. With respect to such a patent, the well-settled rule is that the patentee who has, by the success of his patent, pointed out the combination of functions needed to reach the new result, and has claimed the combination of mechanical parts performing those functions, may enjoin the use of another machine producing the same result where the second machine differs from the first only in a substitution, for parts or elements in the patented device, of parts or elements which, though different in form and kind, perform the same functions in substantially the same way. It may be that the substituted parts are well-known equivalents of those shown in the patent for the performance of the functions to which they are respectively applied, in which case there is manifestly no inventive faculty shown in the change; or it may be that, being shown by the successful operation of the patent the exact nature of the functions to be performed by a part of the patented device, the infringer, by the use of his inventive faculty, hits upon something as a substitute which will perform the same functions more completely and satisfactorily. In the latter case, he is a tributary inventor; but he is none the less an infringer if he uses the whole machine, with his substituted part, to accomplish the same new result. The rule as to infringements of pioneer inventions which point the way to new products or results is analogous to that applied in cases of infringe-

ments of process patents, in which the discoverer is only required to point out one practical method of using his process, and is permitted to claim tribute from all who thereafter use the process, whether with his apparatus or with a different or improved means. In *Machine Co. v. Lancaster*, 129 U. S. 263, 290, 9 Sup. Ct. 299, the supreme court said:

"Where an invention is one of primary character, and the mechanical functions performed by the machine as a whole are entirely new, all subsequent machines which employ substantially the same means to accomplish the same result are infringements, although the subsequent machine may contain improvements in the separate mechanisms which go to make up the machine."

See, also, *Consolidated Valve Co. v. Crosby Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513; *Royer v. Belting Co.*, 135 U. S. 319, 10 Sup. Ct. 833; *Machine Co. v. Murphy*, 97 U. S. 120; *Sessions v. Romadka*, 145 U. S. 29, 12 Sup. Ct. 799; *Clough v. Barker*, 106 U. S. 166, 1 Sup. Ct. 188; *Winans v. Denmead*, 15 How. 330; *McCormick v. Talcott*, 20 How. 402, 405; *Railway Co. v. Sayles*, 97 U. S. 554, 556.

Having settled the character of the Gorham invention, and the principle to be applied in considering infringements of it, we come next to a consideration of the essential features of the defendants' machine. In it, the grain is delivered from the harvester onto what is called a binding deck or table. The table has three slots in it, underneath which is the shaft extending from one side to the other of the binder. On the shaft are two cranks, 180 degrees apart, to which are attached legs carrying at their upper ends packing teeth rigidly fixed thereto. The legs are pivoted on a radius bar, and the operation of the shaft is such that one packing tooth is advancing up and through one of the slots while the other is retreating down and under it, and vice versa. While a packing tooth is advancing, it is above the surface of the table, and while retreating is below the surface. The line of its motion is that of an irregular ellipse. On each leg are two teeth. The first tooth is sharp, and rises higher than the second, which is broader, and bears about the same relation to the first tooth as a thumb does to the finger in an outstretched hand. Immediately over the path in which the packing teeth move is what is called a "breast," or rigid roof, with which the packing teeth co-operate in the seizing, forwarding, and compressing of the grain against a yielding finger mounted on a rock shaft, which, at a certain compression of the grain, sets in motion a clutch throwing the binding mechanism into gear, and raising a sickle-shaped needle from its position of rest in the slot of the binding table between the two slots in which move the packing teeth. The needle, as it rises, pierces the grain above it, strips it in the breast or rigid roof, passes on, and carries the cord about the bundle to the knotting device and cord holder, compresses the bundle between it and the stiff back of the binding receptacle. In some forms of the machine, this stiff back is the trigger or yielding arm which, having served the purpose of a trigger, and thrown the clutch, becomes fixed in its position, and able to act as a sturdy resistant. In other forms, the trigger and sturdy resistant are two different pieces of metal. After the cord has been knotted, cut, and stripped, the binding receptacle,

instead of swinging backward, as in the Gorham machine, and leaving an opening between the main body of the machine and the platform of the binding receptacle for the precipitation of the bundle, swings on a rock shaft and hinge beneath the main frame of the binder, withdrawing the finger or fingers which form the back of the receptacle out of the way of the bundle and throwing it to the ground. Instead of the cut-off rack which Gorham used, the defendants keep the grain out of the throat or passageway after the rising of the needle by a segmental arm or curved projection on the back of the needle itself (a reproduction of the same element in the McPhetridge patent), which forms a complete barrier to the entrance of the inflowing grain to the throat or passageway while the needle or compressor arm is doing its binding and tying.

Does this machine infringe Gorham's patent? Appleby, defendants' licensor, had long been engaged before 1874 on the problem of devising a practical automatic twine binder. In that year he visited Gorham at Rockford, Ill., and examined his machine while in successful operation in the field. Subsequent thereto, he devised his own machine, after a number of unsuccessful experiments, and settled down to the form which we find in that of the defendants. His machine, as used by him in 1878, had but one packer on each leg, and this is its appearance in the drawings and specifications of the patent taken out in 1879; but, finding the machine to be inoperative in this form, he added the second tooth to each of the legs. These circumstances tend strongly to show that Appleby took Gorham's idea as developed in his patented and operative machine. When we look at both machines, we can trace a close resemblance. Part for part, element for element, function for function, the Appleby machine parallels that of Gorham.

There are five claims of the Gorham patent which the complainant avers in its bill that the defendants infringe. They are the third, tenth, eleventh, twenty-fifth, and twenty-sixth claims. The twenty-fifth and twenty-sixth claims relate to the mechanism for cutting and stripping the cord after the knot has been tied by the knotter bill, and will be considered hereafter. The other claims are as follows:

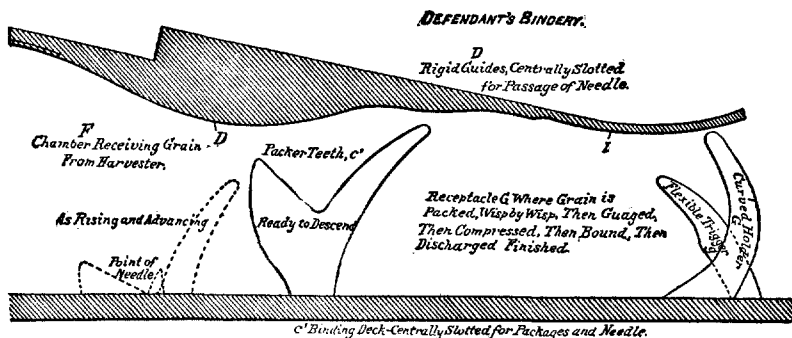
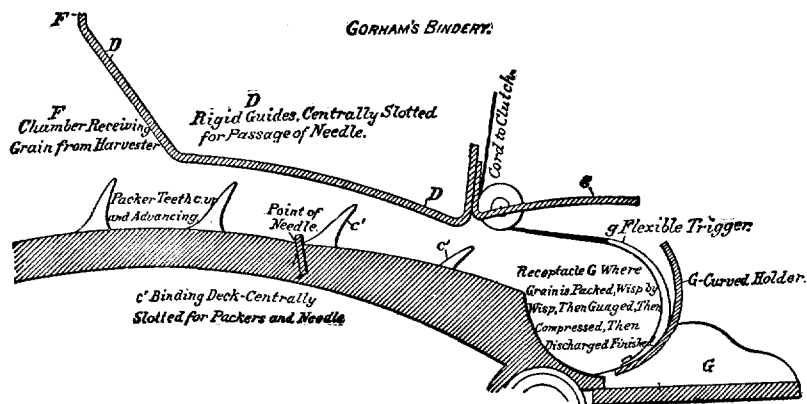
(3) "The reciprocating segments, C⁴, having the feed teeth, C⁶, in combination with the guides, D, as and for the purposes specified."

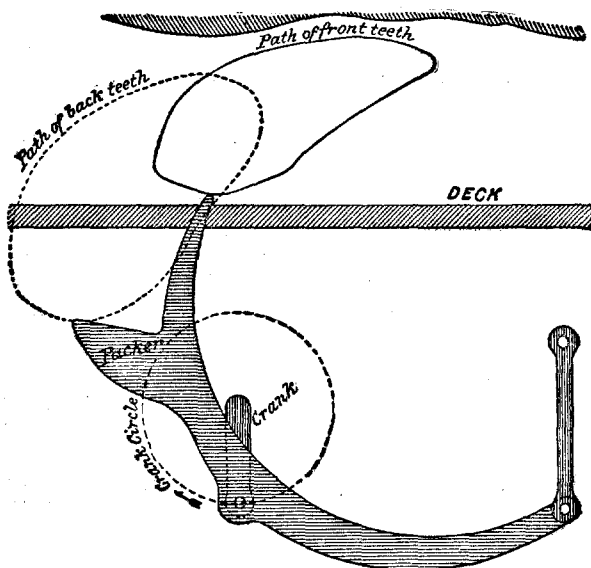
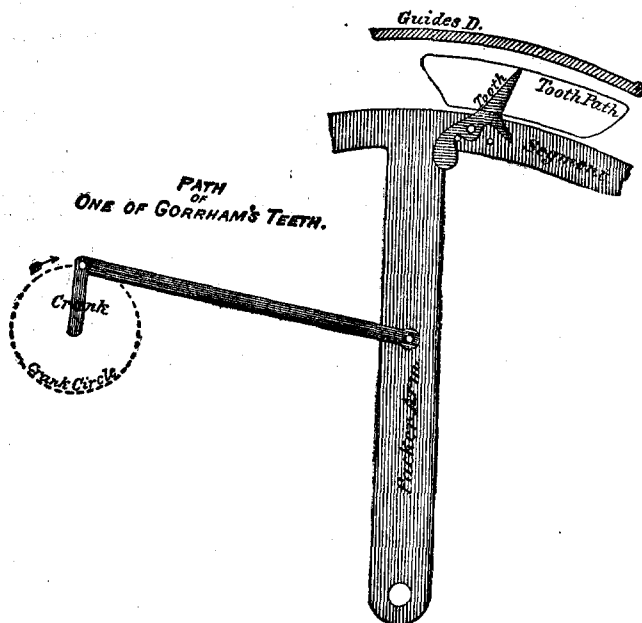
(10) "The flexible strap, g, arranged in receptacle, G, to operate trip lever, H, in the manner substantially as and for the purposes described."

(11) "The combination of the binding strap and cord, g, with the bundle receptacle, G, and tooth-feeding segments, C⁴, substantially as and for the purposes described."

We cannot doubt that defendants' packers and breast infringe Gorham's third claim, and are the equivalents of his segment teeth and guides, D. The packing teeth have a much shorter forward and rearward movement than the segment teeth of Gorham, and some other means is therefore used to bring the grain within the reach of the packing fingers after it has left the harvester. In the ordinary form of defendants' machine, this is done by inclining the binding deck downward so that gravity brings the grain to the packing teeth.

The packing teeth have the function of conveying the grain from the point where it reaches them to the binding receptacle. This is clearly shown by the fact that the machine will work even when the inclination of the deck is upward, instead of downward, from the harvester, provided only that the grain be delivered within reach of the back teeth of the packers. A very common form of the machine manufactured by the defendants, called a "low-down twine binder," has its binding deck inclined upward from the harvester. The packers, it is conceded, perform the wisp by wisp and the packing functions at the waist of the incipient bundle. They therefore discharge exactly the same functions which are discharged by the segmental feed dogs of Gorham, in much the same way. The following drawings fairly illustrate the operation of Gorham's and defendants' teeth from the mouths of the throats formed by guides and defendants' breast to their respective binding receptacles:





The defendants' experts trace the packing teeth of the defendants to the pickers of the Gordon patent, and it is true that their operation above and beneath the plane in which the grain moves is quite like that of the defendants. Gordon's pickers never, however, were used for anything but for conveying. They were never used for packing, and therefore they were never used to discharge the wisp by wisp function which is only important in the subsequent packing of the grain, and is only effective with one series of packers, while in the Gordon patent there were three series operating, not only at the waist, but also at the butts and heads, of the grain. Given a knowledge of the peculiar and useful functions of the feed dogs and guides, D, in accomplishing automatic twine binding in the Gorham mechanism, it hardly required more than mechanical skill to see in the mechanism of the prior art that the pickers of Gordon or the reciprocal bars of Jones, to which the defendants' packers are also likened, could be used to perform the same function as the segmental teeth of Gorham. It is true that these were functions which Gordon's pickers and Jones' bars had never been used before to discharge, but the fact that the Whitney feed teeth did successfully discharge those functions at once suggested that the Gordon pickers and the Jones reciprocal bars which were recognized mechanical substitutes for those teeth, would, if reduced to one series, operating upon the waist alone, effect the same or a similar result.

In *Machine Co. v. Lancaster*, 129 U. S. 263, 9 Sup. Ct. 299, already cited, Mr. Justice Blatchford said:

"It may be true that the defendant's peculiar form of stitch was unknown before; and it may also be true that his arrangement for carrying the buttons with their eyes upward, and turning the eyes into a horizontal plane by the twisting of the conveyor way, was not before known. Of course, they were not before known in a machine for automatically sewing buttons to a fabric, because Morley's machine was the first to do that. But still the defendant employs for the above purposes known devices which, in mechanics, were recognized as proper substitutes for the devices used by Morley to effect the same results. * * * In this sense, the mechanical devices used by the defendant are known substitutes or equivalents for those employed in the Morley machine to effect the same result; and this is the proper meaning of the term 'known equivalent,' in reference to a pioneer machine such as that of Morley. Otherwise, a difference in the particular devices used to accomplish a particular result in such a machine would always enable a defendant to escape the charge of infringement, provided such devices were new with the defendant in such a machine, because, as no machine for accomplishing the result existed before that of the plaintiff, the particular device alleged to avoid infringement could not have existed or been known in such a machine prior to the plaintiff's invention."

We come now to the tenth and eleventh claims. The experts and counsel on both sides agree, and we concur with them, in thinking that to sustain the tenth claim, which is for the flexible strap, g, arranged in receptacle, G, to operate trip lever, H, there must be read into it the means of pressing it into action, namely, the tooth-feeding segments, so that the tenth claim is for substantially the same parts as the eleventh claim, which is for "the combination of the binding strap and cord, g, with the bundle receptacle, G, and tooth-feeding segments, C⁴, substantially as and for the purposes described." It seems to us that into the eleventh claim should also be

read, as an element, the guides, D, because the proper co-operation of the segment teeth, flexible strap, and binding receptacle necessary to the result sought could hardly be secured without those guides. The combination claimed would then be: (1) The tooth-feeding segments; (2) the guides, D; (3) the flexible strap, g; (4) the bundle receptacle, G. The bundle receptacle, G, as described in Gorham's patent, has as its essential parts, in addition to the flexible strap: (a) The sturdy resistant back of the strap to co-operate with the compressor arm of the cord conveyor in the final compression; (b) the means for discharging the bundle after it is bound and tied. We are now to consider whether these, or substantially equivalent, elements of this combination, are found in the machines of the defendants for the performance of substantially the same functions in automatic twine binding. We have already seen the equivalents of the segment teeth and the guides, D, in defendants' packers and breast. We come then to the flexible strap, g. Its function is to assist in the waist compression of the bundle as the wisps of grain are forced against it, and then, upon the yielding of the spring with which the cord, g', connects it, to trip a lever, and start the binding mechanism. For exactly this same purpose, the defendants use a metal finger mounted on a rock shaft. The leather and the metal triggers were mechanical equivalents. The transmission of the force of compression to trip the spring lever by means of the rocking of a shaft upon which the yielding resistant was stiffly mounted was a well-known substitute for a strap and pulley. The rock-shaft connection between the yielding arm and the lever actuating the binding mechanism was suggested in the Spaulding patent. Even if it involved patentable invention to substitute the one for the other, it was but tributary invention, which did not prevent infringement, for the two devices discharge the same functions in substantially the same way. Next we come to the bundle receptacle, G. The space between the packers and resisting finger of the defendants corresponds in every function with the binding receptacle of Gorham. Here the grain is received, wisp by wisp, partially compressed at the waist by the packers and breast. Here it is still further compressed against the triggering resistant, and by the yielding spring, upon which the resistant acts, the bundle is seized at the waist. Here the cord is carried about the bundle. Here the waist of the bundle is further compressed between the compressor arm of the cord carrier and a sturdy resistant forming the back of the receptacle. In the same way in both machines, tension on the cord in the compression is reduced to a minimum. In some of the defendants' machines the two functions of the triggering resistant and the sturdy compressing resistant are performed by the same metallic finger, which, by means of the rocking of the shaft, and a rigid limit of its motion, at one time is made to serve the one purpose, and at another time the other. In other machines of defendants, there are two different metallic fingers, one the trigger, and the other the stiff compressor. In either case, it is quite manifest to us that, however great the ingenuity shown, and the degree of usefulness attained in the change from the

form of Gorham's devices, the substituted parts are but the equivalents of his in his combination; patentable improvements, doubtless, but only improvements. If in the eleventh claim, by the reference to the bundle receptacle, G, is also to be included the means for discharging the bound bundle, we have no difficulty in holding that the mode by which the bundle is discharged from the defendants' machine is, within the rules which apply to the infringement of a pioneer combination patent, nothing more than the mechanical equivalent of the means for accomplishing the same purpose in the Gorham device. The receptacle platform in the Gorham device swings outward and backward, leaving an opening below for the bundle to fall through, while the receptacle platform, or its equivalent, in the defendants' machine, swings downward and forward, out of the path and away from the bundle, which, without support, falls to the ground.

It is further pressed upon the court that the mere fact that the claims of the Gorham patent are expressed by reference to the lettered parts of the machine, as shown in the drawings, must lead to a literal and formal construction of the claims, and limit their scope exactly to the form of the device used and suggested by Gorham. This was the view of the learned justice who delivered the opinion in the court below, and he cited the cases of *Weir v. Morden*, 125 U. S. 106, 8 Sup. Ct. 869, and *Hendy v. Iron Works*, 127 U. S. 375, 8 Sup. Ct. 1275, in support of his conclusion. We are unable to concur in this application of those cases. They did not involve pioneer or even meritorious patents. They were for devices which were at the best mere improvements on previous well-known devices, and, no matter what the claims had been, they would have been limited to the particular forms therein described. In the latter case, the court found that there was no invention or patentability in the elements claimed, and, as an additional reason for holding the patent invalid, suggested that the element claimed was linked in combination with a particular form of cylinder by letter reference to the drawing, and, therefore, that, in such a case, the combination was limited to the particular character of the cylinder. Certainly neither of these cases establishes a hard and fast rule that where a patentee claims the combination of certain elements shown in his patent, describing them by reference letters in the drawings, he thereby deprives himself of the benefit of the liberal doctrine of equivalents applicable to pioneer patents, if otherwise he is entitled to its application. See *Delemater v. Heath*, 20 U. S. App. 14, 7 C. C. A. 279, 58 Fed. 414. Whether he specifically claims in his patent the benefit of equivalents or not, the law allows them to him according to the nature of his patent. If it is a mere improvement on a successful machine, a mere tributary invention, or a device the novelty of which is confined by the past art to the particular form shown, the range of equivalents is narrowly restricted. If it is a pioneer patent with a new result, the range is very wide, and is not restricted by the failure of the patentee to describe and claim combinations of equivalents. Nothing will restrict the pioneer patentee's rights in this regard save

the use of language in his specifications and claims which permits no other reasonable construction than one attributing to the patentee a positive intention to limit the scope of his invention in some particular to the exact form of the device he shows, and a consequent willingness to abandon to the public any other form, should it be adopted and prove useful. Instances of such a limitation may be found in *Keystone Bridge Co. v. Phoenix Iron Co.*, 95 U. S. 274, and in *Brown v. Manufacturing Co.*, 6 U. S. App. 427, 16 U. S. App. 234, 6 C. C. A. 528, 57 Fed. 731. But there is no such limitation in the patent under discussion, and the rule applies which was so fully explained in *Winans v. Denmead*, 15 How. 330, where the court said:

"Patentees sometimes add to their claims an express declaration to the effect that the claim extends to the thing patented, however its form or proportions may be varied. But this is unnecessary. The law so interprets the claim without the addition of these words."

Again, in *Vulcanite Co. v. Davis*, 102 U. S. 222-230, the supreme court said that a patentee was protected against equivalents, whether he claims them or not. A most satisfactory discussion of this general subject may be found in the opinion of the circuit court of appeals of the First circuit in *Reece Button Hole Mach. Co. v. Globe Button Hole Mach. Co.*, 10 C. C. A. 194, 61 Fed. 958, where Judge Putnam, on behalf of that court, examines the two lines of cases of which *Winans v. Denmead* and the *Keystone Bridge Case* are respective types, and reconciles them, so far as they may be reconciled. See, also, *Manufacturing Co. v. Adams*, 151 U. S. 139, 14 Sup. Ct. 295; *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310.

With respect to the third, tenth, and eleventh claims, we therefore conclude that they are valid, and that the defendants infringe them, unless by the application for reissue, and the subsequent abandonment of it, either the scope of the claims was narrowed to a literal reading of them, or the validity of the claims was entirely destroyed. The effect of this reissue application we shall consider later.

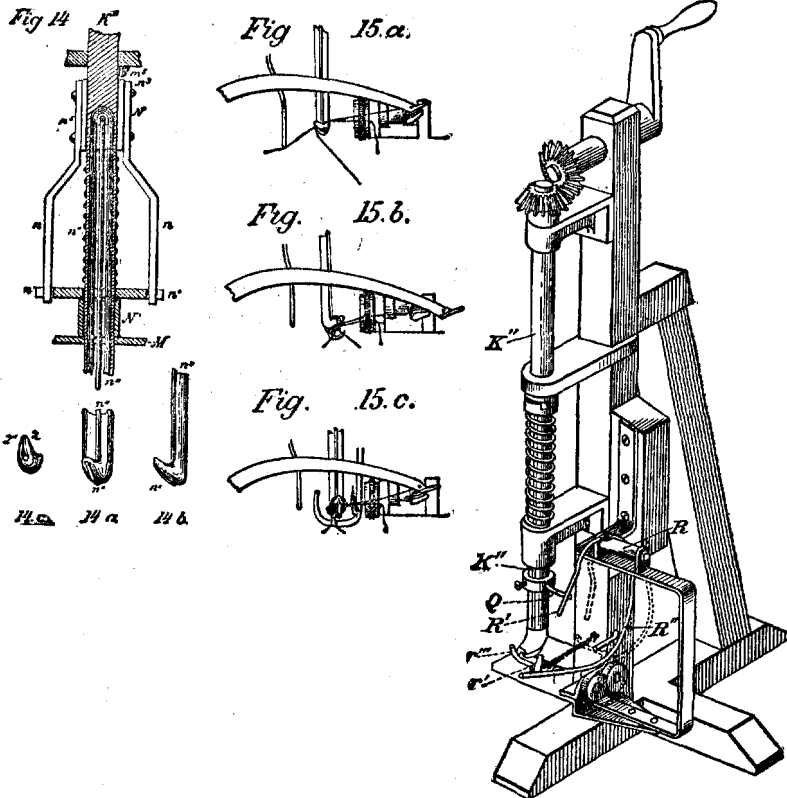
We come now to consider the twenty-fifth and twenty-sixth claims. They are as follows:

(25) "The combination of arm, Q, on shaft, K", with arm, R', and bent arm, R", on rock shaft, R, and carrying the projecting cord arm, r'", to force the cord from the knot-tying device, substantially as described."

(26) "The combination of arm, Q, on shaft, K", with arm, R', and bent arm, R", on rock shaft, R, carrying the knife, r, for cutting the cord, and arm, r'", for forcing the cord off the hook, substantially as described."

These claims relate to the tying mechanism, and to that part of it only by which the knot, after it is tied, is stripped off of the knotting or tying bill, and the cord connecting it with the cord holder is cut. The shaft, K", of the knotting bill is centrally bored to receive the shaft of the cord hook, n⁴, that extends upward into the shaft, K". The knot-tying shaft, K", has at its lower end another cord hook, z, projecting from one side and upward to receive and hold thereon the cord, so that, as the hook is revolved in tying the knot, the cord passes under the hook and forms the loop of the knot. In the lower

curved surface of hook z is a radial groove, z' , extending from the bore for the spindle that is in the center of the shaft, K'' , outward to near its terminal point. This groove is to receive the cord hook n^4 , so that the loop in the cord will pass over the cord hook n^4 , in forming the knot, as the shaft, K'' , is revolved. Shaft, K'' , is cut away on the hook side, from just above the hook, about half its diameter, and high enough to allow the cord carrier to freely pass by in compressing the bundle and carrying the cord over the cord hook. The spindle of the cord hook n^4 is so connected with the shaft, K'' , at its upward end, that as the shaft, K'' , revolves in its bearing, a cam attached to the shaft of n^4 , working against a spiral spring, slides the spindle downward and opens the bill between the cord hook z and the cord hook n^4 . The opening is so timed by the form and size of the cam as to receive the cord in the bill at the proper moment to tie the knot. Some idea of the operation may be obtained from the drawings shown below:



The arm Q is a bent projecting arm from an eye, q , around the knot-tying shaft, K'' , and revolves with it. R is a rock shaft working in bearings, rr , that are fast to top of frame, M . R' is a bent arm

attached to the rock shaft, and bending downward below the path of the revolution of arm Q, while another bent arm, R", passes on the opposite side of the rock shaft downward, and curves towards, underneath, and past the knot-tying shaft, K". On arm R", near its terminal end, is an upwardly projecting knife, r', to cut the cord, while further back from the end than the knife is a curved and upwardly projecting arm, r"', to force the cord off the knot-tying hook after the cord is cut by knife r'. r⁴ is a spiral spring fast at one end to the bent knife arm, R", and the other end fixed to the frame, B. This device for cutting and removing the cord is operated by the revolution of the arm, Q, on shaft, K", which strikes against the lower part of arm R', and carries it forward, rocking the shaft and forcing the arm R", on the opposite side of the rock shaft that carries the knife and bent arm, to advance towards the knot shaft, the knife passing on one side of the shaft, and severing the cord between the shaft and the cord-holding wheels, and passing forward until the bent arm passes on the other side of the shaft, and forces the cord off the hook; and as this is accomplished the arm Q has lost its hold of arm R', when the spiral spring, r⁴, acts to pull the knife and bent arm on arm R" back to their former position.

In the defendants' machine the means for moving the cutter and stripper is a cam flange on the face of a disk revolving, not on the knotter shaft, but on another shaft, which drives other portions of the mechanism, and which, through a beveled segmental gear, also turns the knotter shaft. This bevel gear is only segmental, and passes the co-operating gear on the knotter shaft at a different time from that when the cam operates the two-armed lever upon which is the knife and stripper, so that the knotter shaft is at rest in defendants' machines when the knife and stripper are moving, while in Gorham's they move at the same time.

Gorham took his knotting bill from a patent of one Behel, issued in 1864, in which the two cord hooks forming the bill and co-operating to hold, twist, and knot the cord were connected by a spring tending to hold them together. One of the cord hooks was pivoted to the knotter arm, the bent end of which formed the other cord hook. The bill was opened by the pressure of the knotting bill against the strained cord in such a way as to operate upon one end of the pivoted cord hook against the spring which held the two together, so that as the knotter shaft turned, twisting the cord around it, the cord ends were caught in the open bill, and as the knotter shaft continued to turn the knot was tied. Then, by swinging the knotter shaft on a segment, the cord between the bill and the knot holder was carried against a stationary knife and cut. By the swinging back of the bill, the knot was stripped off of it. There was a patentable improvement in Gorham's bill over Behel's bill, in the mode by which the cord hooks were opened by the use of a cam and a sliding sleeve, and in the working of the spindle of one cord hook in the shaft of the other. But that Behel's knotter bill suggested and was the foundation for Gorham's is not disputed. Behel used a stationary knife, against which he carried his cord by swinging his bill, and

he used the backward swing of the bill itself to strip the cord from it, while Gorham substituted the bent-arm arrangement above shown. There were in the history of the art many knot-tying devices, and in every one of them it was necessary to cut the cord and to strip it from the device which knotted it. Gorham used the revolution of the knotted shaft, with the bent arm, to operate at the right time another bent arm carrying the knife and cord along the side of and parallel to the knoter bill. The defendant did not use the knoter shaft to operate his stripping and cutting device, but took another shaft, which, at a different time from that when the stripper and knife were to be actuated, turned the knoter bill.

In Hickey's knotting device the cutter was operated on a pivoted lever moved by a cam on a shaft other than the knoter shaft.

In Greenhut's grain binder, patented in 1868, the knife is actuated by a two-arm lever which is moved upon a cam flanged on the face of a cogwheel moving on a shaft other than the knoter shaft. This is in many respects quite like that of the defendant.

We think that the state of the art was such, with reference to knotters and strippers, at the time when Gorham invented his knoter-bill knife and stripper, that he is not entitled to claim as an infringement of his knife and stripper any device substantially different in form from that which he used. It is true that the knife and stripper of the defendant is moved by the shaft which also moves the knoter shaft, and that in Gorham's the knife and stripper is moved by the knoter shaft, and that this states generally the difference between the two; but, considering the prior art, it does not state the difference with sufficient detail to prove or disprove their likeness for the purpose of deciding the question of infringement. No claim is made that the knoter bill itself is an infringement, and we are limited in this discussion to the question whether the knife and stripper infringe. Were Gorham's knoter bill and his knife and stripper pioneer patents, the resemblance between them and the same parts of defendants' machine would be sufficient, perhaps, to justify regarding them as equivalents; but they are not pioneer devices. Gorham and the defendants, or their licensor, Appleby, were acquainted with the prior art, and with that in view, they reached the same result, and one not new, in different ways. One improved on one device, and the other on another. We are considering Gorham's stripper and cutter in its character as an independent device for performing the function it discharges in his machine. The twenty-fifth and twenty-sixth claims are not for a combination of all the parts of his machine to accomplish his new result. If they were, the knoter and stripper in Gorham's machine would, of course, be an equivalent of the defendants' as an element of the combination. Considered alone, however, and not in combination, as it must be under these claims, we hold that the defendants do not infringe it.

We come now to the question, what effect, if any, shall be given to the application for reissue which was made by Gorham's widow, Helen M. Gorham, in 1881? In this application the eleventh claim was as follows:

"The combination with the receiving chamber and binding receptacle of the guides, D, and vibrating segments provided with feed teeth, substantially as set forth."

This was rejected by the patent office on the ground that it was anticipated by the patents of Elward, Childs, Gordon, Whitney, and Barta.

The fourteenth claim was:

"In a grain binder, the combination with a receiving chamber and binding receptacle of feeding mechanism and actuating mechanism constructed and arranged to pack the grain into the binding receptacle, substantially as set forth."

This claim was rejected on account of the patents of Heath, Childs, Spaulding, Whitney, and Barta.

The fifteenth claim was:

"In a grain binder, the combination with the binding receptacle of the binder-actuating mechanism a yielding strap, and intermediate mechanism for automatically throwing the binding mechanism in gear with the prime mover, and the toothed segments arranged and adapted to pack the grain into the binding receptacle, substantially as set forth."

This was rejected on the ground of the patents of Spaulding, Low & Adams, Elward, and Barta.

The twentieth claim was:

"In a grain binder, the combination with the binding receptacle of a two-armed oscillating feeding mechanism, constructed and arranged substantially as described, and outer guides, located substantially parallel to the line of movement of the oscillating feeding arms, substantially as set forth."

This was rejected on account of Low & Adams' and Elward's patents.

The thirteenth claim of the original patent was:

"The vibrating segments having feed teeth in combination with guides, D, as and for the purpose hereinbefore specified."

This was rejected on account of the Low & Adams and Whitney patents.

The sixteenth claim was:

"The combination with a binding receptacle of a feeding mechanism and actuating mechanism arranged to pack the grain into the receptacle, substantially as hereinbefore set forth."

This was rejected on account of Childs', Hannah's, and Whitney's patents.

The seventeenth claim was:

"The combination of the flexible strap with the binding receptacle and toothed feeding segments, substantially as and for the purpose hereinbefore set forth."

This was held to be incomplete, superfluous so far as to its operation, and to have been anticipated by Barta's patent.

An examination of the file wrapper and contents of the reissue application satisfies us that the examiner in the patent office held, in effect, by the rejection of the above claims, that the third, tenth, and eleventh claims of the original patent, which we have found to be valid, and to state the gist of the pioneer patent which Gorham

invented, were anticipated in the prior art. There were other claims, old and new, which the assistant examiner allowed, and this was the condition of the application for reissue when the application was withdrawn by the following letter from the counsel for Mrs. Gorham:

"In the Matter of the Application of Marquis L. Gorham for Reissue of Letters Patent Granted Herein February 9th, 1875. No. 159,506. Grain Binders.

"To the Honorable Commissioner of Patents—Sir: The above application having been refused, we request that the original patent may be returned to us, in accordance with the provisions of the law.

"Very respectfully,

Parkinson & Parkinson.

"Sept. 21, 1882."

We find from the evidence in the record and the circumstances that the action of the counsel for Mrs. Gorham and the complainant in withdrawing the application for reissue was with no intention of abandoning their alleged right to a wide construction of the claims of the original patent. We do not find in the file wrapper and contents any statements by complainant's grantor which, merely as evidence upon the construction of the original patent and its claims, would either limit or narrow them.

It is contended by counsel for the appellee that the abandonment of the application for reissue and the return of the patent after a rejection of the claims in the original patent create an estoppel against the patentee, which prevents him from thereafter relying on those claims or asserting a monopoly under them. It is contended that the same rule must apply as in the case where one on an original application accepts a patent after acquiescing in the rejection of a claim. In such a case the patentee cannot be heard to assert that his invention as patented has the scope it would have had if the rejected claim had been allowed. The basis of this rule is that one who seeks a patent from the government is making a contract with the government as to the extent and operation of a monopoly. If he asserts a claim which the patent office rejects, and he thereafter accepts a patent without the allowance of such a claim, the patent is issued on the condition of his acquiescence therein, and he cannot be heard ever afterwards to deny the rightfulness of the disallowance. The government parted with its patent on the faith of his acquiescence in the rejection of the claim, hence he cannot be permitted to revive it after having accepted the benefit of the patent without it. In *Sutter v. Robinson*, 119 U. S. 530, 7 Sup. Ct. 376, Mr. Justice Matthews used this language:

"A comparison of the patent, as granted, with the application, very conclusively establishes the limits within which the patentee's claims must be confined. He is not at liberty now to insist upon a construction of his patent which will include what he was expressly required to abandon and disavow as a condition of the grant. *Shepard v. Carrigan*, 116 U. S. 593, 6 Sup. Ct. 493, and cases there cited."

It is difficult to see how such a principle can apply in the case of an application for a reissue which is not carried to the point of surrender of the patent and the acceptance of a new patent. Nothing

is granted to the patentee which he did not have before, and there is, therefore, no privilege or benefit moving from the government to the patentee upon which an estoppel can be founded.

It is further insisted, however, that the application for the reissue is a resubmission of the validity of the original claims to the patent office as a tribunal for adjudication, and that when the claims are rejected by the properly constituted authority of that office, and that rejection is unappealed from, and therefore acquiesced in, though the patent be returned to the patentee, it is conclusively adjudged to be invalid to the extent of the claims rejected by the patent office. Section 4916 of the Revised Statutes is as follows:

"Whenever any patent is inoperative or invalid, by reason of a defective or insufficient specification, or by reason of the patentee claiming as his own invention or discovery more than he had a right to claim as new, if the error has arisen by inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, the commissioner shall, on the surrender of such patent and the payment of the duty required by law, cause a new patent for the same invention, and in accordance with the corrected specification, to be issued to the patentee, or, in the case of his death or of an assignment of the whole or any undivided part of the original patent, then to his executors, administrators, or assigns, for the unexpired part of the term of the original patent. Such surrender shall take effect upon the issue of the amended patent. The commissioner may, in his discretion, cause several patents to be issued for distinct and separate parts of the thing patented, upon demand of the applicant, and upon payment of the required fee for a re-issue for each of such re-issued letters-patent. The specifications and claim in every such case shall be subject to revision and restriction in the same manner as original applications are. Every patent so re-issued, together with the corrected specifications shall have the same effect and operation in law, on the trial of all actions for causes thereafter arising, as if the same had been originally filed in such corrected form; but no new matter shall be introduced into the specifications, nor in a case of a machine-patent shall the model or drawings be amended, except each by the other; but when there is neither model nor drawing, amendments may be made upon proof satisfactory to the commissioner that such new matter or amendment was a part of the original invention and was omitted from the specification by inadvertence, accident, or mistake, as aforesaid."

By this section, the patent office is given the authority to revise and restrict, in the same manner as in the original applications, the specifications and claim for the reissue. But the same section provides that the surrender of the old patent shall not take effect except upon the issue of the amended patent; and the question is whether the rejection of a claim for the reissue, which the patentee does not acquiesce in, by pressing his application for the reissue to a new patent for the allowed claims, invalidates the old patent, of which he secures the return. In *Peck v. Collins*, 103 U. S. 660, the question was whether, under the patent laws in force in 1866, a patent had any validity, a reissue of which had been applied for to the patent office, and rejected. It was held, in accordance with the decision of *Moffitt v. Garr*, 1 Black, 273, that the application for the reissue involved a surrender of the old patent at the time of the application. At the close of the opinion Mr. Justice Bradley used this language:

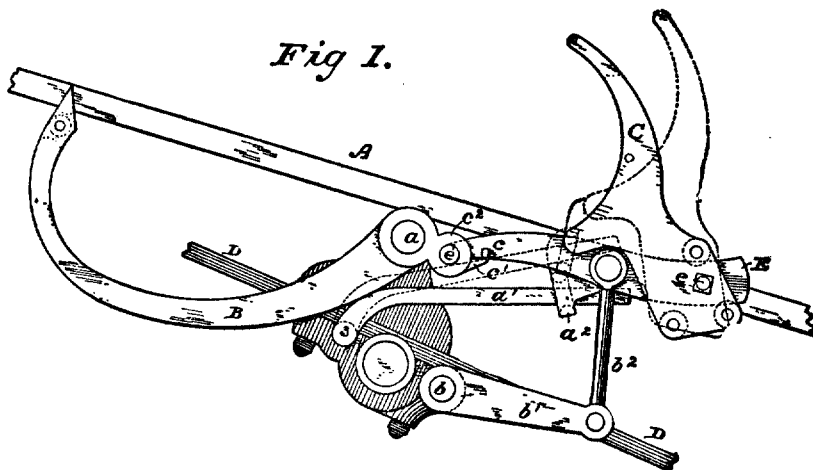
"Since the surrender of the patent in this case, the patent laws have undergone a general revision by the act of July 8, 1870 (chapter 230). In the fifty-third section of that act [being the section relating to the surrender and reissue of patents] a new clause was introduced, declaring that the surrender

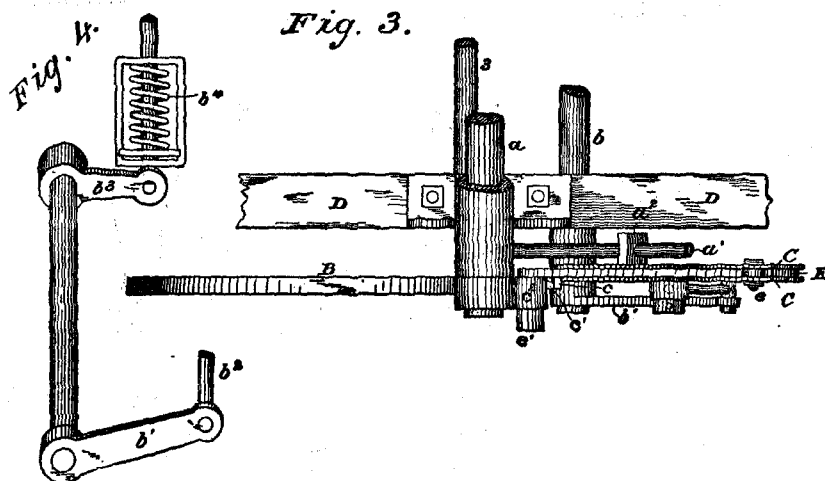
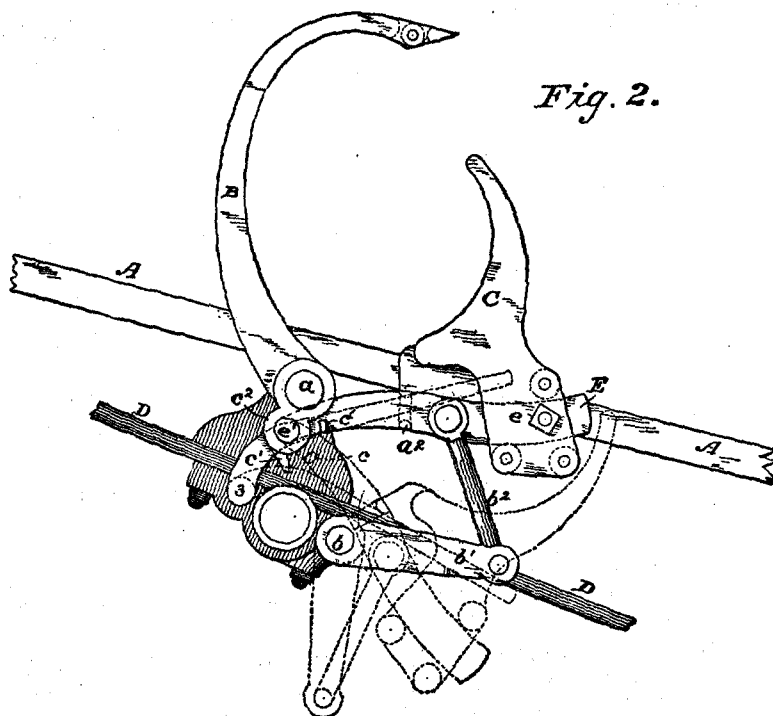
'shall take effect upon the issue of the amended patent'; and this clause is retained in section 4916 of the Revised Statutes. What may be the effect of this provision in cases where a reissue is refused, it is not necessary now to decide. Possibly it may be to enable the applicant to have a return of his original patent if a reissue is refused on some formal or other ground which does not affect his original claim. But if his title to the invention is disputed and adjudged against him, it would still seem that the effect of such a decision should be as fatal to his original patent as to his right to a reissue."

It will be observed that this remark of Mr. Justice Bradley was not necessary to the decision of the case before the court. It was a *semble*, and is so referred to in the headnote of the case. The question has never since been considered and decided by the supreme court. The members of this court have difficulty in reaching a conclusion upon the question thus suggested. It is one of much importance to all persons engaged in the procuring of patents and the remedying of their defects by applications for a reissue. Upon its answer turns the validity or invalidity of an otherwise very valuable and meritorious patent in this case. We think it proper, therefore, to certify to the supreme court, for its instructions, the following question, based on the facts as above stated:

"If a patentee applies for a reissue of his patent, and includes among the claims under the new application the same claims as those which were included in the old patent, and the examiner of the patent office rejects some of such claims, and allows others, both old and new, does the patentee, by abandoning his application for a reissue, and by procuring a return of his original patent, hold his patent invalidated as to those claims which the examiner rejected?"

Finally we come to the question whether the defendants are liable to the plaintiff for an infringement of the Baker patent, which was reissued. This patent was for the improvement upon the mode of supporting the resistant finger or trigger in the Appleby twine-binding machine. The patent may be best understood by reference to the following figures, taken from the drawings:





The drawings are thus explained in the specifications of the re-issue patent:

"E designates the bar or rod, to which the tripping fingers are pivoted by a pivot, e'. This bar is hinged to a heel extension of the binding arm by an eye, c², on said arm, and a pin, e', fixed on the bar and passing through the eye. The bar is supported in the position shown in Fig. 1 by a spring, b⁴, acting through shaft, b, and cranks, b', b³, and pitman rod, b², against the body of the arm. The machinery is tripped by the grain pressing the finger, C, back to the position shown in dotted lines, Fig. 1. In doing this, the finger rocks on pivot, e, and elevates the projecting lug, a², on the bottom of the finger, which raises the tripping lever, a', attached to shaft, 3. The binding arm is operated by a rock shaft, a, set in motion, as is the remainder of the intermediate binding mechanism, by the tripping of the clutch through these instrumentalities. All of the parts as thus illustrated and described are not materially different from those well known in the class of machines to which reference is made. In all machines of this class, the bar or rod, E, which carries the fingers which cause the tripping of the machine, is supported by a spring support, similar to that shown in Fig. 4; and it not infrequently happens, when the grain is damp or green, and from other causes, that the pressure of the grain against the bottom of the tripping fingers will cause the spring support to yield before the pressure at the top of the fingers is sufficient to cause their backward or rocking movement upon their pivot. The yielding of the spring in this manner allows that end of the bar, E, to which the fingers are pivoted, to be borne down and lowered in its position, so that the backward movement of the fingers, taking place after such lowering, will not elevate the trip lever, and hence the binding mechanism will not be started, nor, where the packers are to be stopped, will they be thrown out of action, and the machine will clog. To avoid this difficulty and remedy the defect, I lock the supporting bar positively against descent until the tripping movement of the fingers takes place, for this purpose making the hinge between the binding arm or its rock shaft and the finger support, E, such as to support this bar in the position shown in Fig. 1, irrespective of the spring support; that is, the hinge is made entirely rigid at this point, so that it will not allow the other end of the bar to drop and lower, whether it has or has not other support. This rigidity of the hinge at the point desired is best secured by means of a pin or lug, c, upon the bar, E, and a lip or projection, c', upon the eye, c, arranged to meet at the point desired and prevent any further turning of the hinge. This affords a reliable support to said bar, and insures the tripping of the mechanism under all circumstances. As soon as the fingers have operated the trip, the binding arm starts upon its upward movement, thus breaking the lock by carrying the lip, c', away from the pin, c, and the bar is free thereafter to be lowered at the proper moment to allow the discharge of the bound bundle. The return of the binding arm to its first position renews the lock at the moment the clutch is thrown out, and the parts will be again ready for a fresh binding operation."

What Baker did was to put a lug on the finger bar to operate against another lug on the needle bar at its heel in such a way that when the cam-rod spring had yielded sufficiently under pressure of the grain the finger bar would be rigid with the needle bar as it lay down at rest beneath the deck, and further spring action in the cam rod would be prevented. When, however, the needle was up and squeezing the gavel, the lug on its heel was drawn out of the way of that on the finger bar, so that, when the time came for the cam rod to allow the resisting finger and finger bar to fall away from in front of the bound gavel, the lugs on the finger bar and the needle bar no longer locked, and no longer interfered with this result. This was all that Baker claims to have invented. Everything else in the device shown in the above drawings and description was old. The

Baker patent was reissued, but it is conceded by complainant's experts that all the claims were substantially as limited in the original patent. The sole claim in the original patent, which was repeated in the reissue as the fifth claim, was as follows:

"In a grain binder, a support, E, for the compressing and tripping fingers, C, hinged to the binding arm, in combination with a pin, c, on support, E, and a lip, c', on the binding arm, all arranged to operate substantially as and for the purpose specified."

In the defendants' machine, a lug locks with the heel of the needle arm so as to secure substantially the same result. If the invention is not void for the want of novelty, there is no doubt that the defendant appropriated the Baker device. We are of opinion, however, that the patent is void for want of invention. It was quite old in this particular art, and in every other where two arms were pivoted together, to limit the angle of their separation by lugs or stops which should come in contact at the joint or hinge. In the Appleby machine, the needle arm and the finger bar were hinged. Until the spring was introduced in the cam rod, there was no necessity of measuring and limiting its yielding capacity by making the finger bar and the needle arm rigid. As soon as the cam rod, however, came to have a spring in it, a patent for the present device was applied for by Baker. In Appleby's patent for a twine binder, issued in 1869, the angle of separation between a compressor arm and a needle arm was limited by just such a device. The same device was also shown, in various forms, to limit the operation of a spring used to bring together the binding arm and the resistant arm in a twine binder invented by Locke in 1869. The claim made is that the use of the needle arm by Baker as the leg upon which to lock the finger arm was particularly ingenious because the locking and rigidity of the finger arm could not be permanent, but must end, for the purpose of permitting the discharging apparatus to work as soon as the gavel was bound and tied, and that the invention consisted, not in the mere use of lugs or stops at the hinge of two arms whose divergence was to be limited, but in the selection of the needle arm at rest as one of the legs whose divergence was to be limited, and whose function, as such, would cease as soon as it began to move, thus allowing the finger arm freedom of motion at a time when, in the organization of the machine, it became necessary to have such freedom. Had the locking device not been shown twice in the art previously as applied to the binder arm and the resisting arm in the same class of machines, it might be that it would have involved the inventive faculty to use the binder arm for such a purpose, but we think it was most natural, as soon as it became necessary to limit the operation of the cam-rod spring, for any one, in an examination of the prior art, to see that the device in the Locke and Appleby 1889 patent would serve the desired purpose. The hinging of the resistant arm on the heel of the needle arm, which was old, obviously suggested the use of the needle arm as the means of limiting the motion of the resistant arm. Nor do we think the fact that the locking of the binding arm and the resisting arm in this instance had an added function, namely, of ceasing to lock when the needle arm was elevated, should

change this conclusion. For these reasons, we do not think the claim of infringement on the Baker patent can be sustained.

The result of our discussion of this case leads to an affirmance of the decree of the court below in so far as it holds that the twenty-fifth and twenty-sixth claims of the Gorham patent are not infringed, and that the Baker patent is invalid for the want of novelty. We differ with the court below, however, in the view which it took of the third, tenth, and eleventh claims of the Gorham patent, and we think that, unless by the subsequent application of the reissue these claims were invalidated, the defendants' machine infringed them, and the complainants are entitled to recover damages therefor. We shall hold the case, therefore, until the question as to the effect of the application for a reissue has been submitted to the supreme court, and that court's instructions thereon are certified to us; and it is so ordered.

NEY v. NEY MANUF'G CO.

(Circuit Court of Appeals, Sixth Circuit. July 15, 1895.)

No. 257.

1. PATENTS—PRIOR ART—INFRINGEMENT—HAY-ELEVATOR TRACKS.

The Ney patent (No. 287,772) for an improvement in hay-elevator tracks, if sustainable at all, is limited by the prior state of the art to the exact forms shown, and is therefore not infringed by a track made in accordance with the subsequent patents to Jacob and Valentine Ney (Nos. 395,714 and 465,387).

2. SAME—PRESUMPTION FROM ISSUANCE OF SUBSEQUENT PATENT.

The issuance of a subsequent patent relating to the same subject-matter as a prior one raises a presumption of a patentable difference between them, though the applications were not pending at the same time in the patent office. *Boyd v. Tool Co.*, 15 Sup. Ct. 837, applied.

Appeal from the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This was an appeal from a decree in a suit in equity by the Ney Manufacturing Company to restrain Valentine Ney from infringing letters patent No. 287,772, issued on the 30th day of October, 1883, to the complainant, as the assignee of one Jacob Ney, for an improvement in hay-elevator tracks. By his answer the defendant attacked the validity of the patent, as being for a device which did not involve invention, and which had been anticipated by a number of patents. He averred that Jacob Ney was not the original inventor of the device, but that the same had been used long before he discovered it. He further averred that the machine alleged to be an infringement, which he was manufacturing, was constructed in accordance with two letters patent (Nos. 395,714 and 465,387) issued to Jacob Ney and the defendant, and that it did not infringe complainant's patent. Complainant's device consists of two parallel rails of angle iron, which are spliced so that the joints on one side of the track are opposite the solid portions of the opposite rails. The vertical flanges of the angle-iron rails are held at the desired distance apart, and parallel to each other, by spliced blocks and ferrules, and held together by suitable clamping bolts or rivets. The track is suspended and held in the proper position in the barn by means of hooks secured to the rafters or ridgepole of the building. The bases of these hooks are T-shaped, and embrace the downward projecting portions of the angle irons, the shank of the hook passing up between the angle irons. The traveling wheels of the carriage of the hay elevator run upon the horizontal flanges of the angle irons.

The claims alleged to be infringed were as follows: (1) "A track for hay elevators, composed of two parallel pieces, A, each constructed with horizontal and vertical flanges, with the vertical flanges united together, substantially as described." (3) "In a hay elevator, the combination of the parallel pieces, A, each having horizontal and vertical flanges, the suspending blocks, D, passing between the vertical flanges and having T-shaped ends, on which the parallel pieces are supported, and devices for spacing and holding the said pieces in proper parallel position, substantially as described." (4) "The combination in a hay elevator of two parallel pieces, A, each having horizontal and vertical flanges, with the suspending hooks, D, passing between the vertical flanges, and having T-shaped lower ends, upon which the parallel pieces are supported, substantially as described." The defendant's track is formed of two curved iron pieces, which are fastened together by clamps embracing their vertical portions, and leaving the upper curved portion free to form a tread or way for the trolley wheels. The clamp which secures these pieces together consists of a bar placed between them, with side pieces upon the outside of the vertical portion of the track iron, and a bolt passing through below the track irons to draw the three pieces together, and thus clamp the track iron. The upper part of the bar is formed into a loop to suspend the track. The two outer clamping pieces have shoulders on them for the edges of the track irons to bear against, and thus gauge their position; and the central bar also has a shoulder which the two outer pieces bear against, so as to take the strain off the bolt. There is one clamp shown, in which the upper or loop portion of the hanger bar is cut off, leaving it a mere filling block. Complainant averred in its bill, and introduced evidence tending to prove facts which it relied upon as estopping defendant from asserting the invalidity of its patent; but, as will be seen from the conclusion reached, the facts are not here material. The defendant introduced evidence to show that a wooden hay track, constructed in every respect with reference to spacing block hooks with T-shaped ends and broken splice, had been in use in two barns since 1878 and 1881.

Fred. W. Bond (Paul A. Staley, of counsel), for appellant.

Charles R. Miller (M. D. Leggett, of counsel), for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The state of the art with respect of hay elevators was such that, even if the complainant's patent can be sustained, it must be limited to the exact form shown. In the hay elevator of C. A. Miller patent, July 19, 1870, use is made of two parallel wooden tracks, having vertical flanges and horizontal flanges arranged in parallel lines, and secured to each other by spacing blocks at the end of the beams forming the track, and suspended by hooks to the joists of the barn. The traveling carriage is on trolley wheels, which run upon the horizontal flanges of the tracks, and the hay is suspended by a rope which hangs down from the trolley carriage between the two tracks. In the Gordon F. Prindle patent for hanging sliding doors, angle irons are used, arranged in parallel lines on top of the casings or frames of the doors or gates. The trolley wheels run upon the horizontal flanges of the angle irons, and are held into position by the vertical flanges thereof, and the door is suspended to the axle connecting the two wheels by hangers which pass down between the angle irons. In Corbin's patent for an improvement in railway tracks, angle irons are used with vertical and horizontal flanges held parallel to each other by tubes extending from the inside of one vertical flange

to the inside of the other, in which tubes are rods which pass through the flanges, and are bolted on the outside of each vertical flange, thus forming exactly the same device for firmly holding the vertical flanges parallel seen in the ferrules of the complainant's device. In Wendel's apparatus for hoisting and tiering cotton, the cotton is carried from one part of the building to another on a carriage with trolley wheels, which run upon the horizontal flanges of a trough-shaped track superimposed on a beam suspended by rods from the roof. It does not appear exactly how these rods are connected with the beam, but there is a suggestion in the drawings that there is a T-shaped ending embracing the lower part of the beam. In the Bowman patent for an improvement in railway tracks, issued in 1878, wooden tracks are maintained in parallel position by spacing blocks through which rivets run, bolted outside of the tracks; and this device shows a splicing of the pieces forming the track so that the joints of either line will come opposite the middle of the timbers of the opposite line. In Chamboard's patent for a hay elevator, issued in 1882, the track is made up of two long wooden beams, upon the horizontal top of which the trolleys of the elevator carriage run. The two beams are connected together by a middle beam somewhat lower down than the exterior beams, and not made so long, in order that there may be an open space between the tracks at certain points along the track. The track thus constructed and riveted together is suspended from the ridgepole of the barn by rods and clevises. The rods extend down through the middle beam, and there is shown in the drawing a T-shaped ending for at least one of the rods. Considering that angle irons had been used before to form tracks, that vertical and horizontal surfaces of wooden beams had been used for the same purpose, that their parallelism had been maintained by spacing blocks, that strength in the structure as a whole had been secured by splicing the pieces of one track at points opposite the solid portion of the pieces of the other, and that such tracks had been suspended from the ridgepole or rafters of the barn in which the hoisting was to be done by pieces passing up between the two tracks, we are of opinion that, if the patent sued on is to be sustained at all, the combination claims made therein must be limited to the exact forms shown, and that such claims are not infringed by tracks made of iron that are not angle irons, that are held together by clamps which do not involve the use of rivets passing through the vertical flanges, and that are not suspended from the roof or timbers by hooks which operate independently of the spacing blocks, and serve no function as such. The conclusion we reach is quite like that reached by the supreme court of the United States in the case of *Boyd v. Tool Co.* (decided May 20, 1895) 15 Sup. Ct. 837. In this case, as in that, both parties were manufacturing machines under a patent. Mr. Justice Shiras uses this language:

"Upon the assumption that, owing to the previous condition of the art, Boyd is to be restricted to the exact and specific devices claimed by him as novel, we do not deem it necessary to determine whether either Boyd or Strickler invented anything, because we think that the appellant has failed to show that the defendants have used the particular devices to which Boyd

can be considered entitled. Our discussion, therefore, will be confined to the question of infringement. As both applications were pending in the patent office at the same time, and as the respective letters were granted, it is obvious that it must have been the judgment of the officials that there was no occasion for an interference, and that there were features which distinguished one invention from the other. In *American Nicolson Pavement Co. v. City of Elizabeth*, 4 Fish. Pat. Cas. 189,¹ Mr. Justice Strong said: "The grant of the letters patent was virtually a decision of the patent office that there is a substantial difference between the inventions. It raises the presumption that, according to the claims of the latter patentees, this invention is not an infringement of the earlier patent." It would seem to be evident that as the purpose of the invention was the same, and as the principal parts of the respective machines described were substantially similar, it was also the judgment of the office that the distinguishing features were to be found in some of the smaller, and perhaps less important, devices described and claimed. *Burns v. Meyer*, 100 U. S. 671."

This language has full application to the case at bar, for, though the patents were not pending in the office at the same time, the presumption from the granting of the second patent, in view of the previous issue of the first, would not seem to be different.

We do not pass upon the question of the validity of the Ney patent, because, in the view just stated, it is unnecessary. The same conclusion renders it unnecessary for us to consider the estoppel which the court below held prevented the defendant from attacking the validity of the complainant's patent. The decree of the lower court, therefore, is reversed, with directions to dismiss the bill.

STANDARD CARTRIDGE CO. et al. v. PETERS CARTRIDGE CO.

(Circuit Court, S. D. Ohio, W. D. July 15, 1895.)

No. 4,509.

1. PATENTS—BILL TO ESTABLISH RIGHT TO PATENT—INTERFERENCE DECISIONS.

In proceedings on a bill filed under Rev. St. § 4915, by a defeated contestant in interference proceedings, to establish a right to a patent, he cannot attack the patent issued to the defendant, on the ground that the specifications thereof are insufficient. The only question which can be considered is whether complainant is entitled to a patent for the invention described in the bill and specified in his claim filed in the patent office.

2. SAME—BURDEN OF PROOF—CUMULATIVE AND IMPEACHING EVIDENCE.

In such a proceeding, the burden is upon the complainant to establish his contention beyond a reasonable doubt (*Morgan v. Daniels*, 14 Sup. Ct. 772, 153 U. S. 120); and the final decision of the patent office on the question of priority should not be set aside upon merely cumulative or impeaching evidence.

This was a bill filed under Rev. St. § 4915, by the Standard Cartridge Company and Charles S. Hisey against the Peters Cartridge Company to establish a right to a patent for an alleged invention relating to cartridge-loading machines.

Parkinson & Parkinson and E. M. Marble, for complainants.
Hall & Brown and Albert T. Brown, for defendant.

SAGE, District Judge. This suit is brought under section 4915 of the Revised Statutes of the United States to establish the right

¹ Fed. Cas. No. 312.

claimed by the Standard Cartridge Company to letters patent, denied by the commissioner of patents, for certain inventions in cartridge-loading machines, which it is averred were made by Charles S. Hisey, and by mesne assignment are now the property of the complainant, the Standard Cartridge Company. The defendant as assignee of the right, title, and interest of George Ligowsky to certain improvements in cartridge-loading machines, set forth in an application filed by him in the patent office June 20, 1889, was granted a patent therefor on the 8th of December, 1891. On the 8th of June, 1889, Gershon M. Peters filed his application for a patent upon similar improvements, and on the 24th of June, 1889, Charles S. Hisey filed his application. The patent office declared an interference between these three parties. Hisey had also filed an application September 8, 1888, and that, too, was included in the interference. Much testimony was taken on behalf of each party in support of his claim of priority of invention. The interference, which was bitterly contested, was decided by the examiner of interferences of the patent office April 29, 1891, in favor of George Ligowsky. From that judgment an appeal was taken to the examiners in chief, who reversed the decision as to Hisey and Ligowsky, and found priority in favor of Hisey. An appeal to the commissioner of patents followed. On the 15th of October, 1891, he reversed the decision of the examiners in chief, and awarded priority of invention to Ligowsky. A motion for rehearing was made by Hisey for alleged errors of fact and of law. The commissioner, on the 17th of November, 1891, again found, in an elaborate opinion, that Hisey was not the prior inventor, and denied the motion. The complainants' record in this case covers 1,386 octavo pages; the defendant's, 1,150 pages. The complainants' book of exhibits contains 278 numbered pages, and copies of letters patent fill nearly as many more. The Ligowsky interference record, which is also introduced, contains 167 pages, and Hisey's 374. One brief for complainants contains 264 pages; another, 146 pages. The brief for defendant contains 284 pages. The total number of octavo pages of printed matter in the case, exclusive of letters patent, and of certain other exhibits, is 4,022. It is obvious at the outset that it would be simply impossible to enter upon the details of the evidence or of the arguments of counsel without exceeding by far the limits of any opinion that a nisi prius judge should be expected to prepare, or that any one, excepting, possibly, the parties and their counsel, should be expected, or would be likely, to read.

From the beginning to the end of the record there is a conflict of evidence. The decision of the cause must depend upon the conclusions of fact, to be deduced from the opposing and irreconcilable statements of witnesses, many of them interested. The questions of fact are the same that were presented to and passed upon by the officials of the patent office. Once they were decided in favor of the complainant Hisey, and three times in favor of Ligowsky, defendant's assignor. Upon the final decision by the commissioner, the patent was issued to the defendant. More testimony has been taken on both sides,—some in confirmation, some in denial, mostly cumulative or impeaching,—but the same conflict remains, and the

same questions are to be determined as when the contest was in the patent office, with one exception. In this case, the complainants made an attack upon the sufficiency of the specification of the patent issued to defendant on the Ligowsky invention. That attack cannot be properly made in this case, which is under section 4915, and not under section 4918, of the Revised Statutes, and is a continuation of the interference contest in the patent office. The only question that can be considered here is whether the complainant the Standard Cartridge Company, holding under mesne assignment from the complainant Charles S. Hisey, is entitled, according to law, to receive a patent for the invention described in the bill, and as specified in his claim filed in the patent office. Whether the specification in the patent issued to the defendant is sufficient or insufficient is not involved in this case. It is wholly incompetent, and cannot be inquired into. *Pentlurge v. Pentlurge*, 19 Fed. 817; *Lockwood v. Cleveland*, 20 Fed. 164; *American Clay-Bird Co. v. Ligowski Clay-Pigeon Co.*, 31 Fed. 467.

Inasmuch as it is conceded that, if Hisey is the prior inventor, he is entitled to his patent, the only question to be determined is the question of priority. The burden of proof is upon the complainants; and they must establish their contention beyond a reasonable doubt. *Coffin v. Ogden*, 18 Wall. 120; *Cantrell v. Wallick*, 117 U. S. 689, 6 Sup. Ct. 970; *Morgan v. Daniels*, 153 U. S. 120, 14 Sup. Ct. 772. In *Morgan v. Daniels*, the latest and clearest and most pointed of all the cases, Mr. Justice Brewer, announcing the opinion of the court, said that the case was something more than an appeal; "that it was an application to the court to set aside the action of one of the executive departments of the government; * * * that it was something in the nature of a suit to set aside a judgment, and as such not to be sustained by a mere preponderance of evidence,"—citing *Butler v. Shaw*, 21 Fed. 321, 327. He further said that it was "a controversy over a question of fact which had once been settled by a special tribunal, intrusted with full power in the premises. As such, it might be well argued, were it not for the terms of the statute, that the decision of the patent office was a finality upon every matter of fact,"—citing *Smith v. Vulcanite Co.*, 93 U. S. 486; *Lehnbeuter v. Holthaus*, 105 U. S. 94, to the point that not only is the burden of proof upon the party setting up prior invention against a patent, but that every reasonable doubt should be resolved against him. He declared that those two cases were closely in point, because the plaintiff in *Morgan v. Daniels*, like the defendant in the cases cited, was "challenging the priority awarded by the patent office, and should, we think, be held to as strict proof." He referred to the "presumption in favor of that which has once been decided," and to the fact that that presumption "is often relied upon to justify an appellate court in sustaining the decision below," citing *Crawford v. Neal*, 144 U. S. 585, 596, 12 Sup. Ct. 759, where, the court below having concurred in the findings of fact and conclusions of law reported by a master, the supreme court said that they were "to be taken as presumptively correct, and, unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should

be permitted to stand." In *Morgan v. Daniels*, as in this case, the examiner of interferences found that the defendant was the original inventor. In *Morgan v. Daniels*, the assistant examiner concurred in the finding. On appeal, the examiners in chief, two members being present (as was the fact in this case), came to a different conclusion, and awarded priority to the complainant. On further appeal, the commissioner of patents reversed the judgment of the examiners in chief and sustained that of the original examiners, as was done in this case. A motion for rehearing was brought before a succeeding commissioner, and overruled. In this case, a motion for rehearing was brought before the same commissioner, and was overruled. In *Morgan v. Daniels*, the case was submitted to the circuit court without any additional testimony, where the conclusion finally reached in the patent office was dissented from, and the plaintiff was adjudged to be the original inventor. Justice Brewer said: "Evidently, therefore, the question as to which was the prior inventor is not free from doubt." The supreme court reversed the judgment of the circuit court, and remanded the case, with instructions to dismiss the bill. In this case, as has already been stated, much additional testimony has been introduced; but it is mostly either in corroboration or in contradiction of testimony in the interference case in the patent office. For illustration: In the decision by the examiner of interferences of the patent office, he refers to the testimony of Ligowsky and of eight other witnesses as, in his opinion, clearly proving that Ligowsky made and disclosed to others, in the fall of 1887, seven sketches or drawings of his invention, whereas Hisey did not claim to have made the invention until April, 1888. The commissioner of patents, in his opinion, said: "If there be in the case a material allegation of fact, resting upon oral testimony, which is better supported by proof than any other, it is that, during the year 1887, Ligowsky produced seven sketches showing the parts of the improvements in controversy, and during that year made disclosures of these features to others." In addition to the testimony of those nine witnesses, the defendant now presents the testimony of five additional witnesses to the fact, making, altogether, fourteen witnesses who testify that Ligowsky made the invention in controversy in 1887. Of these five last called, three are entirely disinterested, having no connection with Ligowsky or the Peters Cartridge Company. On the other hand, there are produced additional witnesses, including relatives and members of the family of Hisey, whose depositions were taken after Ligowsky's death, and who testify that Ligowsky admitted in their presence that Hisey was the inventor of the improvements for which he now seeks a patent.

It has been held that a new trial at law will not be granted upon the ground of the discovery of cumulative or of impeaching or contradicting evidence merely. *Ames v. Howard*, 1 Sumn. 482, Fed. Cas. No. 326; *Brown v. Evans*, 17 Fed. 912; *Carr v. Gale*, 1 Curt. 384, Fed. Cas. No. 2,433; *U. S. v. Potter*, 6 McLean, 182, Fed. Cas. No. 16,077; *Macy v. De Wolf*, 3 Woodb. & M. 193, Fed. Cas. No. 8,933. By parity of reasoning, the decision of the commissioner ought not to be set aside upon merely cumulative or impeaching evidence. The ad-

ditional testimony cannot be said to so completely settle the disputed facts as to establish beyond a reasonable doubt that the decision of the commissioner of patents was wrong. The fact referred to in the illustration above given is not only vital, but is a controlling fact of the case. The new evidence relating to other features of the case is of the same character. The opinion of this court, after having heard the arguments of counsel, examined their briefs and the record, and considered the whole case, is that, independently of the rule as to the burden of proof, the decision of the commissioner of patents is right, that Ligowsky was the inventor, and that the attempt of Hisey to appropriate the invention was fraudulent. For the reasons stated in his opinions, the conclusion of the court is that the equity of this cause is with the defendant. The bill will be dismissed, at the costs of the complainants.

CONSOLIDATED BRAKE-SHOE CO. et al. v. CHICAGO, P. & ST. L. RY. CO. et al.

(Circuit Court, S. D. Illinois, S. D. August 8, 1895.)

1 PATENTS—BILL FOR INFRINGEMENT—WHO ARE INFRINGERS.

Where corporations and their officers are sought to be held for infringement as joint tort feorsors, and there is no direct proof that the individual defendants either directed the infringement or participated in the profits thereof, as to them the bill should be dismissed.

2. SAME—COSTS.

In such case, however, where it appears that the individual defendants were the managing officers of the corporations, and that the infringement occurred through the direction given by them to use complainants' device by specific reference to its name, the dismissal should be without costs.

3. SAME—PATENTABILITY—ANTICIPATION—PRIOR STATE OF THE ART.

An invention consisting of a shoe for car brakes, having its body made of cast iron, with pieces or sections on its face of a different kind of metal, is valid, though the prior state of the art shows composite frictional bearing surfaces composed of different materials other than metal, and also shows a prior patent granted for a journal bearing.

4. SAME—DEVICE OF A SHOE FOR CAR BRAKES.

The Congdon patent, No. 174,898, for a shoe for car brakes, *held valid*, and infringed.

This was a bill by the Consolidated Brake-Shoe Company and another against the Chicago, Peoria & St. Louis Railway Company and others for alleged infringement of a patent for a shoe for car brakes. Decree for complainants, except as against defendants William S. Hook and C. A. Henderson, as to whom the bill is dismissed.

William A. Redding and James H. Raymond, for complainants.

Isaac L. Morrison, B. D. Lee, Bluford Wilson, and A. C. Fowler, for defendants.

ALLEN, District Judge. This suit was brought by the Consolidated Brake-Shoe Company, of New Jersey, which, at the date of the commencement of the suit, owned the legal title to letters patent of the United States numbered 174,898, issued March 21, 1876, to Isaac H. Congdon, and by the Congdon Brake-Shoe Company,

which, at the date of the commencement of the suit, was an exclusive licensee for a territory including the whole of this jurisdiction to make, to use, and to sell the improvements described in said letters patent, against the Chicago, Peoria & St. Louis Railway Company, the Louisville & St. Louis Railway Company, the Litchfield, Carrollton & Western Railway Company, severally, and as comprising the Jacksonville Southeastern Line, and against William S. Hook and C. A. Henderson, as officers and agents for said railway companies and for said line. While it has been frequently held that general allegations of infringement in suits against corporations and officers of corporations as joint tortfeasors are sufficient to hold the individual defendants until the entry of a final decree, and especially in cases in which individual defendants should be held, in order that force and effect may be given to any order or decree of the court, whether interlocutory or otherwise, I find in this case an absence of specific proof to the effect that the individual defendants Hook and Henderson either directed the infringement complained of or participated in the profits thereof, and therefore conclude that the bill should be dismissed as to them. But, it sufficiently appearing that they were the managing officers of this railway line during the infringement complained of, and that the complainants' device was specified by name to the car builders who built cars for them, the dismissal as to these individual defendants will be without costs. Walk. Pat. p. 319; Rob. Pat. p. 78; Iowa Barb Steel Wire Co. v. Southern Barbed-Wire Co., 30 Fed. 123; Estes v. Worthington, Id. 465; Cleveland Forge & Bolt Co. v. U. S. Rolling-Stock Co., 41 Fed. 476; New York Grape Sugar Co. v. American Grape Sugar Co., 35 Fed. 212; Cahoon Barnet Manuf'g Co. v. Rubber & Celluloid Harness Co., 45 Fed. 582; Featherstone v. Cycle Co., 53 Fed. 110.

While other questions have been raised in argument and on the briefs, I have concluded that the controlling question in this case is the question of the validity of the complainants' patent under the pleadings, the exhibits, and evidence. The specifications of the patent sued upon state:

"My invention consists of a shoe for car brakes, having its body made of cast iron, with pieces or sections on its face of a different kind of metal, said sections being composed of malleable cast iron, steel, or wrought iron, as hereinafter more fully set forth."

After referring to a method of constructing this brake shoe, the specifications further refer to the fact that "in all railroad shops there is always an accumulation of broken springs," etc., that is harder refuse metal, which may be imbedded in the softer metal of the brake-shoe casing, and thus present a dual frictional surface to the wheel. It is true that the prior state of the art, as exhibited by the evidence, shows composite frictional bearing surfaces composed of different materials,—as, for instance, of wood and rubber,—and also shows a prior patent granted to one McCaffrey in 1874 for a journal bearing; but it is clear to the court that none of these prior devices were ever intended to accomplish, or did accomplish, or were capable, without further invention, of accomplishing, the result accomplished by Congdon as disclosed in the patent sued

upon. This conclusion is confirmed by the facts, abundantly proved: (1) That the Congdon patent formed the basis of an art; (2) that it obtained, by its own merit, a trade-name; (3) that it went into general use; and (4) that it was specified to the car builders by its trade-name, and thus fully recognized by the defendants. Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co., 47 Fed. 894; Kremenitz v. S. Cottle Co., 69 O. G. 241, 13 Sup. Ct. 719 (Shiras, J.), citing Loom Co. v. Higgins, 105 U. S. 580; Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co., 113 U. S. 157, 5 Sup. Ct. 513; Magowan v. Packing Co., 141 U. S. 332, 12 Sup. Ct. 71; Washburn & Moen Manuf'g Co. v. Beat 'Em All Barbed-Wire Co., 143 U. S. 275, 12 Sup. Ct. 443; Gandy v. Belting Co., 143 U. S. 587, 12 Sup. Ct. 598; Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825.

Let a decree be entered sustaining complainants' title to the patent sued upon, as pleaded in the bill of complaint, finding that the defendants have infringed the same; that the said patent is a good and valid patent for a brake shoe for railway cars, composed of different metals, and having inserted bearing pieces of a harder metal than the metal composing the body of the shoe; and dismissing said bill, but without costs, as to the defendants Hook and Henderson.

PACIFIC MAIL STEAMSHIP CO. v. NEW YORK, H. & R. MIN. CO. et al.

APPLETON v. PACIFIC MAIL STEAMSHIP CO.

(District Court, S. D. New York. July 13, 1895.)

GENERAL AVERAGE—NEGLIGENT STRANDING—LIMITATION OF LIABILITY—CARGO INTERESTS UNAFFECTED—CONTRIBUTION BY SPECIE SAVED.

The steamer City of P. having been negligently stranded, and the steamer thereafter voluntarily flooded to prevent total loss from pounding before relief could be had; and the cargo being thereby damaged, but vessel and cargo ultimately saved, and the whole value of the vessel and the freight pending having been afterwards divided among the damage claimants upon a decree in proceedings to limit the owner's liability; and thereafter a general average adjustment being made as between the cargo interests, and libels thereafter filed upon the average bonds given on the delivery of the cargo: *Held*: (1) That the flooding was a general average act. (2) That neither the decree and distribution in the proceeding to limit liability, nor the exclusion of the vessel from participation in the general average, were any bar to the general average adjustment as between the cargo interests; and that due account having been taken in the average adjustment, of the decree and distribution, so as to equalize the cargo interests pro rata, the adjustment should be sustained. (3) That as the general average act was for the benefit of the whole adventure, including the specie on board, the specie must contribute in general average, although it was transshipped a week after the flooding, the transshipment being to another vessel of the same carrier, by which the specie was duly delivered upon the giving of an average bond, and the voyage not being broken up, nor any separation of interests intended by the transshipment.

Wing, Putnam & Burlingham, for Pacific Mail Steamship Co.

Mr. Cox, for Appleton.

Carter & Ledyard, for New York, H. & R. Min. Co. and others.

Butler, Stillman & Hubbard and Mr. Mynderse, for other respondents.

North, Ward & Wagstaff, for other respondents.

BROWN, District Judge. The above actions grew out of a general average adjustment made September 14, 1893, pursuant to average bonds executed in New York by different consignees of cargo, in July, 1888, consequent on the stranding of the steamer *City of Para*, off Old Providence Island on May 17, 1888. The steamer was bound with a general cargo from Colon to New York, but was got off and brought to this port. The accident was held by this court to have been caused through negligence; and the owners were held liable up to the value of the vessel and freight pending (44 Fed. 689). That amount was paid into court, and distributed pro rata among the damage claimants under a final decree entered February 24, 1893.

A sacrifice of cargo and salvage expenses having been incurred in rescuing the ship, the general average adjustment above referred to was made up, in which the cargo charges and allowances are equalized by making due account of the proceeds received under the decree in the limitation of liability proceedings. The vessel having been surrendered, and its proceeds distributed, the adjustment was made entirely between the cargo interests; the vessel not appearing either as debtor or creditor in the account.

The libel of Appleton was filed to recover the amount which the adjusters had stated and found due. The other eight libels were filed to recover the contributory amounts due from various cargo owners according to the general average adjustment, as above stated, and upon the bonds given therefor. The objections below considered were taken to these last demands.

1. The decree in the proceedings for limitation of liability by the owners of the *City of Para*, does not, in my judgment, prevent the operation of the principles of general average contribution, where in other respects the circumstances warrant it. Certainly no such effect is indicated, or could have been contemplated, in the act providing for a limitation of ship-owners' liabilities; and there is not the least equitable reason for giving the act any such effect by construction. The ship, in consequence of the negligence that brought about the stranding, and rendered necessary the general average act, not only forfeited all claim to share as a creditor in the general average distribution, but became liable to respond to the extent of her value to make good the losses of cargo owners. The two subjects are quite independent of each other, and I see no reason why it should make any difference in the final result, whether the general average adjustment was made after the distribution in the limitation of liability proceedings, or before such distribution. Had the adjustment been before decree and distribution of the proceeds of the ship, the ship's share would have been ordered distributed among the cargo interests. Being made since the decree, all that equity and justice require is that the adjustment shall be made with due account of the distribution under that decree, so that the burdens and losses shall be distributed pro rata, in conformity with the intention of the liability act and with the equitable principles of average adjustment. The evidence shows that in this case that has been done.

2. The objection that no adjustment of general average can be made without the admission of the vessel to participate, is an objection of form merely. The adjustment might have been made up in that form; and the vessel's share would then, in consequence of her negligence, have been distributable among the damaged cargo owners, with precisely the same result that this adjustment gives. See *Strang v. Scott*, 14 App. Cas. 601. To the same effect is the Maritime Code of Denmark (section 191).

3. The objection that the specie should not be held to contribute, on the ground that it was removed from the vessel before she was finally got off, ought not to be sustained in the present case. During the first 24 hours after the vessel stranded, various attempts were made to get her off the reef, but without effect. She was in a position where the total loss of ship and cargo, including specie, was threatened from pounding. To avoid pounding, and the danger of losing the entire adventure, the ship was flooded, and thereby steadied until the Merrit Wrecking Company from New York could send out the relief expedition by which the vessel was got off, and the cargo, though damaged, brought to this port. A week after the vessel was thus flooded, a chartered vessel, the *Thames*, procured by the agent of the steamship company owner, came to the reef and removed the mails, specie, and passengers, and proceeded with them to Colon, whence they were forwarded by the company's steamship *Colon* to New York. The specie remained all the time in the steamship company's possession until it was delivered upon the execution of the average bond in suit.

The flooding of the vessel was clearly a general average act, done in the interests of the entire adventure, including the specie. The damage to a portion of the cargo arose through this flooding. Not only was the act of flooding a general average act, but it was a part of the series of measures contemplated from the first for the preservation of all the interests as far as possible; and no separation of interests was intended, nor was the voyage broken up.

An abstract of the adjustment is as follows:

Contributory value of the cargo.....	\$232,599.76
Allowance to cargo.....	112,722.63
Value of cargo, as it arrived in New York.....	119,877.13
Value of specie and treasure transhipped.....	36,000.00
Value of cargo remaining on ship and brought in her (all except the specie).....	33,877.13

The case of *The L'Amerique*, 35 Fed. 835, and other cases there cited, in which an exemption from general average has been allowed in consequence of a separation of interests, seem to me not at all applicable to the facts of the present case. This adjustment is, therefore, sustained, and decrees may be entered accordingly for payment upon the bonds in suit, with costs.

In the case of *Appleton*, a decree may also be entered that the respondent pay to the libellant the amount due upon the adjustment, upon collection by respondent of the sums owing by the debtor interests, or pro rata for such amount as is collectible, with a reference to ascertain the amount, if the amount is not agreed upon.

JEWETT v. WHITCOMB et al.

(Circuit Court, E. D. Wisconsin. July 30, 1895.)

REMOVAL OF CAUSES—SUITS AGAINST RECEIVERS OF FEDERAL COURTS.

A suit against a receiver appointed by a federal court for a cause arising out of his management of the property committed to his charge is one arising under the laws of the United States, and may be removed from a state to a federal court, without regard to the citizenship of the parties or the nature of the controversy.

This was an action by Jennie M. Jewett, as administratrix, against H. F. Whitcomb and Howard Morris, as receivers of the Wisconsin Central Company and the Wisconsin Central Railroad Company, to recover damages for the death of the plaintiff's intestate.

Hooper & Hooper, for plaintiff.
Thomas H. Gill, for defendants.

SEAMAN, District Judge. This action was commenced in the circuit court for Winnebago county upon a complaint which alleges that negligence on the part of the defendants in the operation of the railway committed to their control produced the death of plaintiff's intestate, and that the control and possession of such railway by the defendants was derived through their appointment as "receivers of the Wisconsin Central Company and the Wisconsin Central Railroad Company [they being railroad corporations organized and existing under the laws of the state of Wisconsin] by the circuit court of the United States for the Eastern district of Wisconsin in an action then pending in said court." Upon petition of the receivers, duly presented, the cause was removed to this court and docketed. The plaintiff now moves to remand, and, as diverse citizenship of the parties does not exist, the question arises whether the fact that the defendants were appointed receivers by a federal court, taken with the further fact that their liability is charged solely in that capacity, confers a right of removal to federal jurisdiction.

In *Railway Co. v. Cox*, 145 U. S. 593, 603, 12 Sup. Ct. 905, the unanimous opinion of the supreme court is expressed, through the chief justice, in respect of a similar action against receivers so appointed, in the following language:

"As jurisdiction without leave is maintainable through the act of congress, and as the receivers became such by reason of, and derived their authority from, and operated the road in obedience to, the orders of the circuit court, in the exercise of its judicial powers, we hold that jurisdiction existed because the suit was one arising under the constitution and laws of the United States; and this is in harmony with previous decisions. *Buck v. Colbath*, 3 Wall. 334; *Feibelman v. Packard*, 109 U. S. 421, 3 Sup. Ct. 289; *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677."

While it is true that in that case the receivership was over the property of a company incorporated by congress, the decision is expressly placed upon the broad ground that the receivers were acting under appointment by the federal court, and the precedents

cited are only applicable to that view. That it was so understood and intended by the court appears in *Tennessee v. Bank of Commerce*, 152 U. S. 454, 463, 472, 14 Sup. Ct. 654, where an interpretation is given in each of the opinions. Mr. Justice Gray, in the opinion of the court, referring to *Railway Co. v. Cox*, says:

"This court, speaking by the chief justice, after observing that the corporation would have been entitled, under the act of 1875, to remove a suit brought against it in a state court, maintained the jurisdiction of the circuit court of the United States of the action against the receivers, under the act of 1887, upon the ground that the right to sue, without the leave of the court which appointed them, receivers appointed by a court of the United States, was conferred by section 6 of that act, and therefore the suit was one arising under the constitution and laws of the United States."

And Mr. Justice Harlan, in the dissenting opinion, states as the ruling in that case:

"Without reference to the citizenship of the plaintiff, a suit for damages can be brought in a circuit court of the United States against receivers appointed by a circuit court of the United States of a railroad corporation created by an act of congress, although the case involves no question of a federal nature. This upon the ground that the receivers, in executing their duties, were acting under judicial authority derived from the constitution of the United States. Such a suit, if brought in a state court, could, I take it, be removed, under the present decision, upon the ground simply that the plaintiff's suit was within the original cognizance of the circuit court."

Again, in *McNulta v. Lochridge*, 141 U. S. 327, 331, 12 Sup. Ct. 11, it is held that the supreme court has jurisdiction to review the final judgment of a state court against the receiver for an injury arising out of alleged negligence in operating a railroad under the receivership, because he "was exercising an authority as receiver under an order of the federal court," and it was immaterial whether his claim of error "be founded upon the statute or upon principles of general jurisprudence"; that "this is a legitimate deduction from the opinion of this court in *Buck v. Colbath*, 3 Wall. 334," and other kindred citations.

The doctrine pronounced by these opinions, and their application of the precedents cited, must rule this case. The defendants are sued, as receivers appointed by a United States court, for the conduct of those engaged in the operation of the railroad in the hands of the court, committed to their charge as its officers, and subject to its exclusive direction and control. The liability with which they are charged is one arising wholly out of their management of the property intrusted to them, and is incurred through their appointment to and acceptance of the trust. Federal cognizance is conferred by these conditions, irrespective of any question of citizenship or of a nature peculiar to that jurisdiction, and the right of removal thereto follows as of course. This is the view held in *Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co.*, 59 Fed. 523; *Hurst v. Cobb*, 61 Fed. 1; and *Grant v. Bank*, 47 Fed. 673. The motion to remand must be denied.

WHEELER BLISS MANUF'G CO. v. PICKHAM.

(Circuit Court, N. D. Illinois. July 27, 1895.)

CIRCUIT COURT—JURISDICTION—AMOUNT IN CONTROVERSY.

Where a plaintiff sues in good faith for the contract price of goods sold and delivered, amounting to over \$2,000, and obtains a verdict for less than that sum because the defendant proves a set-off, of the exact amount of which the plaintiff had no notice before the trial, the court is not deprived of jurisdiction, although plaintiff's counsel admits, after the evidence is all in, that the recovery must be for less than \$2,000.

Assumpsit by the Wheeler Bliss Manufacturing Company against Thomas Pickham. Plaintiff obtained a verdict. Defendant moves for a new trial.

Flower, Smith & Musgrave, for plaintiff.
O'Shea & Maloney, for defendant.

SEAMAN, District Judge. The defendant moves for a new trial upon a question of jurisdiction, which was raised at the last moment before submitting the cause to the jury, but of which final consideration was reserved for this motion. The contention is that it appeared upon the trial that the suit did not "really and substantially involve a dispute or controversy" over an amount exceeding \$2,000; that because the uncontradicted testimony limited the best possible recovery of the plaintiff to a sum less than that amount, and especially because it was so admitted by its counsel in his argument to the jury, the plaintiff was concluded against its assertion of a claim in excess, and the court was deprived of jurisdiction by the terms of section 5 of the act of March 3, 1875 (18 Stat. 470, c. 137). The declaration was for goods sold and delivered at the contract price, alleged and proved to be \$2,610, all due and unpaid. There was vigorous contest by the defendant against any liability under the contract; and, as further matter of defense, it was shown that the authorized agent of the plaintiff, for the purpose of terminating the executory contract of sale between the parties, agreed to an allowance or deduction upon the account against the defendant of one dollar each for "indicators" (being the subject of sale) which then remained on his hands. The plaintiff did not dispute this promise when the testimony came in, but it is my recollection that the evidence was received against its objection as inadmissible on the ground that it was only a proposal for settlement, which was not accepted, and therefore not operative; and it was clearly insisted on its behalf that the number of these indicators on hand was not ascertained or stated at the time, and that they were supposed by its agent not to exceed 400; that the first and only definite information plaintiff had of the amount was obtained through the testimony at the trial. Having no proof with which to oppose the defendant's testimony that there were 635 of these indicators on hand, and being overruled in his objections to the admissibility of this offer, counsel for plaintiff frankly stated to the jury that the deduction should be made by them in

arriving at the amount of their verdict. If there was, as contended by counsel for plaintiff, misunderstanding of the fact, or if there was simply a failure on the part of the plaintiff to meet the proof of the number on hand, or if the ruling was not anticipated by which the testimony was admitted, must the submission of plaintiff or its counsel to either of these contingencies serve to oust jurisdiction? I am satisfied that the statute has no such purpose, that it was not intended to turn the plaintiff out of court for a mere failure to prove his claim up to an amount exceeding \$2,000, but that its purpose was to bar one who assumed to enter the jurisdiction with his pleadings framed to simulate the conditions which confer jurisdiction when the claim actually made and presented was not cognizable. The true test is whether a bona fide contest was presented to recover more than \$2,000 in the action. Unless it clearly appears from the record, or in the course of the trial, that it was not seeking such recovery in good faith, upon fair prima facie claim, the plaintiff is entitled to have its controversy determined, without regard to the amount which may be actually recovered upon the whole testimony; and certainly it should not be dismissed by reason of the commendable action of counsel in conceding the deduction, which appeared to him satisfactorily proved. This plaintiff came into court asserting its claim for the full contract price of the goods sold, and on the face of the transaction, no payments having been made, would have recovered \$2,610; and there is no impeachment of the good faith of that assertion. The verdict was for less than \$2,000, because of matters introduced by the defense,—evidence tending to show damages from defects in goods and other causes, and this subsequent promise to deduct \$1 apiece for indicators unsold. If it be assumed that the plaintiff was bound to recognize this alleged promise by its agent, for the purpose and as a condition precedent to its right to sue in this court, no requirement can be imposed that it must know the amount to which the defendant may claim credit thereupon, in the absence of any notice or statement from the latter; and surely the plaintiff could contest the amount of allowance, or put the defendant to his proofs. In any view, the plaintiff's understanding that only 400 of the indicators were on hand, leaving its claim more than the jurisdictional amount, would justify this action. Neither the final showing upon the trial, nor its results, should defeat jurisdiction, with the claim, as a whole, thus asserted and contested.

I have examined with care the authorities cited by counsel for defendant, and find no support in any of them for his contention; and the rule upheld by the supreme court in *Schunk v. Moline, Milburn & Stoddard Co.*, 147 U. S. 500, 13 Sup. Ct. 416, clearly sustains jurisdiction in this case. The amount there in actual controversy was determined irrespective of the effect of the statute of Nebraska, authorizing attachment for a debt not due. The same doctrine is held in *Peeler's Adm'x v. Lathrop*, 2 U. S. App. 40, 51, 1 C. C. A. 93, 48 Fed. 780; *Hardin v. Cass Co.*, 42 Fed. 652; and *Cabot v. McMaster*, 61 Fed. 129. *Cabot v. McMaster* is a decision by Judge Bunn, and in this court. It is referred to by counsel for defendant

as a precedent for denial of jurisdiction here; but the opinion, and the facts as well, in that case clearly distinguish it from the one at bar. There the action was on a bond in which the penal sum was \$6,000, but the only liability either claimed or proved by the plaintiff for recovery upon the trial amounted to \$1,590. It was thereupon held that this real claim was the sole subject of controversy, and limited the amount involved; that jurisdiction could not be maintained by confining the declaration to a statement of the nominal amount of the bond. The opinion states that it was the purpose of the statute "to meet just such cases, and to prevent the court from taking jurisdiction on account of merely colorable allegations to give jurisdiction unwarranted by the facts"; and then remarks: "Of course, if there appears to be an actual controversy involving more than \$2,000, though the recovery may be reduced, by payments or otherwise, below that sum, the court would retain jurisdiction." The case at bar is clearly within this just qualification. It may be noted that a writ of error in that case was not entertained by the circuit court of appeals, and the question there decided was not passed upon by the appellate court. 13 C. C. A. 39, 65 Fed. 533. But the case here is substantially different from that, and would not be affected by any view of that ruling. In the absence of any other assignment of error, the motion for a new trial must be overruled, and judgment will enter upon the verdict.

BENNETT v. FORREST.

(District Court, D. Alaska. August 24, 1895.)

1. COURT—JURISDICTIONAL AMOUNT.

Where a court has jurisdiction for the recovery of money or damages when the amount "claimed" does not exceed a specified sum, and an action is brought for a less amount than such specified sum, the court is not ousted of jurisdiction by the filing of a counterclaim for a sum exceeding the aggregate amount of such jurisdictional amount and the sum claimed by plaintiff.

2. SAME—COUNTERCLAIM.

The fact that a counterclaim exceeds in amount the jurisdiction of the court in which it is filed is not ground for refusing to allow defendant to set it up; but, in case the court finds that it is established, it can render judgment in defendant's favor only for the amount of which it has jurisdiction.

Writ of review by William M. Bennett against Charles Forrest to test the legality of proceedings and judgment of a commissioner's court in an action between the same parties. Affirmed.

John G. Heid, for plaintiff.

John F. Malony, for defendant.

TRUITT, District Judge. This case comes up by writ of review prosecuted by said plaintiff for the purpose of testing the proceedings and judgment of said commissioner's court in the certain action therein tried in which said Charles Forrest was plaintiff

and said William M. Bennett was defendant. In that action the complaint charges that the defendant is indebted to plaintiff on a balance due for wages in the sum of \$198 for labor and services performed by plaintiff for defendant, at his special instance and request, between the 3d day of May, 1893, and the 22d day of July, 1893. This complaint was filed August 7, 1893, and on the 16th day of the same month the defendant filed his answer, in which he admits that the plaintiff did perform labor and services for him at his quartz mill and mine, situated in Silver Bow Basin, Alaska, for the term of 70 days, at \$4 per day, but denies that any settlement in relation to the same was ever had, or any payment for said services made, for the reason that, while the plaintiff was so employed by defendant in and about said quartz mill and mine, he, in company with others, unlawfully and without authority did on or about the 24th day of July, 1893, take all the gold and amalgam, of the value of \$1,000, then cleaned up and contained in said quartz mill, and appropriated the same to his own use. The answer then alleges that plaintiff has not accounted to defendant nor paid him for said gold and amalgam, that he is indebted to him for it in said sum, and asks judgment on this counterclaim for \$1,000, together with costs and disbursements. Plaintiff filed his reply to this answer, by which he puts in issue the allegations of the answer, except that it admits that under an agreement with defendant the plaintiff did receive gold and amalgam of the value of \$82, for which sum defendant was at the time duly credited, leaving the balance named in the complaint still due and owing to him from defendant, for which sum judgment is demanded. To this reply the defendant demurred on the ground "that the court has no jurisdiction of the subject of the above-entitled action, in that the amount in issue and involved herein exceeds the sum of two hundred and fifty dollars." The record shows that the court overruled this demurrer, which seems to have been regarded as a motion to dismiss the action, and gives the following statement of the subsequent proceedings:

"Motion denied on the ground that the defendant is limited in his counterclaim to the jurisdiction of this court in the sum of \$250.00, and, if more is claimed by his counterclaim than the jurisdiction of this court, his remedy is by suit against the plaintiff, and cannot be adjudicated by this court. The defendant offers no evidence, and, after reading and considering the plaintiff's complaint and all the pleadings in this action, the court finds that defendant is indebted to the plaintiff in the sum of one hundred and ninety-eight dollars. Therefore, it is adjudged and determined that the plaintiff, Charles Forrest, do have and recover from defendant, William M. Bennett, the sum of one hundred and ninety-eight dollars damages and five dollars costs."

The organic act providing a civil government for Alaska confers upon United States commissioners the civil jurisdiction of a justice of the peace in Oregon, and that is limited to \$250 in actions for the recovery of money or damages. In the case at bar the plaintiff brought his action regularly by filing his complaint against defendant for a balance due him for wages in the sum of \$198. This was clearly within the jurisdiction of the commissioner's court. A summons was issued and served, and the defend-

ant appeared and filed his answer. The court then had jurisdiction of the subject-matter of the action and of the person of the defendant. There is no dispute upon these points, but the petition for the writ of review alleges the error of the court to be "that the said U. S. commissioner's court exceeded its jurisdiction in rendering and entering said judgment in said action; to the injury of the substantial rights of plaintiff in that said court, determined said action, and rendered a judgment therein against this plaintiff while the issue disclosed and shown by said pleadings in said action involves a sum exceeding the sum of \$250, exclusive of costs." It will be seen from this that the only point relied upon to sustain this review and reverse the action of the lower court is that the defendant, by filing his answer setting up a counterclaim in the sum of \$1,000, ousted said court of its jurisdiction, and thereafter it could not proceed any further, but must dismiss the case. The commissioner's court has jurisdiction for the recovery of money or damages when the amount claimed does not exceed \$250. To whom must the claim referred to in the statute belong? To the plaintiff, most certainly. The court gets jurisdiction by the filing of a complaint and the service of a summons. The machinery of the law is put in motion by the plaintiff, and I know of no way by which the defendant can oust the jurisdiction of the court, except by defense or plea that the title to real property is involved. Hill's Ann. Code Or. § 909 (882); *Sweek v. Galbreath*, 11 Or. 516, 6 Pac. 220. The contention that a defendant can oust the jurisdiction of a commissioner's court, or other court of limited jurisdiction, by pleading a counterclaim which exceeds the amount for which judgment can be obtained in such court, is not supported by precedent or good reason. The case of *Corbell v. Childers*, 17 Or. 528, 21 Pac. 670, was an action of replevin originally brought in the county court of Klamath county, Or., to recover the possession of certain personal property, alleged to belong to the plaintiff therein, of the value of \$365. The answer alleged said property to be of the value of \$1,060, which was put in issue by the reply. The defendant moved to dismiss the action for the reason that the value of the property was beyond the jurisdiction of the court. The motion was denied, the cause tried by a jury, and a verdict returned for the plaintiff, upon which judgment was entered by the court. The defendant appealed. The supreme court of Oregon, in passing upon the case, said:

"The motion to dismiss this action in the court below was without merit, and was properly overruled. The plaintiff claimed in his complaint that the value of the property in controversy was \$365; the defendant, that it was of the value of \$1,060. In this class of cases the county court has jurisdiction where the claim or subject of controversy does not exceed the value of \$500. Hill's Ann. Code Or. § 894 [868]. Of course, by simply alleging in the answer that the value was greater than \$500, the jurisdiction of the court could not be ousted. The plaintiff's action on the face of the complaint appeared to be within the jurisdiction of the court. If jurisdiction existed in fact, no difference what the answer contained, the plaintiff had a right to a trial, and in such case the question of jurisdiction could not be summarily determined on motion."

Though not directly in point, I think the principle of law announced in this case applies with great force to the one at bar. In an action in a commissioner's court, a plaintiff is entitled to the benefit of the provisional remedies of arrest, attachment, and delivery of personal property claimed in an action; but, if a defendant could oust its jurisdiction and procure the dismissal of the action by trumping up a fictitious counterclaim or inflating the value of the property involved, these remedies would be delusive and vain. In this case the defendant had the right to set up the counterclaim that he did in his answer. "The defendant may set forth, by answer, as many defences and counterclaims as he may have." Hill's Ann. Code Or. § 73 (72). It is true that the value of this counterclaim as alleged exceeds the amount for which the court could render judgment, but that fact should not prevent him from setting it up, and if put in issue by the reply, as it was in this case, then he had the right to go to trial, and if his counterclaim had been established in the amount alleged by the preponderance of evidence it would have defeated the plaintiff's cause of action, and judgment to the amount of the jurisdiction of the court—\$250—should have been given to defendant. In this action, at least, the defendant would have been compelled to waive \$552, provided he could have established his full claim; but if he elected to come into that forum with a claim on which he might have maintained a separate action in another court he must accept the result of what he voluntarily elected to do. The plaintiff disputed defendant's entire counterclaim by his reply, and upon the trial might have defeated it. The court below did not err in overruling defendant's demurrer or motion to dismiss, though the reasons given by the record for his action do not seem to me to be good. But he need not have assigned any reason therefor at all. The transcript shows that after the decision of the court upon defendant's demurrer the case came on for trial, and "the defendant offers no evidence, and after reading and considering the plaintiff's complaint and all the pleadings in this action the court finds that the defendant is indebted to the plaintiff in the sum of one hundred and ninety-eight dollars." This, then, was a trial of the case. The plaintiff was not required to introduce any evidence to establish his claim for labor performed, for defendant admits in his answer that "plaintiff did perform labor and services for defendant, at defendant's quartz mill and mine, situated in Silver Bow Basin, Alaska, for the term of 70 days, at \$4 per day." This would amount to \$280, but the plaintiff in his reply admits a payment of \$82, which leaves the balance claimed in his complaint, and for that amount and costs the commissioner's court entered judgment. Upon the allegations of the complaint and admissions of the answer the plaintiff could rest his case. If the defendant wished to prove his counterclaim, he should have introduced his evidence then; but he offered no evidence, as is affirmatively shown by the record, and I think the court did right in entering judgment for plaintiff. And even if it be conceded that the dictum of the court in deciding defendant's motion to dismiss was such as to mislead defendant, and prevent him from offering evidence, that is not assigned as an error by the petition for review, and cannot, therefore, be con-

sidered. The Oregon Code provides that the petition must describe the decision or determination sought to be reviewed with convenient certainty, and set forth "the errors alleged to have been committed therein." No substantial error appearing to have been committed by the commissioner's court in this case, its decision must be affirmed.

In re HALL & STILLSON CO.

(Circuit Court, S. D. California. August 6, 1895.)

No. 647.

FEDERAL AND STATE COURTS — PETITION FOR LEAVE TO LEVY EXECUTION ON RECEIVERSHIP PROPERTY—NOTICE.

A petition to a federal court for leave to levy an execution issued from a state court on property in the hands of a federal receiver, on the ground that the property was attached on process from the state court before it came into the receiver's hands, will not be determined, except on notice to the parties to the suit in the federal court, and notice to the receiver does not operate as notice to them.

This was a petition by the Hall & Stillson Company, a corporation, for an order authorizing the sheriff of San Bernardino county, state of California, to levy an execution upon the property of the Vanderbilt Mining & Milling Company, said property being in the hands of a receiver appointed by the United States circuit court for the Southern district of California.

The petition in this matter sets forth that on the 23d day of February, 1895, petitioner, the Hall & Stillson Company, commenced an action in the superior court of said county against the Vanderbilt Mining & Milling Company, a corporation, on an indebtedness of \$5,165.83, besides interest, and that on said day a writ of attachment was issued out of said superior court, which on the same day was levied upon the property in question, the same being real estate; that afterwards, on the 13th day of June, 1895, judgment was recovered by the plaintiff in said action for the amount above named; that on or about the 18th day of June, 1895, in an action pending in the United States circuit court for the Southern district of California, wherein Henry King Whittle is plaintiff, and the said Vanderbilt Mining & Milling Company and others are defendants, one W. N. Crandall was appointed receiver of all the property of the said Vanderbilt Mining & Milling Company; that said W. N. Crandall, as such receiver, has taken, and now holds, possession of all the property levied upon by virtue of the aforesaid attachment. On the foregoing allegations, the prayer of the petition is for an order permitting the levy of an execution issued on said judgment upon the property above referred to. The petition was served upon the receiver, together with written notice that, upon said petition, petitioner would, at the time in said notice mentioned, move the court for the order above indicated. When the motion and petition were called up for hearing, objection thereto was made by the receiver, and also by the parties to the action, on the ground that the latter had not been notified of either the motion or petition.

E. B. Stanton and A. B. Paris, for petitioner.

Clarence A. Miller, Miller, Wynn & Miller, and Allen & Flint, for complainant.

W. J. Hunsaker and William Chambers, for defendants.

Henry Dillon, for Taylor, interpleader.

WELLBORN, District Judge (after stating the facts). It is a familiar and necessary rule, based on comity, and governing particularly the relations of state and federal courts of concurrent jurisdiction, that, where the object of an action requires the control and dominion of the property involved in the litigation, that court which first acquires possession draws to itself the exclusive right to dispose of it, for the purposes of its jurisdiction. *Heidritter v. Oil-Cloth Co.*, 112 U. S. 306, 5 Sup. Ct. 135. This rule is invoked by the petitioner, and facts are alleged in the petition which, it is claimed, bring the application under the operation of the rule stated. If the petition be granted, the consequence will be the removal of the property in question beyond the reach of those upon whose complaints it has been, by this court, placed in the hands of a receiver. A motion or application looking to such a result ought not to be determined except upon due notice to the parties adversely interested. These parties are not only entitled to be heard on the issue of law arising upon the face of the petition, namely, whether or not the facts therein stated are sufficient to authorize the relief sought, but should also be allowed an opportunity, if so advised, to controvert the facts. To illustrate, the petition alleges, among other things, that on the 23d day of February, 1895, the sheriff of the county of San Bernardino attached, by virtue of a writ previously issued from the superior court of that county, the real estate in controversy. Suppose that in the issuance of the writ there was some fatal defect, which renders it a nullity, or that in the levy there was a failure to observe some statutory requirement essential to its validity. In either of these contingencies the property, whatever might be its situation if the attachment were valid, could not be in the custody of the sheriff. I instance these things merely to show that upon a petition of this sort there might arise issues of fact upon which the parties concerned unquestionably should be accorded a hearing.

Who are the parties concerned? Manifestly, the claimants of the property who are parties to the original suit. Does the receiver represent these parties, in the sense that notice to him is notice to them? When this question was first presented, two weeks ago, I was inclined to the affirmative side. Further reflection, however, has satisfied me that this inclination was erroneous, and that notice to the receiver is not notice to the real parties in interest. These parties have no common interest. Indeed, their claims are conflicting. It might be that some one or more of them, impelled by their respective interests, would desire this application to prevail, while others, moved by corresponding impulses, would antagonize the application. Manifestly, the receiver cannot be the common representative, on this question, of the various parties to the litigation, but each is entitled to speak for himself. Whether the petition be part of the original suit, or a proceeding outside of, but auxiliary thereto, it is not, as was said by the supreme court of the United States, relative to a somewhat kindred proceeding, in the case of *Krippendorf v. Hyde*, 110 U. S. 282, 4 Sup. Ct. 27, cited by petitioner, "an independent and separate litigation"; but "it was provided to enable the court to determine whether its process had, as was

claimed, been misapplied, and what right and justice required should be done touching the property in the hands of its officers. It was intended to enable the court, the plaintiff in the original action, and the claimant to reach the final and proper result by a process at once speedy, informal, and inexpensive." It does not seem to me, however, that it is material, except as to the appropriate means of bringing the parties before the court, whether this application be considered a cause petition, or a dependent suit, although I think it more regular and logical to treat the application as being made in the original action. This conclusion results, in part, from the fact that the court exercises control over the receiver, not through orders spread generally upon its minutes, but only by means of orders entered in the particular case in which the receiver is appointed. In whichever light, however, the application be viewed, the substantial requirement must exist, that the parties adversely interested to the petitioner shall be duly notified, and an opportunity to be heard thus afforded them. Foster states the requirement thus broadly:

"All petitions which are for matters not granted as of course must be served upon all parties interested in the matter prayed for in them. Service is made substantially in the same way, and at the same time before the hearing, as that of notices of motions." 1 *Fost. Fed. Prac.* § 202.

If, upon a hearing, after due notice to the parties interested, it shall be made to appear that the receiver of this court has taken possession of property which at the time was in the custody of another court of concurrent jurisdiction, I shall be prompt to recognize the rule of comity, and to act in accordance with its requirements. Whether the matters alleged in the petition are true, or, if true, whether they bring the case under the rule just adverted to, or, more specifically, whether an attachment of real estate gives to the officer attaching constructive possession thereof, or is merely the imposition of a lien thereon, are questions upon which no opinion is, at this time, expressed. All that I now decide is that the parties to the original suit are entitled to notice of this application before its hearing.

MORAN et al. v. HAGERMAN et al.

(Circuit Court, D. Nevada. August 13, 1895.)

No. 399.

FEDERAL COURTS—FOLLOWING STATE PRACTICE—INTEREST ON JUDGMENTS.

Since in Nevada, under Gen. St. § 4903, providing that when no different rate of interest is specified, interest shall be allowed on a judgment at a certain rate, it is held that, when the judgment is silent as to interest, no execution calling for payment of interest is authorized, and Rev. St. U. S. § 966, provides that interest shall be allowed on judgments rendered in federal courts only when allowed on judgments by the laws of the state in which the court was held, an execution issued on a judgment rendered in a federal court held in Nevada, which includes interest on the judgment, should be quashed.

This was a motion by Charles Moran and others, complainants in an action against J. C. Hagerman, administrator, and others, wherein

an affirmative judgment was given for defendants, to quash executions issued on that judgment. Motion granted.

Robert M. Clarke, for complainants.

W. E. F. Deal, for respondents.

HAWLEY, District Judge (orally). On the 6th day of September, 1892, a judgment was rendered in this court in favor of respondents A. A. Watkins, John Wright, administrator of the estate of James Webster, deceased, and J. C. Hagerman, administrator of the estate of Jerry Schooling, deceased, against complainants for separate sums of money, amounting in the aggregate to the principal sum of \$33,419.57, and interest thereon, amounting to \$18,239.87, making a total of principal and interest of \$51,659.44. The judgment does not, in terms, call for interest after the date of its rendition. It is silent upon that question. On the 3d day of November, 1892, the complainants took an appeal from said judgment to the supreme court of the United States, and gave a supersedeas bond for a stay of execution thereon. This appeal was dismissed by the supreme court for want of jurisdiction on the 22d day of January, 1894. *Moran v. Hagerman*, 151 U. S. 329, 14 Sup. Ct. 354. On the 3d day of November, 1892, complainants also took an appeal from said judgment to the United States circuit court of appeals for the Ninth circuit, and after a hearing of said case upon its merits, the court, on the 23d day of October, 1894, affirmed the judgment, with costs. *Id.*, 12 C. C. A. 239, 64 Fed. 499. On March 23, 1895, complainants paid the full amount of the principal and interest of the judgment, as expressed upon its face, and respondents gave a receipt therefor, which is indorsed upon the judgment, and reads as follows:

"Received of Charles Moran et al., complainants in the above-entitled cause, by the hand of E. Gest, the sum of fifty-one thousand seven hundred and forty-two dollars and seventy-nine cents (\$51,742.79), which is in full payment of the amount of said judgment, principal, and costs, but does not include interest on said judgment from the rendition thereof, to wit, September 6, 1892,—the question whether said judgment or any portion thereof bears interest being contested and reserved for decision by the court.

"W. E. F. Deal, Attorney for Defts., Judgment Creditors.

"Dated March 23, 1895."

On May 24, 1895, at the request of respondents, and evidently for the purpose of having the matter brought before the court, in pursuance of an agreement of the respective counsel, the clerk issued and delivered to the marshal three separate executions for interest due upon the principal sums named in the judgment from the date of the judgment up to the time of payment, making in all the total sum of \$5,952.02. Complainants now move to quash these executions upon the ground that they do not follow the judgment, and that such interest is not recoverable thereon.

Section 966 of the Revised Statutes of the United States provides that:

"Interest shall be allowed on all judgments in civil causes, recovered in a circuit or district court, and may be levied by the marshal under process of execution issued thereon, in all cases where, by the law of the state in which

such court is held, interest may be levied under process of execution on judgments recovered in the courts of such state; and it shall be calculated from the date of the judgment, at such rate as is allowed by law on judgments recovered in the courts of such state."

What is the law of Nevada upon this subject? Section 4 of the territorial act in relation to interest provides:

"When there is no express contract, in writing, fixing a different rate of interest, interest shall be allowed at the rate of ten per cent. per annum, for all moneys after they become due on any bond, bill or promissory note, or other instrument of writing, on any judgment recovered before any court in this territory, for money lent, for money due on the settlement of accounts, from the day on which the balance is ascertained, and from money received to the use of another." Gen. St. Nev. § 4903.

Under this statute, if it was before the court for construction, it might be said that "on any judgment recovered before any court" in Nevada, the clerk might as a matter of course issue execution for the amount of the principal sum with legal interest thereon, irrespective of the question whether the rate of interest was expressed in the judgment or not. There are many authorities that tend to support this view. *Burke v. Carruthers*, 31 Cal. 470; *Himmelman v. Oliver*, 34 Cal. 247; *Dougherty v. Miller*, 38 Cal. 548; *Clark v. Dunnam*, 46 Cal. 204; *In re Olvera's Estate*, 70 Cal. 184, 11 Pac. 624; *Stewart v. Spaulding*, 72 Cal. 265, 13 Pac. 661; *In re Kennedy's Estate*, 94 Cal. 22, 29 Pac. 412. It will be seen by a perusal of these authorities that the supreme court of the state of California, from which state the statute in question was bodily taken, has uniformly, consistently, and persistently held that judgments entered under any of the provisions of the statute carry the legal rate of interest thereon, whether it is so expressed upon the face of the judgment or not, and that this result necessarily follows as a consequence under the statute making the judgment bear interest. The same construction upon similar statutes has been announced by the courts of other states. *Crook v. Tull* (Mo. Sup.) 20 S. W. 8; *Nevada Co. v. Hicks*, 50 Ark. 416, 8 S. W. 180; *Wither's Appeal*, 16 Pa. St. 151; *Cox v. Marlatt*, 36 N. J. Law, 389. In *Amis v. Smith*, 16 Pet. 311, the court said:

"We can see no good reason why interest upon a judgment, which is secured by positive law, is not as much a part of the judgment as if expressed in it. The legislature say: 'All judgments shall bear interest at the rate of eight per cent.' Can the judgment be satisfied without paying the interest? It is the practice in Mississippi and several other states to include no interest in the judgment, except what is then due, but to leave it to the collecting officer to calculate the amount of interest, according to law, when he settles with the defendant."

Why should interest on a judgment in a case like the present be allowed? In *Nevada Co. v. Hicks*, *supra*, the court said:

"The interest allowed in a judgment, where interest is not stipulated in the contract sued on, is not by virtue of the contract between the parties to the suit, but it is by operation of law, and in the nature of a penalty provided by the law for delay in payment of the principal sum after it becomes due."

In *Morley v. Railway Co.*, 146 U. S. 168, 13 Sup. Ct. 54, the court said:

"But if the contract itself does not provide for interest, then, of course, interest does not accrue during the running of the contract, and whether, after maturity and a failure to pay, interest shall accrue depends wholly on the law of the state, as declared by its statutes. If the state declares that, in case of the breach of a contract, interest shall accrue, such interest is in the nature of damages, and as between the parties to the contract such interest will continue to run until payment, or until the owner of the cause of action elects to merge it into judgment. After the cause of action, whether a tort or a broken contract, not itself prescribing interest till payment, shall have been merged into a judgment, whether interest shall accrue upon the judgment is a matter, not of contract between the parties, but of legislative discretion, which is free, so far as the constitution of the United States is concerned, to provide for interest as a penalty or liquidated damages for the nonpayment of the judgment, or not to do so. When such provision is made by statute, the owner of the judgment is, of course, entitled to the interest so prescribed until payment is received, or until the state shall, in the exercise of its discretion, declare that such interest shall be changed or cease to accrue."

If the disposition of the motion to quash the executions in the present case depended solely upon an original independent exposition of the terms and meaning of section 4903 of the General Statutes of Nevada, it will be observed that many valid and substantial reasons might be given in favor of respondents' contention in this case. But the question does not rest upon any independent construction which this court might give of the statute. The question involved in this case is not of such general interest as would justify this court in departing from the general rule of law which requires the United States courts to follow the decisions of the state courts upon the construction of the statutes of the state, upon the exceptional and broad ground that the decision of the state court is radically erroneous. The line of duty for this court to follow is clearly and directly pointed out in section 966, Rev. St. U. S., before quoted.

In order to ascertain the law of Nevada the decisions of the state court must be examined. They constitute the law upon the subject under consideration, and, whether right or wrong, they are of binding force and effect upon this court. *Morley v. Railway Co.*, 146 U. S. 166, 167, 13 Sup. Ct. 54, and authorities there cited. The evident object and purpose of section 966 was to bring about and maintain absolute harmony and uniformity between the United States courts and the state courts upon this subject. Rule 30 of the circuit court of appeals for this circuit imposes upon this court substantially the same duty as is specified in section 966, Rev. St. U. S. It reads as follows:

"(1) In cases where a writ of error is prosecuted in this court, and the judgment of the inferior court is affirmed, the interest shall be calculated and levied from the date of the judgment below until the same is paid, at the same rate that similar judgments bear interest in the courts of the state or territory where such judgment was rendered." 11 C. C. A. cxii, 47 Fed. xiii.

What is the law of Nevada, as declared by the decisions of the supreme court? In *Hastings v. Johnson*, 1 Nev. 613, the court declared that, when the judgment of the court is silent in regard to the collection of interest, no execution calling for payment of interest is authorized by the statute. If this was the only decision in

relation to this matter, it might be argued that it would be the duty of this court to determine whether that decision was not rendered upon a section of the statute other than the one in question here, which, in allowing parties upon certain contracts to agree in writing for the payment of any rate of interest, provides that judgments rendered on such contracts shall conform thereto "and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment" (Gen. St. Nev. § 4904), as the contract in that case might be said to be one that came under this section, and the decision might have rested solely upon the ground that interest could not be collected upon the judgment because no interest was "specified in the judgment." The decision, however, was to the effect that under the law of Nevada, which included both sections, no interest could be collected when the judgment was silent as regards the collection of interest. Moreover, the law of Nevada does not rest upon that decision alone. The identical question here presented was brought before the court in *Solen v. Railroad Co.*, 14 Nev. 405, and the court said:

"The decision in *Hastings v. Johnson*, 1 Nev. 617, is directly in point * * * upon the real question presented by this appeal. It was therein decided that, where the judgment of the court is silent as regards the collection of interest, it does not authorize the issuance of an execution calling for payment of interest on the judgment, that the execution must follow the judgment, and if the judgment does not call for interest, the execution cannot."

See, also, *Solen v. Railroad Co.*, 15 Nev. 313.

The principle announced in these decisions is the law of the state of Nevada to-day, and, as before stated, must be followed by this court. In obedience thereto it follows that the motion to quash must be, and it is hereby, granted; the costs of this motion to be taxed against respondents.

LOUISVILLE, N. A. & C. R. CO. v. OHIO VALLEY IMPROVEMENT & CONTRACT CO. et al.

(Circuit Court, D. Kentucky. September 11, 1894.)

1. RAILWAY COMPANIES—GUARANTY OF BONDS OF OTHER COMPANIES—INDIANA STATUTE.

The statutes of Indiana (Rev. St. 1888, §§ 3951a-3951c; Rev. St. 1894, §§ 5216-5218) provide that the board of directors of a railway company may, upon the petition of the holders of a majority of the stock of the company, direct the execution of a guaranty of the bonds of another company. The directors of the L. Ry. Co., an Indiana corporation, without any action by the stockholders, directed the execution of a guaranty of the bonds of the B. Ry. Co. The guaranty, as indorsed on the bonds, contained no representation that the stockholders had petitioned for its execution. The stockholders promptly disavowed the action of the directors. *Held*, that the guaranty was invalid, both as between the L. Ry. Co. and another corporation, at whose instance the guaranty was made, and as between the L. Ry. Co. and subsequent holders of the guaranteed bonds, for value and without notice. *Zabriskie v. Railroad Co.*, 23 How. 381, distinguished.

2. CONTRACTS—GUARANTY—PARTIES.

A guaranty indorsed on a railroad bond, and running to the holder of such bond, passes with the bond, by delivery, and is not affected by a statute

making obligations which pass by assignment subject to the same defenses in the hands of the assignee as in those of the assignor.

Bill by the Louisville, New Albany & Chicago Railroad Company against the Ohio Valley Improvement & Contract Company and others for an injunction, and to cancel a guaranty on certain bonds.

Henry Crawford and Helen & Bruce, for complainant.

Humphrey & Davie, St. John Boyle, Noble & Sherley, and Barnett, Miller & Barnett, for defendants.

BARR, District Judge. The decision of Justice Brewer and Judge Jackson, after full consideration, that this court has jurisdiction of this cause, and the granting of an injunction, should, we think, settle for this court some of the questions argued by counsel.¹ That decision determined the complainant is an Indiana corporation, and not a Kentucky one; hence, whatever authority the complainant had or has to guaranty the mortgage bonds issued by the Richmond, Nicholasville, Irvine & Beattysville Railroad Company is derived from the corporate powers granted by that state. It is also determined that upon the then showing the complainant was entitled to an injunction to prevent the disposition by the Ohio Valley Improvement & Contract Company and others of the bonds of the Beattysville Railway Company with the guaranty of the complainant upon them. The subsequent orders entered by this court canceling the complainant's guaranty on the bonds held by the Ohio Valley Contract Company were judgments against the validity of those guaranties, but, as those orders were made without discussion other than given the cause when the injunction was granted, it is proper this court should consider the general question of authority to make those guaranties, as well as the right of bona fide holders of the bonds, for value, without notice of any defect in, or want of authority to execute, the guaranty. The consideration for the guaranty on the coupon bonds of the Beattysville Railway Company was to be the delivery of three-fourths of the capital stock of that railway company to complainant by the Ohio Valley Contract Company. These bonds had been issued by the Beattysville Railway Company, and were to be delivered to the contract company as the Beattysville Railway was constructed. The guaranty which was indorsed on \$1,185,000 of bonds is as follows:

"For value received, the Louisville, New Albany & Chicago Railway Company hereby guaranties to the holder of the within bond the payment by the obligor therein of the principal and interest thereof, in accordance with the terms thereof. In witness whereof the said railway company has caused its corporate name to be signed hereto by its president and its seal to be attached by its secretary."

The authority to guaranty the payment of mortgage coupon bonds of another railway company does not arise, nor can it be implied, from the general business of the complainant, either in construct-

¹ The judges named filed no opinion, nor were their oral opinions reduced to writing.

ing or operating its railroad, but is an authority which must be given to it, as a railroad corporation, by the state, expressly, or be clearly implied from other corporate powers granted to such a corporation. The provisions of the Indiana statute upon the subject of guaranty bonds of another company are as follows:

"3951a. Guaranty of Bonds of Another Company. (1) The board of directors of any railway company organized under and pursuant to the laws of the state of Indiana, whose line of railway extends across the state in either direction, may, upon the petition of the holders of a majority of the stock of such railway company, direct the execution by such railway company of an indorsement guaranteeing the payment of the principal and interest of the bonds of any railway company organized under or pursuant to the laws of any adjoining state, the construction of whose line or lines of railway would be beneficial to the business or traffic of the railway so indorsing or guaranteeing such bonds.

"3951b. Petition of Stockholders. (2) The petition of the stockholders specified in the preceding section of this act shall state the facts relied on to show the benefits accruing to the company indorsing or guaranteeing the bonds above mentioned.

"3951c. Limitation of the Power. (3) No railway company shall, under the provisions of this act, indorse or guarantee the bonds of any such railway company or companies, as is above mentioned, to an amount exceeding one half of the par value of the stock of the railway company so indorsing or guaranteeing as authorized under this act." Rev. St. 1888 (Rev. St. 1894, §§ 5216-5218).

It is quite clear from this record that no effort was made by the board of directors of the complainant, or any one else, to conform to the provisions of this statute in regard to a petition of the holders of the majority of the stock in complainant's company, and that the order of the board, directing the president and secretary to guaranty these bonds, was without the approval or petition of a majority, or any, of the stockholders. The provisions of the Indiana statute seem to have been ignored, and the guaranty made presumably under the supposed authority of an act of the state of Kentucky approved April 7, 1882. But, as complainant is not a Kentucky corporation, this guaranty cannot be sustained or aided by that statute. It will be observed that the board of directors are authorized by the Indiana statute quoted to guaranty the bonds of another company only upon the petition of the holders of a majority of the stock of their company. The stockholders, and not the board of directors, are to take the initiative, and a majority thereof determine whether there shall be a guaranty of the bonds of another company. The board of directors may decide whether a majority has petitioned them so as to authorize a guaranty, and may determine the manner of the indorsement of guaranty, and the proper mode of executing the power given them by the petition of the holders of a majority of stock, but the authority does not exist except by and through the stockholders. The provision of this statute which requires the facts which are relied on to show the benefit accruing to the company indorsing or guarantying the bonds to be stated in the stockholders' petition clearly shows the authority to guaranty the bonds of another company was not intended to be given the board of directors. There is no question here as to the effect of a subsequent approval or ratification of the guaranty of

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these bonds by the board of directors by the stockholders, as their action was promptly repudiated by them the first meeting after the guaranty was made, and presumably as soon as it was practical to have had a stockholders' meeting.

It is insisted that there are other provisions of the statute of Indiana which grant to railway corporations organized in that state, under its laws, corporate powers, that authorize guaranties such as made here. These powers are such as to consolidate with other railroad companies, and to buy and lease, by way of extension of their railway lines, other railroads, etc.; but the authority to guaranty the bonds of another railroad company is given in express terms in section 3951a, and the mode prescribed, and we think this precludes any implied authority arising to guaranty bonds, in cases covered by that section, by the exercise of other corporate powers given in other parts of the statute. Those parts of the statute might be pertinent to show corporate authority to buy the stock of the Beattysville Railway Company, but, as the consideration thereof was the guaranty of the payment of said company's coupon bonds, this guaranty could not be given by the action of the board of directors alone, without the petition of the stockholders, as directed by section 3951a. In *Thomas v. Railroad Co.*, 101 U. S. 71, the supreme court, by Justice Miller, says:

"We take the general doctrine to be, in this country,—though there may be exceptional cases, and some authorities to the contrary,—that the powers of corporations organized under legislative statutes are such, and such only, as those statutes confer. Conceding the rule applicable to all statutes,—that what is fairly implied is as much granted as what is expressed,—it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others."

And in the case of *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 48, 11 Sup. Ct. 478, Justice Gray, after reviewing the cases in the supreme court, says:

"The clear result of these decisions may be summed up thus: The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: The obligation of every one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by laws."

This court and the circuit court of appeals of this (Sixth) circuit have recently considered the question of the corporate right of the Kentucky Union Land Company to guaranty the payment of the coupon bonds of the Kentucky Union Railway Company, and have sustained the land company's authority to make the guaranty; but this was upon a construction of the powers given in the charter of that company,—especially the power to engage in the business of transportation, and to consolidate with any railroad company chartered or to be chartered. See *Tod v. Land Co.*, 57 Fed. 48; *Marbury v. Land Co.* (Oct. Term, 1893) 10 C. C. A. 393, 62 Fed. 335.

The doctrine, as announced by the supreme court, through Justices Miller and Gray, as to the extent and the limitations of corporate powers, when applied to this case, is, we think, conclusive, if our construction of the Indiana statute is correct, against the right of the board of directors of complainant's company to enter into the contract of October, 1889, and subsequently to guaranty the bonds of the Beattysville Railway Company. As between the complainant and the Ohio Valley Contract Company, the guaranty on the Beattysville Railway Company is invalid. See, also, *Pearce v. Railroad Co.*, 21 How. 441; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 307, 6 Sup. Ct. 1094; *Colman v. Railway Co.*, 10 Beav. 1; *East Anglian Ry. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775; *Davis v. Railroad Co.*, 131 Mass. 258; *Marble Co. v. Harvey*, 92 Tenn. 115, 20 S. W. 427.

Many of the defendants are bona fide purchasers and holders of these bonds, having bought them on the market for full value, with the guaranty upon them, and without knowledge or notice of the want of authority by complainant's board of directors to have the guaranty made; and they insist the guaranty is not invalid, as against them, and should not be canceled. The first inquiry upon this branch of the case is the relation which these bondholders have to the guaranty. The guaranty is, in terms, "to the holder of the within bond"; and although the Ohio Valley Contract Company was at the time of the indorsement the holder of some of these bonds, and the guaranty was made under a contract with that company, which was to deliver three-fourths of the capital stock of the Beattysville Railway Company as the consideration thereof, it was evidently the intention of the parties that the guaranty was to be to whoever might be the holder of the bond. The guaranty was intended to pass with the bond, and such is the legal effect of the indorsement. But it is insisted that although the legal title to this guaranty passed with the ownership of the bond upon which it is indorsed, yet, by the provisions of the Kentucky statute, the guaranty is subject to the same defenses as exist against the Ohio Valley Contract Company. The provisions of the Kentucky statute are as follows:

"All bonds, bills or notes for money or property shall be assignable so as to vest the right of action in the assignee, but except in case of bills of exchange, not to impair the right to any defense, discount or set-off that the defendant has or might have used against the original obligee, or intermediate assignor before notice of the assignment." Section 474.

The Code of Practice (section 19) provides:

"In the case of an assignment of a thing in action, the action by the assignee is without prejudice to any discount, set off or defense now allowed * * *. This section does not apply to bills of exchange, nor promissory notes placed upon the footing of bills of exchange, nor to common orders or checks."

These are the only provisions touching the question under consideration. These provisions apply only when an assignment is necessary to pass the title to the thing in action. That is, where the bill, bond, or note had an obligee other than the party suing,

and from whom he gets his right of action, and in whose name the suit would be brought, except for the provisions of the law. But here the guaranty is not to the Ohio Valley Contract Company, or to the order of that company. The obligation of the guaranty is, in terms, to the holder of each bond, and it is to that holder the principal and interest of the bond is guaranteed to be paid if the obligor defaults. These bonds were intended by the parties to be placed upon the market and sold, and they passed to a purchaser by delivery, and not by virtue of the statute of assignments enacted by Kentucky. This is by the general commercial law. *City of Lexington v. Butler*, 14 Wall. 282. The title to the obligation of guaranty passed with the bond, without assignment, under the statute, because the guaranty was to whoever might be the holder thereof, and the holder was by a bona fide delivery. There is no need, therefore, of an assignment, under the provisions of the Kentucky statutes. Thus, as no assignment was necessary, and there being no assignment, the statute authorizing assignment, with reservations as to defenses, etc., as against an original obligee, has no application. An assignment of the thing in action is necessary only when there can be an original obligee other than the party suing. This guaranty, if valid, does not place the complainant in the position of a second maker on the Beattysville railway bonds, nor does it place the company in the position of an indorser of a bill of exchange, but the position is somewhat analogous. An indorser of a bill of exchange agrees to pay if the parties previously bound thereon do not, and he is given legal notice of the defaults, and here the complainant guaranties the obligor will pay principal and interest of the bond according to its terms. It is quite unnecessary to review the conflicting authorities upon this subject. We conclude that as the bonds pass by delivery, and the obligation of the guaranty passes with the bonds, the provisions of the Kentucky statute of assignments as to defenses, etc., do not apply. We concur in what was said by Justice Matthews in *Davis v. Wells*, 104 U. S. 169:

"It has always been held in this court that, notwithstanding the contract of guaranty is the obligation of a surety, it is to be construed as a mercantile instrument, in furtherance of its spirit, and liberally, to promote the use and convenience of commercial intercourse."

Although this guaranty passed with the bond upon which it was indorsed, and inured to the benefit of the holder thereof, the question remains whether the guaranty is valid and enforceable in the hands of a bona fide holder for value, without notice of the want of authority in the board of directors and its president to make the guaranty. There are no recitals in this guaranty, other than that it is given for value received, and there can be no estoppel or presumption against the complainant corporation, in favor of innocent holders, other than that which may arise from the guaranty itself, and the fact these bonds were put upon the market, with the guaranty upon them, with the consent of the board of directors of complainant. The guaranty of such bonds was not within the scope of the business of operating a railway, nor could the corporate power to thus guaranty the bonds of another railway company

constructing a railway in another state be inferred from the usage of railway companies. The nature of the contract should have been notice to all purchasers to inquire into the corporate powers of the guarantying railway company, as it was unusual, and outside of the ordinary business of a railway company, either in operating or constructing railroads. Purchasers on the bond market were bound to know that the president and board of directors of complainant were not the corporation, but its agents, and that the corporate power to guaranty such bonds did not ordinarily exist in the directory. There were no recitals, either in the resolution of the board of directors, or in the guaranty itself, to mislead the purchaser, or stay inquiry. The commercial character of the bond and guaranty thereon did not relieve a purchaser from the risk of the want of corporate authority to execute the guaranty. In speaking of notes and bonds issued or accepted by an agent acting under a general or special power, the supreme court says:

"In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards; for it is to be kept in mind that the protection which the commercial usage throws around negotiable paper cannot be used to establish the authority by which it was originally issued."

See *Floyd Acceptances*, 7 Wall. 676, and approved in *Marsh v. Fulton County*, 10 Wall. 683.

It is insisted that as the board of directors of complainant's company had the corporate authority to guaranty these bonds, under certain circumstances, these innocent purchasers had a right to presume the necessary conditions existed to confer the authority upon them. The language of Justice Swayne in *Merchants' Bank v. State Bank*, 10 Wall. 604, is quoted as a general proposition applicable to all contracts with corporations. Justice Swayne said:

"Where a party deals with a corporation in good faith, the transaction is not ultra vires, and he is unaware of any defect of authority or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in part exists. If the contract can be valid under any circumstances, an innocent party, in such a case, has a right to presume their existence, and the corporation is estopped to deny them."

This language is applicable as in that case, where the company had the corporate authority to make the contract, and the agent who made it was within the general scope of his duties, though not especially authorized to make the contract in controversy; but it cannot be true, broadly stated, else stockholders in corporations would be without the protection of the limitations and conditions placed upon their corporation by the charter, and the state itself would be without the power to prescribe conditions to the exercise of corporate powers, or prescribe the mode or agencies by which corporate powers should be exercised. Here the condition upon which the board of directors had the authority to make the guaranty of the mortgage bonds of another railway company was the request of a majority of the stock of complainant's company, and this was to be in the shape

of a written petition, and the reasons therefor were to be given. This condition precedent to the corporate authority of the board of directors was not performed, or attempted to be performed. It may be the board of directors might have had the right to determine whether, if a petition of stockholders had been presented, it was as required by the statute, as to the number of stockholders and the character of the petition. But there was no action of stockholders at all, and there was no recital in the resolution of the board, or in the guaranty, that there was. We do not, therefore, see that the position of these bondholders, who are bona fide purchasers without notice, is other or different from that of the Ohio Valley Company.

It is earnestly contended that in the instance where the Cleveland, Columbus & Cincinnati Railroad Company guarantied the payment of the bonds of the Columbus, Piqua & Indiana Railroad Company, the supreme court has decided the other way, in *Zabriskie v. Railroad Co.*, 23 How. 381. There the contest was between a stockholder of the Cleveland, Columbus & Cincinnati Railroad Company and the bona fide holders of the guarantied bonds; the stockholders seeking to enjoin the payment of the interest on the bonds guarantied by the guarantor, the Cleveland, Columbus & Cincinnati Railroad Company. There was an effort to sustain the stockholders' suit by allegation of misconduct of one or more of the directors of the Columbus, Piqua & Indiana Railroad Company; but the real objection to the guaranty was an alleged want of authority, as the stockholders did not assent thereto by a two-thirds vote before the contract of guaranty was entered into, as was required by the statute under which the Cleveland, Columbus & Cincinnati Railroad Company was organized. It appeared in that case, the contract under which the guaranty was to be made was entered into in March, 1854, and that in the summer (July) of 1854, at a called meeting of the stockholders of the Cleveland, Columbus & Cincinnati Railroad Company, the indorsement of guaranty was expressly approved by the stockholders, without a recorded dissent. The suing stockholder was present by proxy, who verbally dissented, but declined to vote, although his vote would have controlled the meeting. After this stockholders' meeting, these bonds were sold in the market "under an uncontradicted representation of their validity through the votes" at the stockholders' meeting, and the bonds were freely purchased upon the representation of the action of the stockholders. There was no action of the stockholders of the Cleveland, Columbus & Cincinnati Railroad Company repudiating the action of the company in making the guaranty, nor did the suing stockholder take any action to modify or repudiate the action of his company until the fall of 1856, and after the Columbus, Piqua & Indiana Railroad Company had become insolvent. He, in his suit, denied any efficacy to the vote of the stockholders in July, 1854, because the notice was insufficient as to time of notice, and the failure to state its purpose; and he contended that not more than half of the stock was represented, and two-thirds of those present did not vote. The court refused to sustain this stockholder's injunction, under the circumstances, and Justice Campbell, in the course of his opinion, said:

"The observations of Lord St. Leonards, in the house of lords (*Bargate v. Shortridge*, 5 H. L. Cas. 297), in reference to the effect of the conduct of a board of directors, as determining the liability of a corporation, are applicable to this corporation under the facts of this case. 'It does appear to me,' he says, 'that if, by a course of action, the directors of a company neglect precautions which they ought to attend to, and thereby lead third persons to deal together as upon real transactions, and to embark money or credit in a concern of this sort, these directors cannot, after five or six years have elapsed, turn around, and themselves raise the objection that they have not taken these precautions, and that the shareholders ought to have inquired and ascertained the matter. * * * The way, therefore, in which I propose to put it to your lordships, in point of law, is this: The question is not whether that irregularity can be considered as unimportant, or as being different in equity from what it is in law, but the question simply is whether, by that continued course of dealing, the directors have not bound themselves to such an extent that they cannot be heard, in a court of justice, to set up, with a view to defeat the rights of the parties with whom they have been dealing, that particular clause enjoining them to do an act which they themselves have neglected to do.' This principle does not impugn the doctrine that a corporation cannot vary from the object of its creation, and that persons dealing with a company must take notice of whatever is contained in the law of their organization. This doctrine has been constantly affirmed in this court, and has been ingrafted upon the common law of Ohio. *Pearce v. Railroad Co.*, 21 How. 441; *Straus v. Insurance Co.*, 5 Ohio St. 59. But the principle includes those cases in which a corporation acts within the range of its general authority, but fails to comply with some formality or regulation which it should not have neglected, but which it has chosen to disregard."

In that case the stockholders' meeting had been held, and proper resolution, by unanimous vote,—so far as the record showed,—passed, and the bonds had been sold upon the representation of that vote, taken when the suing stockholder was present by proxy. Certainly, the buyers of these bonds should not have been bound by facts which were not in the record, and which contradicted the record upon which the bonds were sold. The fact that the suing stockholder was present by proxy, and refused to put on record his dissent, which would have been decisive, would, of itself, have been sufficient to prevent his obtaining the relief he sought. But construing the language of the court in its broadest acceptation, and applying it to the case at bar, it is only to the effect that had there been a petition by stockholders presented to the board of directors of complainant's company, directing this guaranty, and that board had acted as directed, reciting a majority had petitioned, the question of its compliance with the statute, as to the reasons given or number of stockholders petitioning, would not be thereafter open to inquiry, as against bona fide purchasers.

The case of *Toppan v. Railroad Co.*, reported in 1 Flip. 75, Fed. Cas. No. 14,099, is also much relied on by defendants' counsel. That case arose on the same guaranty of the bonds of the Columbus, Piqua & Indiana Railroad Company mentioned in the case of *Zabriskie v. Railroad Co.*, supra. The action was at law, by a bondholder of the guaranteed bonds, for the interest thereon, against the Cleveland, Columbus & Cincinnati Railroad Company. The opinion of Judge Willson, of the Northern district of Ohio, was upon a demurrer to the declaration. One of the objections urged was that the guaranty was not negotiable, and the holder of the bond could not sue and recover thereon. Another was that, the defend-

ant having no power in its charter to make the guaranty, the legal authority and the facts and circumstances contemplated by the general act of 1852, by which such power could be exercised, should be fully set out in the declaration. The learned court decided that the guaranty was negotiable, and passed with the bond upon which it was indorsed. He also decided that the allegation in the declaration that "said guaranty was duly signed by the defendant, by its then president, who was authorized to execute the same, and was afterwards, to wit," etc., "duly ratified and confirmed by the stockholders of said company," was sufficient. The latter ruling raised the question of the materiality, under the law of 1852, of the time when two-thirds of the stockholders assented to the guaranty. The statute of 1852 gave to the railroad companies authority to aid, etc., other railroads, when certain facts and circumstances existed, and had the proviso "that no such aid shall be furnished, nor any purchase, lease or arrangement perfected until a meeting of the stockholders of each of said companies shall have been called by the directors thereof at such time and place, and in such manner as they shall designate, and the holders of at least two-thirds of the stock of such companies represented at such meeting in person or by proxy, and voting thereat, shall have assented." Laws 1852, p. 281, § 24. The court, in discussing the point, used language which, when disconnected from the case, is quite broad, but held the allegation of the declaration was sufficient, and that the time of the assent of two-thirds of the stockholders was not material. It appeared in that case that the action of the directory in making the guaranty had been ratified by the stockholders. The extent of this decision is that the assent of two-thirds of the stockholders to the aid, as given, might be given after the aid as well as before. That law provided for the arrangements and agreements to be made by the directors of the respective railroad companies, and for them to call the stockholders together at such time, place, and manner as they should determine, and then the action or proposed action of the directors should be assented to, and was to be before the aid was furnished, or the purchase, lease, or arrangement was perfected. In that instance all arrangements and agreements and the initiative was to be taken by the directors, and in fact, as is stated in the *Zabriskie Case* by Justice Campbell, the bonds with the guaranty upon them were not put upon the market until after the stockholders assented to the guaranty. It is not intended to state the stockholders assented to the guaranty before the guaranty was indorsed upon the bonds, but before they were put upon the market. In the case at bar the initiative was to be taken by the stockholders, and they were to determine whether there should be a guaranty, and direct the directors by a petition in writing, giving the facts upon which they based their determination. This extraordinary corporate power was to be exercised by the stockholders themselves, and not by their agents, the board of directors, and in a way and manner that all who dealt with the corporation could know, if they desired. These two cases, both in principle and facts, fall far short of the present case.

This view makes it unnecessary to consider and determine whether all of the defendants are bona fide holders of these bonds, without notice of the facts which make the guaranty invalid. The complainant is entitled to have its injunction sustained, and the guaranty on defendants' bonds canceled, and a decree will go accordingly.

FIRST NAT. BANK OF MONTPELIER v. SIOUX CITY TERMINAL
RAILROAD & WAREHOUSE CO. (TRUST CO. OF
NORTH AMERICA, Intervener).

(Circuit Court, N. D. Iowa, W. D. August 27, 1895.)

1. CORPORATIONS—LIMIT OF MORTGAGE INDEBTEDNESS.

The Iowa statute provides that corporations organized thereunder must, by their articles of incorporation, fix a maximum of indebtedness, which shall not exceed two-thirds of their capital stock; this provision not to apply, however, where corporate bonds are issued and secured "by an actual transfer of real estate securities," which shall be a first lien on unincumbered real estate, worth at least twice the amount loaned thereon. McClain's Code, § 1611. *Held*, that the execution and delivery by the corporation of a mortgage on its own real estate to secure bonds was a transfer of real-estate securities, within the meaning of the statute.

2. SAME—PRIOR INCUMBRANCES.

A terminal and warehouse company executed a lease of its property for a term of 100 years, and shortly afterwards mortgaged the same to secure an issue of bonds. The lease and mortgage mutually referred to each other, and the lease contained a provision, with an express covenant by the lessee, for the payment to the trustee under the mortgage of so much of the rental as was necessary to pay interest on the bonds and the costs of the trusteeship. *Held*, that the two instruments were to be construed in pari materia, and that, consequently, the lease was not a prior incumbrance to the mortgage, within the meaning of a statute requiring corporate bonds to be secured by mortgage upon unincumbered real estate. McClain's Code, § 1611.

3. SAME—VALUE OF MORTGAGED PROPERTY—EVIDENCE.

Upon a question as to whether property mortgaged by a corporation was worth twice the amount of the bonds secured by the mortgage, as required by statute, *held*, that where it appeared that the bonds were sold in open market for from 90 to 95 cents on the dollar, in cash, it could not be held that the security, at the time it was given, did not meet the statutory requirement.

4. SAME—VALIDITY OF MORTGAGE—RATIFICATION.

The fact that a trust deed to secure bonds was not in strict accordance, in some particulars, with the resolution authorizing it, is not sufficient ground for holding it invalid, where, subsequent to its execution, the board of directors recognized its existence and validity by directing the issuance of the amount of bonds which the deed was given to secure.

5. SAME—PERPETUITIES.

Where a corporation executed a lease for 100 years, and shortly afterwards a mortgage of the same property, and the two instruments mutually referred to each other, so as to be in pari materia, *held*, that there was no ground for a contention that the estate created by the mortgage could not take effect until the expiration of the lease, and that, consequently, the mortgage was void, as creating a perpetuity.

This was a bill by the First National Bank of Montpelier against the Sioux City Terminal Railroad & Warehouse Company, wherein the Trust Company of North America, as intervener, filed a bill to

foreclose a mortgage securing bonds of the terminal company. The cause was submitted on the pleadings and proofs.

Joy, Call & Joy, for complainant.

John C. Coombs and H. J. Taylor, for defendants.

SHIRAS, District Judge. The Sioux City Terminal Railroad & Warehouse Company was incorporated under the laws of the state of Iowa in August, 1889; and by the articles of incorporation it was empowered to purchase grounds in Sioux City, Iowa, for railway terminal facilities, and to construct the necessary freight and passenger depots thereon, and to build and operate all the railway tracks, sidings, etc., needed for the use of the terminal facilities by any and all railroads coming into Sioux City, and with the further right to construct lines of railway in Sioux City and Woodbury county. The capital stock of the corporation was fixed at \$1,000,000, with the right to commence business when \$200,000 of stock should be subscribed. The company acquired certain lands in Sioux City in the latter part of 1889, and in the years 1890-93 it constructed freight and passenger depots and warehouses thereon, with the necessary railway trackage to render the same available for proper use; but the company never built, or in any way acquired, any line or lines of railway except those placed on the terminal grounds in Sioux City. On the 1st day of January, 1890, the company executed a mortgage upon its property within the limits of Sioux City to the Trust Company of North America, as trustee, to secure the payment of \$1,250,000, evidenced by 1,250 bonds of \$1,000 each. These bonds were sold in open market, realizing from 90 to 95 cents on the face thereof; and the proceeds were used in payment of the property purchased by the terminal company, and in payment of the floating indebtedness of the company, evidenced by notes of the company previously issued, and negotiated through the Union Loan & Trust Company of Sioux City. The interest upon these bonds being in arrears, the trust company has filed a bill in the present case seeking a foreclosure of the mortgage. Prior to the filing of this bill, the terminal company had executed a deed of assignment of all of its property to E. H. Hubbard, for the purpose of securing payment of its then outstanding notes, negotiable through the Union Loan & Trust Company, amounting to about \$750,000. In answer to the bill of foreclosure filed by the Trust Company of North America, Hubbard, as assignee, and the terminal company, aver that the mortgage sought to be foreclosed and the bonds secured thereby are invalid and void on several grounds,—the first being that under the statutes of Iowa the terminal company had no power to incur an indebtedness in excess of two-thirds of its authorized capital stock; that the capital stock of the company was fixed in the articles of incorporation at \$1,000,000; that the mortgage and issue of bonds covered thereby are for \$1,250,000; and that as the statutes of Iowa limit the amount of indebtedness to two-thirds of the capital stock, with certain exceptions named in the statute, the terminal company had no power to give a mortgage for a sum in excess of two-thirds of its authorized capital stock.

The terminal company was created under the provisions of chapter 1, tit. 9, of the Code of Iowa, and chapter 139, Acts 20th Gen. Assem. By the thirteenth article of its charter, it is provided that:

"The highest amount of indebtedness to which this company shall at any one time subject itself shall not exceed two thirds of the amount of the paid up capital stock of the company, aside from the indebtedness secured by mortgage, upon the real estate of the company."

Section 1611, McClain's Code Iowa, provides that:

"Such articles of incorporation must fix the highest amount of indebtedness or liability to which the corporation is at any one time to be subject, which must in no case, except in that of risks of insurance companies, exceed two-thirds of its capital stock. Provided, that the * * *. Provided further, that the provisions of this section shall not apply to the debentures or bonds of any company, duly incorporated under the provisions of this chapter, the payment of which debentures or bonds shall be secured by an actual transfer of real estate securities for the benefit and protection of purchasers of said debentures or bonds, such securities to be at least equal in amount to the par value of such bonds or debentures, and to be first liens upon unincumbered real estate worth at least twice the amount loaned thereon."

For the common benefit and protection of the creditors and stockholders of corporations created under the provisions of chapter 1, tit. 9, of the Code of Iowa, it is first enacted that the limit of authorized indebtedness is fixed at two-thirds of the capital stock; but by the second proviso it is declared that this limitation shall not apply to debentures or bonds secured by a first lien upon unincumbered real estate, worth at least twice the amount loaned thereon. The theory of this section seems to be that, if bonds of the corporation are secured upon real estate worth at least twice the amount loaned thereon, they will be paid out of this security, and thus there will be left for the benefit of other creditors the security derived from the capital stock of the corporation; and therefore, in ascertaining whether the amount of indebtedness to which a corporation may lawfully subject itself under the first paragraph of the section has or has not been exceeded, such secured bonds are not to be taken into account. It has been suggested in argument that a mortgage or trust deed executed by a debtor corporation upon realty owned by it does not come within the terms of the proviso, and that it is only bonds secured by the transfer of other notes, bonds, debentures, or like evidences of debt, secured upon realty not belonging to the debtor corporation, which are intended to be excepted out of the operation of the first clause of the section. It is not to be denied that the language of the proviso gives plausibility to this contention, yet I do not deem it to be the proper construction thereof. The trust deed in question in this case is a real-estate security; the execution and delivery thereof to the trustee was an actual transfer of a real-estate security for the benefit of the purchasers of the bonds described in it; and it thus comes within the class of securities described in the paragraph in question. It thus seems clear that under the provisions of the articles of incorporation of the terminal company, read in connection with the provisions of the Code of Iowa applicable thereto, the bonds in question cannot be held void simply because, in amount, they exceed two-thirds of

the authorized capital stock of the company, for the reason that they are bonds secured by the transfer to the trustee of real-estate security, to wit, a trust deed equal in amount to the par value of the bonds secured thereby. But it is said that the trust deed is not a first lien upon unincumbered real estate, within the requirement of the statute, because of the existence of a lease of the terminal property made by the terminal company to the Sioux City & Northern Railroad Company for a period of 100 years, at the yearly rental of \$90,000. This lease bears date of December 14, 1889, whereas the trust deed sought to be foreclosed is dated January 1, 1890; but the provisions of the two instruments show that they were executed with relation to each other, are in that sense in *pari materia*, and must be construed together, in ascertaining the rights and priorities created thereby. Thus it is recited in the lease that:

"Whereas, the said terminal company, party of the first part, has been vested with power by its stockholders and board of directors to execute and deliver, and will execute and deliver, its first mortgage to the Trust Company of North America, of Philadelphia, Pennsylvania, to secure bonds to an amount not exceeding one million two hundred and fifty thousand dollars, which mortgage is to cover, embrace, and include all of the real estate of said terminal company, and all the rights of way, franchises, and all rights acquired under and by virtue of the said ordinances, assignments, and transfers aforesaid; and whereas, it is further provided in said mortgage, under said power given as aforesaid, that so much rental in this lease provided as shall be necessary to pay the interest upon said bonds, and the necessary costs of trusteeship, shall be paid in quarterly installments to the trustee in said mortgage named."

And, based upon these recitals, the lessee expressly covenants to pay to the Trust Company of North America \$75,000 yearly, to apply in payment of the interest of the bonds issued by the terminal company, and also so much additional as might be needed to pay the costs of the trusteeship; it being further provided that in case there should be a failure to pay any part of the stipulated rental, or to pay the interest or principal of the bonds of the terminal company, then the rental coming due from the railroad company, as original lessee, or from any subtenants, should be payable to the trustee in the mortgage for the benefit of the bondholders secured thereby. In the trust deed are found similar recitals touching the lease, and in the granting clause the lease itself is described as part of the rights and property mortgaged for the payment of the bonds. It thus appears that in no proper sense can it be said that the lease is a lien or incumbrance upon the property covered by the trust deed prior to that instrument. To give a value to the terminal property, it was essential that it should be used by some railway for terminal purposes. The company owning it was not operating any line of railway, and therefore the property was without value, and no income could be derived therefrom, unless it was leased to a railway company or companies having lines entering Sioux City. If the trust deed had been first executed and recorded, and then the lease had been executed, containing the provisions now found therein in regard to the payment of rental to the trustee for the benefit of the bondholders, could there be any question that a greatly increased

value would thereby have been given to the mortgagee's interest in the property? The same increase of value is created by the lease as it was executed. Although bearing a date prior to that of the mortgage, it is evident from its terms that it was not intended to create any lien or interest antagonistic or superior to the mortgage. According to its terms, the lessee is bound to pay to the trustee in the mortgage \$75,000 annually,—a sum sufficient to pay the yearly interest maturing on the mortgage bonds,—and, in addition, a sum sufficient to pay the costs of the trusteeship. Furthermore, in case of a failure on part of the terminal company to pay either the principal or interest of its bonds, the lease is liable to be sold, through a foreclosure of the mortgage, for the benefit of the bondholders. In fact, the lease was made for the benefit of the bondholders, and does not create any lien or incumbrance that is paramount or superior to the mortgage. The statute also requires that the bonds must be secured on realty worth at least twice the amount secured thereon. What the real value of the property covered by the mortgage is now, or what it was when the mortgage lien thereon was created, is very uncertain, and the opinions of witnesses would very greatly differ with regard thereto. The undisputed fact is that the bonds were sold in open market, and brought in cash, from 90 to 95 cents on the dollar, which demonstrates that the purchasers deemed the security to be ample. The evidence is not such that the court can say that, as values then were in Sioux City, the security did not meet the requirements of the statute. But, if it were true that the security for the bonds was less than that required by the statute, would that fact defeat the lien of the bonds upon the security actually given? In equity, would not the bondholders be entitled to hold the security actually given, and to enforce their bonds against it, even though they might be estopped from enforcing payment against the other property of the corporation? The statute limits the indebtedness that may be lawfully created to two-thirds of the authorized capital stock, and then provides that, in estimating the amount of the indebtedness, bonds secured on unincumbered realty worth twice the amount secured thereon shall not be included. The theory is that bonds thus secured will be paid out of the security, and will not, therefore, come against the general assets of the corporation. Would not the full purpose of the statute be met by holding that in case bonds are sold, based upon security that is not equal in value to that required by the statute, the bondholders can hold the security actually given, and enforce payment against it, but will be estopped, in favor of other creditors, from claiming payment from the other assets of the corporation? But, however this may be, as already said; the evidence is not such as to show clearly that the bonds were issued in violation of the statute in this matter of the value of the security, and therefore the mortgage cannot be held to be void on that ground.

It is further urged in argument that the published notice of incorporation of the terminal company stated the limit of indebtedness to be two-thirds of the authorized capital stock, without containing the exception authorized by the statute, and named in the thirteenth

article of incorporation, to wit, of the bonds secured on realty. A failure to publish the statutory notice of incorporation does not invalidate indebtedness created within the statutory limit, but only renders the stockholders individually liable under the provisions of section 1618, McClain's Code Iowa. If it be true that the notice published did not comply with the requirements of the statute,—which, however, I do not hold,—it would not follow that the trust deed and the bonds secured thereby are void for want of authority to issue them. The authority to issue them is found in the articles of incorporation, read in connection with the statutes of Iowa, and is not dependent upon the character of the published notice. As I gather the facts from the record, there are not presented thereby many of the questions which have been so fully and ably presented by counsel in their oral and written briefs and arguments touching the doctrine of estoppel, the defense of want of authority on part of the corporation to issue these bonds, and other cognate questions, and I am therefore relieved from the duty of reviewing the authorities on these points.

The validity of the trust deed or mortgage is further questioned on the ground that the instrument executed was never authorized by the corporation; that, while it is true the board of directors did authorize the execution of a trust deed, the one in fact executed differs in many particulars from the one authorized, and must therefore be held to be void. It cannot be questioned that the board of directors did expressly authorize the execution of a trust deed to secure bonds in the sum of \$1,250,000; that the deed was executed; that subsequently the board of directors adopted the following: "Resolved, that the Trust Company of North America, Philadelphia, trustees under the mortgage made by this company, dated January 1, 1890, be authorized, and they are instructed, to deliver 1,250 bonds of the denomination of \$1,000.00, secured by said mortgage, to the order of A. S. Garretson,"—and the said Garretson was empowered to receive and sell the bonds for the benefit of the corporation, which was done. From this it appears that the board of directors knew of the execution of the trust deed of January 1, 1890; that they recognized its validity, and directed the sale of the bonds secured thereby. And hence it must be held that if the trust deed, as executed, differs from that previously authorized by the board, such changes were recognized and approved by the board, and the trust deed, as executed, cannot be said to have been executed without the knowledge, approval, and consequent authority of the board.

It is further earnestly contended by counsel for defendants that the trust deed must be held to be void, and not enforceable in equity, because it is repugnant to the rule against perpetuities. In Gray, Perp. § 201, the rule invoked is stated in the following terms: "No interest subject to a condition precedent is good unless the condition must be fulfilled, if at all, within twenty-one years after some life in being at the creation of the interest." The theory of counsel is that the interest or estate created by the mortgage rests or is conditioned on the prior term created by the lease; that the lease is for

the period of 100 years; that, as the estate created by the mortgage may not take effect until the expiration of the lease, it must be held to be contrary to public policy, because of the remote period which might thus elapse before the estate would vest. If it were true that the lease created a prior estate, and that the mortgage could not take effect, and that no interest or estate thereunder could be created or conveyed, until after the termination of the lease, which, by its terms, is for the period of 100 years, then it might be that the objection urged would have force, but I do not deem this to be the true construction of the mortgage and lease in question. The lease, although earlier in date than the mortgage, does not in fact create an interest or estate to be enjoyed prior to the taking effect of the mortgage estate. The bonds secured by the mortgage mature in 10 years from their date, and, if the interest and principal thereof were paid in accordance with the terms of the mortgage, the mortgage lien would be at an end. If, however, the bonds should not be paid as provided in the mortgage, then foreclosure proceedings could be had, and by a sale under the terms of the mortgage the fee title of the mortgaged property, together with the lease itself, could be conveyed to the purchaser. The existence of the lease would not in any manner prevent a foreclosure and sale, and thus a new title would be created under the mortgage. In other words, the entire purpose of the mortgage could be fulfilled, and the interest, lien, or estate created thereby could be converted into a new title, vested in another party, to wit, the purchaser at the foreclosure sale, within a period falling far short of the 21-years limit named in the rule. The interest and rights created by the mortgage are not in abeyance until the termination of the lease, nor is the mortgage vested on the lease in such sense that the leasehold forms a condition precedent to the existence or enforcement of the mortgage lien. The lien of the mortgage took effect upon its delivery and recording, and this lien can now be enforced according to the terms of the mortgage, by a foreclosure decree and sale; and I therefore fail to see why a court of equity should refuse to enforce it on the principle of public policy underlying the rule against perpetuities, as the same exists at common law. The statute of Iowa upon the subject (section 3091, McClain's Code) declares that "every disposition of property is void, which suspends the absolute power of controlling the same for a longer period than during the lives of persons then in being, and for twenty-one years thereafter." In *Todhunter v. Railroad Co.*, 58 Iowa, 205, 12 N. W. 267, it was held that "the object of the statute is to prevent property from being taken out of commerce, and prevent it from being held without the power of alienation beyond the prescribed period." In that case the facts were that the Des Moines, Indianola & Missouri Railroad Company leased its line of railway to the Chicago, Rock Island & Pacific Railroad Company for the term of 999 years, agreeing to pay as rental 30 per cent. of the gross yearly earnings, to be used and applied in payment of the interest accruing on the bonds of the lessor. It was held that as the lessor could convey the fee title, and the lessee could assign the lease, "and by uniting in a conveyance the lessor

and lessee may freely, and without restraint, convey both the fee and the leasehold interest," the lease, though for 999 years, was not void. In the case now before the court, as a foreclosure decree and sale under the provisions of the mortgage will not only convey the fee title, but also the lease thereon,—thus accomplishing all that the lessor and lessee could do in the Todhunter Case,—it is clear that the mortgage does not prevent an alienation of the property, within the meaning of the statute of Iowa, as construed by the supreme court in the case just cited.

The evidence shows, and the fact is not questioned, that the bonds secured by the trust deed executed to the Trust Company of North America were sold for a fair value to different parties, who bought them relying upon the security afforded by the trust deed in question, and I am not able to find in the provisions of the deed, or in the facts of the case, any reason why these parties should be deprived of the security upon the faith of which they bought the bonds and parted with their money, which, it is admitted, was received by the terminal company. I therefore find and hold that the trust company is entitled to a decree of foreclosure as prayed for.

VON AUW et al. v. CHICAGO TOY & FANCY GOODS CO. et al.

(Circuit Court, N. D. Illinois. July 15, 1895.)

1. JURISDICTION OF FEDERAL COURTS—NONRESIDENTS OF DIVISION OF DISTRICT—APPEARANCE.

If it be true that parties cannot be sued in the Northern district of Illinois except in the division thereof wherein they reside, this is a personal privilege, which is waived by their general appearance to the action, and is not a matter going to the jurisdiction of the court.

2. EQUITY PLEADING—CREDITORS' BILL—MULTIFARIOUSNESS.

A creditors' bill which sets up several distinct fraudulent conveyances to different defendants is not multifarious where it seeks to enforce but a single debt; and the satisfaction thereof by one defendant under a decree against him would be a satisfaction of a proper decree against any other defendant.

This was a creditors' bill filed by complainants, Von Auw and others, against the Chicago Toy & Fancy Goods Company and others. Defendants demur to the bill for want of jurisdiction and on the ground of multifariousness.

Moses, Pam & Kennedy, for complainants.

Moran, Kraus & Mayer, for defendants.

JENKINS, Circuit Judge. The complainants, as judgment creditors of the corporation defendant, filed a creditors' bill in favor of themselves and of other creditors of the judgment debtor, and charge: First. That the corporation defendant was organized on the 26th of February, 1890, by the defendants Meyer, Cohen, and Meyer, with a capital stock of \$10,000, Gustave Meyer subscribing for 52 shares, Cohen for 47 shares, and Marcus Meyer for 1 share, and that said defendants elected themselves directors of the company,

and continued so to act up to the time that the company ceased business; Gustave Meyer as president of the company, and Alexander H. Cohen as secretary treasurer. Second. That, at the time when the indebtedness of the complainants was contracted by the corporation defendant, it was indebted in the sum of \$100,000 in excess of its capital stock, to the knowledge of the directors, who assented to the incurring of such indebtedness. The complainants ask judgment against the three defendants who are directors for the amount of their debt under the statute of Illinois. Third. That Gustave A. Meyer and Alexander H. Cohen have not paid the amount of their respective stock subscriptions, and that they should be respectively held for the unpaid amounts thereof, to liquidate the indebtedness of the corporation. Fourth. That for the purpose of wrecking the corporation, and cheating and defrauding its creditors, the three directors named, on the 31st day of December, 1893, caused a judgment to be entered by confession in favor of the defendant Frank Ephraim for the sum of \$10,598.68, upon execution under which judgment the said sum was realized and received by Frank Ephraim, to whom, also, the directors turned over other property, of the value of at least \$18,000; that Ephraim is a relative of Gustave A. Meyer; that the company was not indebted to said Frank Ephraim; and that the judgment was entered and the money and property turned over to Ephraim solely for the benefit of the officers and directors of the defendant company and in reality in the interest of one or more of the directors of the company, and that such money and property are now held in secret trust for their benefit, or for the benefit of some one of them. Fifth. That on the same day another judgment by confession was entered in favor of Rebecca Cohen for \$775.71, upon which was realized the amount, and that the officers of the company delivered to Rebecca Cohen merchandise and property of the defendant company to the amount of at least \$2,000 prior to the entry of the judgment; that Rebecca Cohen is a relative of Alexander H. Cohen; that the judgment was entered to hinder and delay the creditors of the company; and that she holds the property in secret trust for the benefit of the officers and directors of the company, or some one of them. It asks for an accounting by Rebecca Cohen of the property and effects received by her and moneys realized upon execution, and that the same be applied to the payment of the debts of the company. Sixth. A similar judgment by confession on the same day was entered in favor of the defendant Benjamin Cohen for \$1,355.42, and upon which the money was realized upon execution. Benjamin Cohen is a brother-in-law of Alexander H. Cohen. Seventh. On the same day a like judgment was entered in favor of one Abraham C. Harris for \$10,586.42, which was realized by Harris by levy under said judgment. (Whether or not these judgments were without proper consideration or fraudulent is not averred.) Eighth. That the defendants Pick, Bloch, and Joel received from Gustave A. Meyer certain assets of the defendant company which the bill states should have been applied to the debts and obligations of the company, but no attack seems to be made otherwise upon the transaction. The bill prays

for a discovery and an account touching all the assets of the corporation which came into the possession of the defendants, or either of them; and that the amount of such property bedelivered to a receiver, and applied to the payment of the debts of the defendant company; that all preferences may be declared illegal, and the defendants be required to account for any amount received by them under any unlawful preference; that the stock liability of each of the subscribers to the capital stock be ascertained and determined, and each person liable be required to account to a receiver for the same, and to pay in the amount of his liability towards the payment of the debts of the company, and to satisfy the judgment of the complainants; that the liability of the directors by reason of the incurring of indebtedness in excess of the capital stock of the company be ascertained and determined, and they required to account to the receiver and to pay the amount for which they are liable, and that all transfers by the defendants, or either of them, be decreed to be fraudulent and void and without consideration, and to have been made with intent to hinder and delay the creditors of the company; that the business of the company be wound up, and the avails of the property be applied to the satisfaction of the judgment. To this bill demurrer is interposed—First, that it appears from the bill that the court has no jurisdiction of the parties nor of the subject-matter; second, that the bill is multifarious.

The first ground of demurrer is without merit. The allegations of citizenship are full and complete. The objection that it does not appear that the various defendants are residents of the Northern division of the Northern district of Illinois, and that they can be sued in the division of their residence, cannot be sustained. If it be true that they could only be sued in the division of the district in which they reside, that is a personal privilege, which is waived by their general appearance to the action, and it is not a question going to the jurisdiction of the court.

Second. With respect to the objection of multifariousness, I have examined the numerous decisions to which I was referred at the argument, and there would seem to be some confusion with respect to what constitutes multifariousness in a bill. The rule of multifariousness has recently been summed up in Gibson's Suits in Chancery (section 292; quoted in 1 Beach, Mod. Eq. Prac. § 129) in a manner which commends itself to my judgment. He says that to make a bill demurrable for multifariousness it must contain all of the following characteristics: First, two or more causes of action must be joined against two or more defendants; second, these causes of action must have no connection or common origin, but be separate and independent; third, the evidence pertinent to one or more of the causes must be wholly impertinent as to the other or others; fourth, one or more of the causes of action must be capable of being fully determined without bringing in other cause or causes to adjust any of the legal or equitable rights of the parties; fifth, the decree as to one or more of the separate or independent causes must be conclusive against one or more of the defendants, and the decree proper as to the other

cause or causes must be conclusive against the other defendants or defendant; sixth, the relief proper against one or more of the defendants on one or more of the separate and independent causes of action must be distinct from the relief proper against the other defendant or defendants of the other cause of action; seventh, the satisfaction of the proper decree by any of the defendants to the extent of his alleged liability on any one or more of the distinct causes of action must not be a satisfaction of a proper decree against the other defendant or defendants on the other cause or causes of action; and, eighth, the multifariousness must be apparent, and the misjoinder of distinct causes of action manifest. If this be the correct doctrine upon the subject, this bill cannot be held to be multifarious under the seventh subdivision before referred to. There is here but one debt, and the satisfaction of that debt by one defendant under any decree against him would be a satisfaction of a proper decree against any other defendant on the other cause or causes of action.

The demurrer is overruled, and the defendants must answer to the merits by the first Monday of August, 1895.

WHITE et al. v. EWING.

(Circuit Court of Appeals, Sixth Circuit. July 15, 1895.)

No. 212.

1. VENDOR AND PURCHASER—FALSE REPRESENTATIONS—SPECULATIVE VENTURES.

Liability on deferred purchase-money notes given for town lots, to a corporation engaged in exploiting the town, cannot be avoided on the ground of misrepresentation, where the purchasers knew that the scheme was speculative in character, and the company's prospectus was wholly promissory, and did not state falsely any existing fact, and where the only other representations relied on were those published in the daily press in regard to the company's condition, capital, prospects, etc., and which were not traced to any agents of the company.

2. SAME—EFFECT OF PRIOR INCUMBRANCE—WARRANTY DEEDS.

Purchasers of town lots from a company engaged in exploiting the town were, after the company's insolvency, sued on their deferred purchase-money notes. They set up as a defense that there was an unenforced lien on the property for purchase money due from the company's vendor to his vendor. The company's vendor had conveyed the land to it with a covenant against incumbrances. *Held*, that the existence of this lien was no defense, in the absence of evidence that the covenantor was insolvent.

3. VOLUNTARY APPEARANCE—WITHDRAWAL OF ANSWERS.

Where, in a suit to foreclose a vendor's lien, nonresidents served by publication voluntarily appear and file answers, the subsequent withdrawal thereof, without prejudice to the rights of complainant, and against his objection, does not take away the right acquired by him, by virtue of such appearance, to obtain a personal decree for any deficiency existing after the sale of the premises.

4. FORECLOSURE OF VENDOR'S LIENS—PERSONAL JUDGMENT FOR DEFICIENCY.

A vendor's lien expressly reserved on the face of a deed, has, in equity, the same effect as a mortgage, and therefore comes within the provision of the ninety-second rule in equity, which authorizes the entry of a personal judgment for a deficiency on the foreclosure of a mortgage in the federal circuit courts.

Cross appeals from the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

John W. Yoe, John F. McNutt, and Tully R. Cornick, for appellants.

Pritchard & Sizer (Clark & Brown, of counsel), for receiver.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. Each of the appellants was a purchaser of a town lot in the town of Cardiff, in Tennessee, from the Cardiff Coal & Iron Company, and paid the consideration therefor,—one-third in cash, and the balance in two notes payable in one and two years after date. A lien was reserved, in favor of the company, to secure the purchase-money notes. The sale at which these purchases were made took place at Cardiff in April, 1890, and the purchasers went at once into possession. On May 21, 1891, a creditor's bill was filed by one Bosworth against the company, alleging its insolvency, and asking the appointment of a receiver, the collection and sale of its assets, and a distribution among its creditors. A receiver was appointed, and he was directed, by ancillary proceedings in the same cause, to proceed to collect the purchase-money notes due to the company for the sale of its town lots at Cardiff, from the makers thereof, and to subject the lots sold to the payment of them. Accordingly, an ancillary bill was filed by the receiver, making all the makers of the unpaid notes parties; and those who were nonresidents of the district were served by publication, under section 8 of the jurisdiction act of 1875. At a former hearing of this cause in this court, the jurisdiction of the circuit court to hear such an ancillary bill, where the amount involved in each case did not exceed \$2,000, was challenged, and the question thus made was certified to the supreme court for instructions (13 C. C. A. 276, 66 Fed. 2), and the consideration of all other questions in the case was stayed until the question should be answered. We have now received from the supreme court the instruction that the circuit court, in such an action, had the jurisdiction to entertain the bill, as ancillary to the main controversy, and to render decrees against all the debtors of the company on whom it could obtain lawful service, either personal or substituted. 159 U. S. —, 15 Sup. Ct. 1018.

There remains now to be considered only the question raised upon the merits. Many of the defendants filed answers and made defense. The only defense really pleaded in the answers was that the purchase of the lots and the execution of the notes had been induced by false representations made on behalf of the company. The evidence introduced to make this defense was very unsatisfactory, and entirely inadequate to sustain it. The prospectus of the company was wholly promissory, and did not state falsely any existing fact. Other statements contained in the daily press in regard to the company, its condition, capital, and prospects, are not traced to the agents of the company. Slight as the evidence is, it shows clearly enough that no one made any money out of the enterprise, but that

the projectors, as well as the lot owners, were all disappointed in their expectations. It was an enterprise made possible by the speculative fever so widespread at the time. Its disastrous failure was quite like that of a hundred others of like character, and is not evidence per se, of a conspiracy to defraud on the part of the promoters, but only of a buoyant self-deception in respect to the material possibilities, and an unreasonable blindness to material difficulties. All who took part in the scheme knew its speculative character, and cannot escape liability on the obligations they assumed, unless they can put their fingers on false statements of material and existing facts which induced them to make the venture. This they have utterly failed to do.

One answer of the many raises another objection. It is that the title acquired from the company is likely to fail because the entire town site is incumbered by a lien for the purchase money due from H. C. Young, vendor of the company, to Hembree, Young's vendor. The deed from Young to the company contains a covenant that the land is free and unincumbered. The record does not disclose, and it is not averred, that the lot owners had in their deeds covenants of general warranty of title from the company. If they did not, it is difficult to see how they could object to the payment of a purchase-money note on the ground that there was a lien unenforced on the property sold them. But let it be conceded that they have such general warranties from the company, and that its insolvency renders such a warranty worthless. There is still the general warranty of Young, who is not shown in any way to be insolvent, which they may rely upon to protect them from loss by eviction. In such a case it is well settled that the vendee must rely on the covenants of his deed, and cannot resist the payment of the purchase money before eviction. *Topp v. White*, 12 Heisk. 165; *Wanzer v. Truly*, 17 How. 584.

The receiver appeals from the action of the court below in refusing to give personal decrees against certain nonresident defendants, who had been served by publication, and who had personally appeared and filed answers. The record shows that the case came on to be finally heard on the bill of the complainant against the various lot purchasers, and that pending the hearing, at the suggestion of the court, the following-named defendants, E. L. French, etc.—

"Were allowed to withdraw their answers filed in this cause on June 6, 1893, but the withdrawal is allowed without prejudice to the rights of complainant, and said withdrawal is allowed over the objection of complainant."

It further appears from the record that:

"After confirmation of the report of the special commissioner showing the sale of lots in the town of Cardiff in foreclosure of vendors liens under decree heretofore rendered in the cause, it appearing that the proceeds of the sale of lots owned by the defendants hereinafter named are insufficient to satisfy the decrees heretofore rendered against them, the receiver, Boyd Ewing, by solicitor, appeared and moved the court for personal judgment against those defendants who were allowed on the hearing of June 12, 1893, to withdraw their answers theretofore filed in the cause, for the balances due from them on said decrees, after crediting the proceeds of sales of lots thereon. And said motion, being considered, was by the court overruled, to which action of the court the receiver excepts, and prays an appeal."

It is settled in the case of *Creighton v. Kerr*, 20 Wall. 8, 12, 13, that the leave to withdraw their answers without prejudice to the rights of the complainant did not take away the advantage which the complainant obtained by the voluntary appearance of the defendants, after service by publication, to file answers, and that, therefore, the defendants were in court personally at the time the decrees below were entered, and that the court had jurisdiction, if it was otherwise proper, to enter personal decrees against the defendants upon the complainant's bill.

Ninety-second equity rule, adopted by the supreme court April 18, 1864, provides that, in suits in equity for the foreclosure of mortgages in circuit courts of the United States, a decree may be rendered for any balance that may be found due to the complainant over and above the proceeds of the sale or sales, and execution may issue for the collection of the same. It was held in *Noonan v. Lee*, 2 Black, 500, and *Orchard v. Hughes*, 1 Wall. 73, that, without such a rule, personal decrees for the deficiency in a foreclosure suit could not be rendered by a court of equity. The present action was for the purpose of foreclosing a vendor's lien reserved in a deed, and we think that the rule applies as well to the foreclosure of such a lien as to the foreclosure of a mortgage. In *King v. Association*, 1 Woods, 386, Fed. Cas. No. 7,811, Mr. Justice Bradley said, while presiding on the circuit:

"The reservation of the vendor's lien in the deed of conveyance is equal to a mortgage taken for the purchase money contemporaneously with the deed, and nothing more. The purchaser has the equity of redemption, precisely as if he had received a deed, and given a mortgage for the purchase money." See, also, *Ober v. Gallagher*, 93 U. S. 199, 206, 207; *Kirk v. Williams*, 24 Fed. 437-442.

All these cases clearly show that a lien for the purchase money expressly reserved on the face of the deed has, in equity, the same effect as a mortgage; and, as the ninety-second rule applies only to the equitable foreclosure of a mortgage, we have no difficulty in holding that the foreclosure of the lien expressly reserved on the face of a deed comes within that rule. It is true that the ninety-second rule, in terms, is not mandatory upon the court; but, unless some reason to the contrary appears, we do not see why a complainant is not entitled, if such relief is properly prayed for, to a personal decree against the defendant in foreclosure for that part of the deed secured by the lien which the proceeds of the sale do not satisfy. It was error in the court below, therefore, arbitrarily to withhold this relief; and the decrees below should be modified so as to make them personal decrees for the amount of the purchase money due, and not paid by the proceeds of the sale of the lots. And it is so ordered. The costs of the appeal and cross appeal must be taxed against the appellants, *White et al.*

FIRST NAT. BANK OF SIOUX CITY v. PEAVEY.

(Circuit Court, N. D. Iowa, W. D. August 22, 1895.)

1. FEDERAL COURTS—ADMINISTERING STATE STATUTES—FORM OF REMEDY.

It seems that where a state statute creates a right in favor of creditors, and provides a remedy for the enforcement thereof, this remedy, whether at law or in equity, must be adopted by the federal courts. If the state statute does not create the right, but only redeclares a right existing in the absence of statute, then the form of remedy in the federal courts is determined by principles which differentiate legal and equitable jurisdiction.

2. CORPORATIONS—UNPAID STOCK—RIGHTS OF CREDITORS—STATE STATUTES.

The right of creditors to look to unpaid portions of the capital stock as a fund for the payment of their claims is not created by state statutes, but is derived from general principles of law. The enforcement of such right, therefore, is not dependent upon remedies provided by state legislation; and if it appear that the state has, by statute, provided legal remedies for the enforcement of equitable rights, the creditor may at his election, when proceeding in a federal court, adopt the form of remedy appropriate in courts of equity, or may sue at law, under the statute.

3. SAME—LEGAL AND EQUITABLE RIGHTS.

The question whether the right of a creditor to look to unpaid capital stock is legal or equitable in its nature, in any particular case, is to be determined, it seems, by the following principles: If a person has subscribed for or purchased the stock under such circumstances that the corporation itself, and, through it, its creditors, can call upon the stockholder for the unpaid portions of the stock, then this claim is one at law, based upon the express or implied terms of the subscription or purchase. If, however, by the terms of the original subscription or purchase, no liability is assumed to make any further payments to the corporation on this stock, and it is agreed between the corporation and the stockholder that the stock shall be considered as full paid, then a creditor's right to look to unpaid portions of the stock is equitable, and cannot be enforced by action at law, unless so provided by statute.

This was an action brought in a court of the state of Iowa by the First National Bank of Sioux City against Frank H. Peavey to enforce an alleged liability for unpaid portions of capital stock of the Sioux City Street-Railway Company. The case was removed to this court by the defendant, and filed on the law docket. Defendant demurs to the petition.

Marsh & Henderson, for plaintiff.

Wright, Hubbard & Bevington, for defendant.

SHIRAS, District Judge. This action was brought in the district court of Woodbury county, Iowa; and upon the application of the defendant, who is a citizen of the state of Minnesota, the same was removed into this court. It is averred in the petition that the Sioux City Street-Railway Company is wholly insolvent; that the plaintiff is the owner of two certain judgments rendered in the district court of Woodbury county, Iowa, against said railway company, and aggregating over \$21,000 in amount; that executions on said judgments have been duly issued and returned unsatisfied; and that there is no property of the railway company that can be reached by execution. It is further averred that the defendant herein has

been at different times the owner of 2,744 shares of the capital stock of said railway company, and that when said railway company became indebted to plaintiff the said defendant then owned stock to an amount largely in excess of the indebtedness due plaintiff; that neither the defendant nor any other person ever paid to the company any sum for said shares of stock, which were issued without any payment being made therefor; that the defendant still owns stock in said company in an amount largely greater than the amount of the judgments held by plaintiff; that the stock issued to the defendant purported to be full paid, and thereby, by reason of the action of the defendant in receiving and holding said shares of capital stock, the street railway company appeared to be the owner of property not in fact possessed by it; that the capital stock in question was false and fraudulent, because the defendant paid nothing therefor, and therefore a fraud was committed upon the plaintiff. To this petition a demurrer is interposed on the ground that an action at law cannot be maintained in this court, the remedy being in equity only; that it does not appear that any assessment has been made upon the stockholders; and that there is a defect of parties, in that the street-railway company and the other stockholders and creditors are necessary parties.

In the case of *Bank v. Peavey*, 64 Fed. 912, pending in the Southern district of Iowa, the same questions were fully considered by Judge Woolson, and the demurrer was overruled. The petition in this case is, in some respects, inartificially drawn; and, in the case just cited, Judge Woolson was inclined to hold that the pleader apparently intended to include two causes of action in the one count. There is ground for this view, yet I think the better view is that the pleader in fact intended to declare only upon the liability of the stockholder to respond to creditors for the amount remaining unpaid upon the shares of stock held by him in the insolvent corporation. If the pleader intended to aver a cause of action under the provisions of section 1621, McClain's Code Iowa, which declares that "intentional fraud in failing to comply substantially with the articles of incorporation, or in deceiving the public or individuals in relation to their means or liabilities, shall subject those guilty thereof to fine and imprisonment or both at the discretion of the court. Any person who has sustained injury from such fraud, may also recover damages therefor against those guilty of participating in such fraud,"—it would be necessary to show by proper averments that deceit had been practiced by the defendant upon the plaintiff in regard to the means or property of the street railway company; that such deceit had caused injury to the plaintiff; and the prayer would be for the recovery of the damages thus caused. It is not charged in the petition that the plaintiff was in any manner deceived or misled by any act of the defendant; nor is it averred that plaintiff was induced to credit the street-railway company by reason of the apparent amount of capital stock issued by the company; nor is it averred that when the plaintiff became a creditor of the company it was not fully aware of the real facts of the case; nor is it charged that the plaintiff was in any way, or in any amount, dam-

aged by any act or representation of defendant. Furthermore, the prayer for judgment is one only, and it asks judgment for the entire amount due upon the judgments held by it against the street-railway company, and not for the damages caused plaintiff by any deceit practiced upon it, which damages might well be far less than the amount of the judgments owned by plaintiff. For these reasons, I hold that the petition, which contains but one count, and but one prayer for relief, must be construed to set forth but one cause of action, and that is based upon the right of a creditor to reach all unpaid portions of the capital stock of the debtor corporation, and subject the same to the payment of the debt due him. The question in dispute, and presented by the demurrer, is whether this right can be enforced, under the facts of this case as now made to appear, in an action at law, or whether the remedy is solely in equity.

In the briefs of counsel, much space is devoted to the point whether the federal court is bound by the rulings of the state supreme court upon similar questions of practice. The rule, as I gather it from the decisions of the supreme court, is that where a state statute creates a right in favor of creditors, and provides a remedy for the enforcement of the right thus created, then this remedy, whether at law or in equity, must be adopted, regardless of the tribunal in which the proceedings are had. If, however, the state statute does not create the right sought to be enforced, but only redeclares it, so that it would exist in the absence of the state statute, then it exists as a provision of the general or common law, and when its enforcement is sought in the federal courts the form of the remedy is determined by the principles which differentiate legal and equitable jurisdiction in these courts. *Pollard v. Bailey*, 20 Wall. 520; *Mills v. Scott* 99 U. S. 25; *Terry v. Little*, 101 U. S. 216; *Bank v. Franclyn*, 120 U. S. 747, 7 Sup. Ct. 757; *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468. The decision of the supreme court in *Sawyer v. Hoag*, 17 Wall. 610, and numerous later rulings based thereon, have firmly established the principle that the unpaid portions of corporate capital stock form a trust fund for the benefit of the creditors of the corporation. The right of the creditor to look to this fund for the payment of corporate debts is not created by state statute, but is derived from general existing legal principles, and therefore its enforcement in federal courts is not dependent upon the existence of remedies provided by state legislation. The petition in the case now before the court is clearly based upon the general principle recognized in *Sawyer v. Hoag*, *supra*. The form of the remedy sought is that provided for in the statute of the state in cases wherein a legal liability exists against the stockholder for unpaid portions of the stock subscribed for. If, therefore, the action was purely one to recover the unpaid portions of the stock, or, in other words, was to enforce, in effect, the contract of subscription, which, in turn, is a legal liability existing primarily between the corporation and the stockholder, but which the state statute renders available to creditors in actions at law, I would see no objection to sustaining the action at law in this court. In fact, however, this is not the case made in the petition. It is therein averred that

the street-railway company issued to the defendant stock apparently full paid, whereas no money was paid therefor. It is not averred that any legal contract existed between the defendant and the corporation, whereby the latter could compel payment of any sum by the defendant for said stock. On the contrary, the allegations of the petition would seem to negative the existence of any such contract, right, or claim, as between the defendant and the corporation. The right of the plaintiff, as a creditor of the corporation, to compel payment from the defendant, is not based upon any strictly legal right growing out of a contract of subscription to the capital stock made by defendant, but is rather based upon the equitable principle laid down in *Sawyer v. Hoag*, to wit, that the unpaid portions of corporate capital stock form a trust fund for the benefit of the creditors of the corporation, and that all transactions between the corporation and its stockholders affecting the trust fund will be closely scrutinized, and, if found to be unfair towards the creditor, will be annulled or disregarded. The legal right of contract exists between the corporation and its stockholders, but a contract valid as between the corporation and the stockholders may be abrogated in favor of creditors. *Sawyer v. Hoag*, 17 Wall. 610; *Richardson's Ex'r v. Green*, 133 U. S. 30, 10 Sup. Ct. 280; *Clark v. Bever*, 139 U. S. 96, 11 Sup. Ct. 468.

The question whether this is a purely equitable right, not available in an action at law, is one upon which the decisions are not in accord. Upon principle, the true rule, it seems to me, is that where a person has subscribed for or purchased stock in a corporation under such circumstances that the corporation, and, through it, the creditors of the corporation, can call upon the stockholder for payment of the unpaid portion of the capital stock, then this claim is one at law, based upon the express or implied terms of the subscription or purchase of the stock. If subsequently to the subscription or purchase, thus creating a contract right to call for the unpaid portions of the stock, an agreement is entered into between the corporation and the stockholder, whereby the latter is released from liability on the stock held by him, this release, though good between the corporation and stockholders, may not be binding upon creditors, if injurious to them, or in fraud of their rights; and, as they are not parties to it, its validity may be attacked in an action at law. In such a case the plaintiff's right of action at law would be based upon the legal effect of the original contract of subscription or purchase, and the contract of release would be a matter of defense, and when relied on as such its validity would be open to investigation in the law action. If the release was found to be valid, not only as against the corporation, but also against the creditors, it would then be a good defense against the action based upon the original contract of subscription or purchase. If, however, the release was found to be in fact in fraud of the rights of creditors, then it would not be binding upon them, and would not constitute a defense to the law action based upon the subscription, and the judgment would go in favor of the creditor upon the legal right of recovery created by the contract of subscription or purchase. If, however, by the

terms of the original subscription or purchase, no liability is assumed by the stock purchaser to the corporation for any further payments upon such stock, and it is agreed, as part of the contract of subscription or purchase between the corporation and the stockholders, that the stock shall be deemed to be full paid, and it is issued in this form, then the creditors' rights, if any, are equitable, and cannot be enforced in an action at law, unless the statute of the state so provides. In such case the creditors cannot declare at law upon the original contract of subscription, for it created no legal cause of action. The right of the creditors in such case is based upon the equitable doctrine that the capital stock is deemed to be a trust fund created for the benefit and protection of the creditors of the corporation. Unless expressly so authorized by statute, a court of law cannot enforce equities, unless there is also a cause of action at law as the basis of the proceeding. In cases wherein a person has subscribed for or purchased stock in a corporation, and by the terms of subscription or purchase, viewed as a contract between the corporation and the stockholders, the latter is not bound for any further payments on the stock, but is expressly released therefrom, the creditors have no legal ground for recovery against the stockholder on this contract of subscription, but they may appeal to the court for relief upon the equitable grounds already suggested.

If I correctly interpret the allegations of the petition in this case, it would seem that it falls within the latter category; that in fact the plaintiff is not seeking to enforce a contract right or legal cause of action, but, in effect, is asking the court to annul the contract between the corporation and the defendant, as a fraud upon creditors, and to protect the equities of the plaintiff, rather than to enforce any strictly legal right held by him. There certainly can be no question that a federal court of equity would have jurisdiction of a bill brought by a creditor for the enforcement of his rights under the assumed circumstances, and, in the absence of a state statute creating a new legal remedy, the remedy would be exclusively in equity in all cases wherein, by the terms of the original contract of subscription, the subscriber was not bound to the corporation for any further payments on the stock purchased. *Sawyer v. Hoag*, 17 Wall. 610; *Sanger v. Upton*, 91 U. S. 56; *County of Morgan v. Allen*, 103 U. S. 498; *Scovill v. Thayer*, 105 U. S. 143. If it be further true that the statute of Iowa creates a remedy at law for the enforcement of equitable rights, then it follows that a litigant in the federal court has a choice of remedies. He may avail himself of the new statutory legal remedy, if it be sufficient to meet the exigencies of the particular case, or he may proceed under the undoubted equitable jurisdiction which exists in the federal court, and which is not destroyed or limited in any degree by the creation of a legal remedy by state legislation.

The case having been removed from the state court by the defendant, it is open to the plaintiff to determine whether, in this court, he will proceed at law or in equity. He has the right to reform his pleadings, and to select either the law or equity side of the court as the forum of litigation. The present order will therefore be that

the demurrer is overruled, and that the plaintiff be required to reform the petition, and, in doing so, to determine whether the case shall be proceeded with at law or in equity, and, in either event, that the pleading be made clear and specific,—such reformed petition to be filed within 20 days.

PAULY v. O'BRIEN.

(Circuit Court, S. D. California. August 12, 1895.)

No. 598.

BANKS AND BANKING—NEGOTIABLE INSTRUMENTS.

Where a person, at the solicitation of national bank officers, gave his note to the bank to take up the note of a stranger, for the purpose, as stated by the officers, of getting the old note "out of the past-due notes," held, that the maker of the new note was liable to the receiver of the bank, on a renewal of the note, whether the transaction was a real one, or a mere trick to make it appear to the government and the creditors and stockholders that the bank had a valuable asset which it in fact did not have.

This was an action at law by Frederick N. Pauly, receiver of the California National Bank of San Diego, against J. E. O'Brien on a promissory note made by the latter to the bank.

David L. Withington, for plaintiff.

E. W. Britt and Works & Works, for defendant.

ROSS, Circuit Judge. This is another of the many rascally transactions disclosed in suits brought before this court in connection with the insolvent California National Bank of San Diego. The action is upon a promissory note executed by the defendant to the bank, and is submitted to the court upon an agreed statement of facts which shows—First, that the facts alleged in the complaint, which is in the ordinary form in such actions, are true; and, second, the purpose of the note and the circumstances under which it was executed, which are, in substance, as follows: On the 15th day of November, 1889, one Naylor was indebted to the bank in the sum of \$3,714.40, evidenced by his promissory note, secured by a deposit with the bank of a lot of jewelry as collateral. Naylor was insolvent, and, on the day named, the bookkeeper of the bank, who was a brother of the defendant, at the instance of its vice president, one D. D. Dare, asked the defendant to give his note to the bank in place of and to take up that of Naylor, at the time stating "that Naylor's note was past due, and was secured by collaterals which were believed to be ample to pay the note, and that the bank wanted to get the note out of the past-due notes, and that the Naylor note and collaterals were to be collateral to the note to be given by him, and would wipe his note out when the collaterals were disposed of, assuring him that the bank held jewelry as collateral sufficient to pay it." The defendant consented to this request, and, pursuant thereto, executed his note to the bank for the sum of \$3,-

714.40, "and the Naylor note was entered as paid on the books of the bank, and the O'Brien note was entered as a discount for its face." Thereafter, the bank sold "some or all" of the jewelry for the sum of \$1,150, and credited that amount on the note given by the defendant. Subsequently, and on the 21st of March, 1891, the bank informed the defendant of the sale, at which time he executed to the bank a new note, for the amount of the first one, less the amount realized by the sale of the jewelry; and still later, to wit, on the 21st of July, 1891, defendant executed to the bank, in renewal of the one last mentioned, the note sued on herein, the amount of which was the amount of the note of March 21, 1891, without interest. Each and all of the notes executed by the defendant, proceeds the agreed statement, "were given without any other consideration than here stated, and that the only knowledge said Naylor had of the matter was that Dare told him that the jewelry had been sold, and applied on the note. The Naylor note had been carried, and each of the O'Brien notes were carried, among the assets of the bank upon its books and in its statements to the comptroller, as an asset for their face."

Upon these facts, I think it clear that the plaintiff is entitled to judgment. It is said for the defendant that the note sued on was without consideration. Not so, according to the agreed statement of facts, for it is there stated that it was executed in place of and to take up the note of Naylor, then represented by the bank officers to be past due, and to be secured by collaterals which were believed to be ample to pay it, and which they represented the bank wanted to get "out of the past-due notes," and which, together with the collaterals, were to stand as collateral to the note executed by the defendant, upon the execution of which the Naylor note was entered as paid on the books of the bank, and the defendant's note was entered thereon "as a discount for its face." It thus appears that the defendant executed his first note, subsequently renewing it from time to time, and ultimately by the note in suit, for the purpose of having it take the place of the Naylor note, which, together with the collaterals, "were to be collateral to the note" given by him. If, however, this was not really the case, but that, in truth, the transaction was a mere trick to make it appear to the government and to the creditors and stockholders of the bank that it had a valuable note when in fact it did not have one, the result must be the same, for, when parties employ legal instruments of an obligatory character for fraudulent and deceitful purposes, it is sound reason, as well as pure justice, to leave him bound who has bound himself. It will never do for the courts to hold that the officers of a bank, by the connivance of a third party, can give to it the semblance of solidity and security, and, when its insolvency is disclosed, that the third party can escape the consequences of his fraudulent act. Undoubtedly, the transaction in question originated with the officers of the bank, but to it the defendant became a willing party. It would require more credulity than I possess to believe that the defendant, when his brother, who was the bookkeeper of the bank, came to him with the proposition of its vice president, in its every suggestion and

essence deceptive and fraudulent, did not know its true character and purpose. So far as appears, Naylor was a total stranger to him. Why should he execute his note to take up the note of Naylor? What moved him to do it, except to enable the officers of the bank to supplant the overdue note of Naylor with a live note, which he now insists was without consideration and purely voluntary, but which enabled the bank officers to make a deceptive, and therefore fraudulent, showing of assets? Obviously, nothing. There will be judgment for the plaintiff for the amount due upon the note sued upon, according to its terms, with costs.

PRICKETT v. CITY OF MARCELINE.¹

(Circuit Court of Appeals, Eighth Circuit. June 4, 1895.)

No. 604.

MUNICIPAL BONDS—SEARCY COUNTY v. THOMPSON, 13 C. C. A. 349, 66 Fed. 92, FOLLOWED.

In Error to the Circuit Court of the United States for the Western District of Missouri.

This was an action at law by William R. Prickett against the city of Marceline, Mo., to recover on certain municipal bonds. A jury was waived, and the case submitted to the court on the proofs. The court found the issues generally for the defendant, and rendered judgment accordingly. 65 Fed. 469. The plaintiff brings error.

H. A. Clover, for plaintiff in error.

Harry K. West and Samuel W. Moore, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURIAM. This case is affirmed on the authority of *Searcy County v. Thompson*, 13 C. C. A. 349, 66 Fed. 92.

NORTHWESTERN MUT. LIFE INS. CO. v. QUINN et al.

(Circuit Court, W. D. Michigan, S. D. July 23, 1895.)

1. CLERKS OF COURT—FEES AND COMMISSIONS.

The clerk is not entitled to any commission on the amount of the accepted bid in a foreclosure sale where the sale is conducted by a special master, who, under direction of the decree, himself pays over the proceeds to the mortgagee, so that no money comes into the clerk's hands.

2. SAME.

The decree was not void if erroneous, and, after execution, an objection by the clerk was too late.

This was a bill for the foreclosure of a mortgage brought by the Northwestern Mutual Life Insurance Company against Thomas B. Quinn, Mary Quinn, Herman N. Williams, Elizabeth Williams, and John Denney. Heard on the petition of Charles L. Fitch, clerk of the court, for an allowance of the statutory percentage on the amount bid at the foreclosure sale.

¹ Rehearing pending.

More & Wilson, for complainant.
Charles L. Fitch, in pro. per.

LURTON, Circuit Judge. On the 24th of May, 1894, a decree for the foreclosure of a mortgage was made by the circuit court, and John S. Lawrence was appointed a special master for the purpose of executing the decree. This decree was for the purpose of satisfying the amount due to the complainant, as fixed by the decree, of \$2,520.75, and the costs. The said master in chancery by the decree was ordered, out of the proceeds of sale, to "retain his fees, disbursements, and commissions on said sale, and pay to complainant, or its solicitors, its costs in this suit to be taxed, and also the amount so reported, due as aforesaid, together with legal interest thereon, as aforesaid, from the date of said report, or so much thereof as the purchase money of the mortgaged premises will pay of the same; and that the said master take receipts for the amount so paid, and file same with his report; and that he bring the surplus moneys arising from said sale, if any there be, into court without delay, to abide the further order of this court." In pursuance of this decree, the master sold the mortgaged premises February 13, 1895, for \$2,837.41, the complainant being the purchaser. No money except for the fees, disbursements, and commissions of the master was actually paid him, he taking the complainant's receipt for the purchase price, as having been paid on complainant's debt, and for the taxed costs of the cause. The master filed his report of sale and the receipts of the complainant, and showed that there was no surplus to be returned into court. Thereupon Charles L. Fitch, clerk of said court, filed his petition, setting out the facts as above, wherein he insisted that, notwithstanding the decree, the master should have required the complainant to pay the amount of its bid in money, and that this purchase money should have been paid into the registry of the court, under sections 995, 996, of the Revised Statutes of the United States, and that in such case petitioner would be entitled to 1 per cent. of said moneys for receiving, keeping, and paying out the same, as provided by section 828 of the Revised Statutes. The prayer of the petition is that the complainant may be ordered to pay the amount of its bid "over to said master in chancery, or into the registry of this court, to be disposed of as required by law, unless it shall voluntarily pay over to your petitioner one per cent. thereof, as and for the clerk's statutory percentage thereon." Section 828, Rev. St., among other things, provides that the clerk shall receive, "for receiving, keeping and paying out money, in pursuance of any statute or order of court, one per centum on the amount so received, kept and paid out." It is manifest that this was intended to compensate the clerk for the service and responsibility of "receiving, keeping, and paying out money" under any statute or order of the court. Mr. Fitch has never actually received, kept, or paid out any part of the money on which he now claims a commission. The clerk is not entitled to this statutory commission unless the money has either actually or constructively passed through his hands. In *re Goodrich*, 4 Dill.

230, Fed. Cas. No. 5,541; *Leech v. Kay*, 4 Fed. 72; *Blake v. Hawkins*, 19 Fed. 204; *Fagan v. Cullen*, 28 Fed. 843; *The Serapis*, 37 Fed. 437; *Smith v. The Morgan City*, 39 Fed. 572; *Easton v. Railway Co.*, 44 Fed. 719.

The contention of the clerk that this purchase money was ever constructively in his hands is equally unfounded. No money ever in fact came into the hands of the master who made the sale. Having been directed by the decree of the court to pay to the complainant the costs taxed in the cause, and the amount of its mortgage debt, with interest, the master was entirely justified in taking the complainant's receipt, it being the purchaser. But if money had been paid to the master, and he had paid it out as directed by the decree, how could it be said that this money had ever been constructively in the hands of the clerk? Certainly, the clerk was never responsible for any part of it, and his bond had never protected it. The master, in receiving and paying out this fund, was acting by direction of the decree appointing him. The theory that he should have ignored the decree, and paid the proceeds into court, is based upon the suggestion that the decree, in so far as it directed him to pay out the purchase money to the extent of the costs and debt, was void, as contravening section 995, Rev. St. That section reads as follows:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of such court; provided, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under the direction of the court."

That the master was an officer of the court is plain. *U. S. v. Hartwell*, 6 Wall. 385; *Thomas v. Railway Co.*, 37 Fed. 548.

In the absence of a direction to make some other disposition of the proceeds, a special master should comply with the statute, and pay the proceeds of sale to the designated depository of the United States, to the credit of the court. To have done so in this instance would have been to disregard the decree, which explicitly ordered him to make the very disposition of the proceeds which he did make. The question as to whether the decree was inadvertently made was not for the master to quibble about. The proviso to the section cited seems to leave it within the power of the parties, under direction of the court, to have the fund disbursed by the master to those entitled, as a delivery on security satisfactory to those interested. No reason appears for construing this section of the statute as depriving the court of authority to make such special order as is deemed wise and prudent with regard to the special case, leaving the statute to cover cases where no disposition of the fund is made by decree. The authorities upon this question are not harmonious, and there is no reason for now deciding the question. *Easton v. Railway Co.*, 44 Fed. 719; *Thomas v. Railway Co.*, 37 Fed. 548. The decree under which the sale was made and the proceeds disbursed was not void. It was, at most, erroneous in respect to the disburse-

ment by the master. There was no application for its modification, as in *Thomas v. Railway Co.*, heretofore cited. If I treat the present proceeding as an application for its modification, it comes too late, for the decree has been fully executed. If the clerk conceives his legal commission affected by an inadvertent order, he should at the time raise the question by an application for a modification. He cannot stand by and let the decree be executed, and then ask commissions upon the theory that the decree which kept him from receiving, keeping, and paying out the fund was void, or that it constructively placed the fund in his hands. The application must be disallowed.

WANAMAKER et al. v. COOPER, Collector.

(Circuit Court, E. D. Pennsylvania. June 25, 1895.)

No. 24.

1. CUSTOMS DUTIES—CLASSIFICATION—MEN'S LEATHER GLOVES.

"Men's leather gloves, prick-seam and embroidered," were dutiable, under the act of October 1, 1890, at \$1 per dozen and 50 per cent. ad valorem, not at \$1.50 and \$2 and 50 per cent. ad valorem.

2. SAME—TOYS—TINSEL THREAD FOR CHRISTMAS TREES.

Metal thread, known as "tinsel," "tinsel thread," "lametta," etc., but never as a "toy," was not dutiable as such, under the act of October 1, 1890, merely because it is used almost exclusively for decorating Christmas trees.

3. SAME—WOOL, KNIT HATS.

"Wool knit hats," invoiced as "red fez caps," held dutiable as wearing apparel (affirming the decision of the board of general appraisers, in the absence of evidence by appellant).

4. SAME.

The fact that a "toy," broadly defined, is an article mainly intended for the amusement of children, does not warrant the conclusion that anything chiefly used to decorate an object designed to amuse children is to be classified as a "toy."

5. SAME—FURNISHED NEEDLE CASES.

An article which is invoiced and intended to be sold as a single thing is not resolvable into its constituents for purposes of ascertaining duty. *Held*, therefore, that cases containing needles, imported as an entirety, and designed to be sold as "furnished needle cases," must be classified as integral articles according to their components or chief value.

6. SAME—PAPIER MACHE.

Merchandise invoiced and known (and in this instance sold) as papier mache is dutiable as such, though every constituent of papier mache may not be present in the composition of which it is made.

This was an application by John Wanamaker and others, importers of certain merchandise, for a review of the decision of the board of general appraisers affirming the decision of the collector of the port of Philadelphia as to the rate of duty upon the said merchandise.

Among the imports in question were certain "men's leather gloves, prick-seam and embroidered." These were assessed by the appraiser at a cumulative duty of \$1.50 and \$2 per dozen and 50 per cent. ad valorem, under the tariff act of October 1, 1890. The importer claimed by his protest that they were dutiable only at \$1 per dozen and 50 per cent. ad valorem. The appraiser's decision was affirmed v.69F.no.6—30

by the collector and the board of United States general appraisers. Part of the merchandise consisted of "wool knit hats," which were invoiced as "red fez caps." These were appraised as wearing apparel by the appraiser, and his decision was affirmed by the collector and the board of general appraisers.

Frank P. Prichard, for plaintiffs.

Ellery P. Ingham, U. S. Atty., for the Government.

DALLAS, Circuit Judge. This is an appeal from a decision of the board of general appraisers by which questions are presented as to the rates of duty applicable to five articles.

1. Their decision as to "men's leather gloves, prick-seam and embroidered," conflicts with judicial authority, and therefore cannot be sustained.

2. As to the wool knit hats, the appellants offered no evidence, and the decision as to these articles will stand.

3. As to the use and trade-name of the article described in the opinion of the board of appraisers as "metal ornament for Christmas trees," there is, under the evidence, no room for doubt. Its principal and almost exclusive use is for the decoration of Christmas trees, and it is known in the trade as "tinsel," "tinsel thread," "lametta," etc., but never as a "toy." In fact, it is a metal thread, though, in the condition in which it was imported in this instance, it is not fit to be employed as a metal thread, for embroidering or other manufacturing purposes. I do not understand that the board of appraisers found these facts to be otherwise than I have stated them. If they had done so, I would, of course, have regarded their finding with much respect. There is, however, no conflict of evidence, and the only question is as to the correctness of the conclusion which they deduced from the clearly-established facts. Their decision was wholly founded upon the assumption that because a toy, broadly defined, is an article mainly intended for the amusement of children, therefore anything which is chiefly used to decorate an object designed to amuse children should itself be taken to be a toy. I think this reasoning is unsound. In common speech the word "toy" certainly has no such comprehensive significance, and the evidence shows that, in the trade, the material in question is not known or designated as a toy. When placed upon Christmas trees, it does, no doubt, contribute to the amusement of children, but so do many things which could not with any aptitude be classified as toys. A toy is a thing to amuse children, but it does not follow that everything which amuses them, or which enters into a device for their amusement, is in itself a toy. I am constrained to overrule the decision of the board of general appraisers as to this merchandise.

4. Protest 8704b related to an importation of needle cases furnished with needles. If separately considered, as the appellants contend they should be, these cases would be dutiable, and the needles would be free. The board of appraisers found, however, that the cases, with their contents, were invoiced and imported as an entirety, and designed to be sold as "furnished needle cases"; and they there-

fore held that they should be classified as integral articles according to their components of chief value. I am of opinion that this view of the matter is correct; that an article which is invoiced and intended to be sold as a single thing is not resolvable into its constituents for the purpose of ascertaining its liability to duty. The decision as to these articles will stand.

5. The board of appraisers found that certain imported merchandise consisted of "articles known as papier mache," and therefore held that it was dutiable as papier mache. This finding of fact is unquestionably correct, and the conclusion stated was also right. Articles invoiced, known, and (in this instance) sold as papier mache, cannot be relieved from payment of duty as such, upon the ground, here set up, that every constituent of true papier mache was not present in the composition of which they were made. The decision as to these articles will stand.

Let judgment be entered in accordance with this opinion.

ZIMMERN et al. v. UNITED STATES.

(Circuit Court, S. D. New York. May 9, 1895.)

CUSTOMS DUTIES—CLASSIFICATION—SILK VEST CHAINS.

Silk vest chains, in which silk is the component of chief value, were dutiable at 50 per cent. ad valorem, under paragraph 383 of the act of March 3, 1883, and not at 25 per cent., as "jewelry," under Tariff Ind. 459.

This was an application by Henry Zimmern & Co. for a review of the decision of the board of United States general appraisers affirming the decision of the collector for the port of New York in respect to the classification for duty of certain merchandise imported by them.

The merchandise in question consisted of vest chains, which are silk guards or chains used for watches and eyeglasses. Silk is the component of chief value, and the collector imposed a duty of 50 per cent. ad valorem, under paragraph 383 of the act of March 3, 1883. The importers protested on the ground that the goods were dutiable at 25 per cent., as "jewelry," under Tariff Ind. 459. The board of appraisers affirmed the collector's decision, saying that the goods were not commercially or popularly known as "jewelry."

Albert Comstock (of Comstock & Brown), for importers.

Jason Hinman, Asst. U. S. Atty., for the United States.

TOWNSEND, District Judge (orally). It does not appear that there is any commercial designation for jewelry which includes these silk vest chains. The article is not jewelry in the ordinary sense of the word, nor is it considered jewelry by the trade. The decision of the board of general appraisers is affirmed.

DAVOCK v. CHICAGO & N. W. R. CO.

(Circuit Court, N. D. Illinois, N. D. July 27, 1895.)

PATENTS FOR INVENTIONS—NOVELTY—ANGLE SPLICE FOR RAILWAY JOINT.

Letters patent No. 228,347, issued June 1, 1880, to James Hawks, for "angle splice for railway joint," consisting of "a splice made angular in cross section, and having its base flange constructed with a bend whereby the base flange of the splice is adapted to fit upon the bases of two abutting rails of unequal height," are not void on their face, for want of patentable invention and novelty, although they inferentially admit that angle splices are not new for that purpose, and only claim them when bent as described, and although they state that "these joints have usually been formed by fish plates, the ends of which were arranged at different heights, corresponding with the position of the rails."

In Equity. On demurrer to bill.

Suit by Harlow P. Davock against the Chicago & Northwestern Railroad Company to restrain the infringement of a patent.

Charles Loughridge, for plaintiff.

George Payson, for defendant.

SEAMAN, District Judge. The defendant demurs to a bill of complaint alleging infringement of letters patent No. 228,347, issued to James Hawks, June 1, 1880, for "angle splice for railway joint," and assigned to the complainant. The first claim of the patent is this:

"A splice made angular in cross section, and having its base flange, *l*, constructed with a bend, *k*, whereby the base flange of the splice is adapted to fit upon the bases of two abutting rails of unequal height, and having its vertical web, *L*, fitted under the heads of the abutting rails, substantially as set forth."

And the second claim is for a combination, with rails of unequal height, of two of the angle splices of the first claim, bolted to the rails.

The sole ground asserted for the demurrer is that the patent "is wholly invalid on its face, for want of patentable novelty and invention." It is unquestionable that this objection may be taken by demurrer, and it is equally clear that the demurrer should be overruled, and the complainant put to answer, if the question of invention or novelty is fairly open to doubt. Oftentimes a showing of the prior state of the art will demonstrate that to be true invention which does not seem to possess this merit on first impression, and when read in the simple terms of the patent, and all light in that direction is shut out if the demurrer is sustained. The argument that the court can take judicial notice of certain facts which are of common understanding does not apply, as it would require, for the purposes of this case, an assumption of knowledge, not only of the methods which had been employed for joining the rails, but of the practical difficulties, under various conditions, which were met, and the measure in which the means theretofore employed had failed, and the alleged invention had succeeded, in overcoming them. It would be an innovation for the

court, upon this issue, at least, to thus bring to bear any information it might possess or obtain aliunde the patent. But it is further urged: This patent states that the invention is "new and useful improvements in angle splices for railway joints," and therefore admits that angle splices are not new for the purpose; that it states, of the prior art, that "these joints have usually been formed by fish plates, the ends of which were arranged at different heights, corresponding with the position of the rails"; and, finally, that it does not claim the angle splice "by itself, broadly, but only when bent in the particular way described." There is great force in these objections, and they certainly raise serious doubt of patentable novelty in the device. Nevertheless, they do not, in my opinion, so far overcome the presumptions in favor of the patent that the complainant should be foreclosed from the showing (which, it was asserted in the argument on his behalf, could be made) of the long-felt want in railroad construction, especially with the adoption of heavier rails for increasing traffic and speed; of attempts and failures to find a remedy, and the extent to which it was supplied by the alleged invention, and of the extensive use which followed,—all being circumstances entitled to consideration in case of doubt, and upon which the doubt may be resolved in favor of the patentee. *Topliff v. Topliff*, 145 U. S. 156, 164, 12 Sup. Ct. 825. In view of the definition of patentability by the supreme court in respect of inventions of great simplicity,—*Loom Co. v. Higgins*, 105 U. S. 580; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513; *Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. 71; *Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450; *Gandy v. Belting Co.*, 143 U. S. 587, 12 Sup. Ct. 598; *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825; *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719; and *National Cash-Register Co. v. Boston Cash-Indicator & Recorder Co.*, 156 U. S. 502, 15 Sup. Ct. 434, 1041,—it is my opinion that determination of the validity of this patent should be left to final hearing upon proofs, and that the demurrer should be overruled. It is so ordered.

McBRIER et al. v. A CARGO OF HARD COAL.

(District Court, D. Minnesota, Fifth Division. September 3, 1895.)

WAIVER OF MARITIME LIENS—EFFECT OF DISCHARGE OF CARGO—ADMIRALTY PLEADING.

An allegation that, before discharge of cargo, libelants notified the consignee that they would look to the cargo for freight and demurrage, is sufficient to show that their lien therefor was not waived by such discharge.

This was a libel by James McBrier, John Thompson, and E. D. Carter, owners of the steamboat *Nyanza*, to enforce an alleged lien for freight and demurrage. The Pioneer Fuel Company, consignee of the cargo, has interposed certain exceptions to the libel.

H. R. Spencer, for libelants.

E. S. McMillan, for claimant.

NELSON, District Judge. The only question raised on the argument of the exceptions to the libel upon which the court is in doubt is whether the libel, having set forth a discharge of the cargo, should have also stated, in order to preserve a lien for freight and demurrage, the further fact that there was an understanding that such discharge was not a waiver of the lien. It is set forth in the libel that before such discharge a notice was served upon the consignee that the libelants would look to the cargo for freight and demurrage, and also that the consignee eventually discharged the cargo after such notice. I think this is a sufficient allegation that the delivery was not unqualified and absolute, but made with the intent to retain the lien. If it be true that before the cargo was discharged, or when the boat was at the dock of the consignee, notice of a claim and lien for freight and demurrage was given, an action in rem against the cargo can be maintained; and some authorities hold that notice even before the commencement of the suit is sufficient to sustain an action against the cargo to enforce the lien. Upon full consideration of the exceptions to the libel, they are overruled. Ordered accordingly.

THE FLAMBOROUGH.

SWITZERLAND MARINE INS. CO. v. THE FLAMBOROUGH.

(District Court, S. D. New York. May 23, 1895.)

INJURY TO FREIGHT—INSPECTION UNDER HARTER ACT.

Cargo having been damaged through defects of the carrying steamer which could have been ascertained by proper inspection and examination, *held*, that the inspection that was made was not such as "due diligence" under the "Harter Act" requires; and *held*, that the shipowners were chargeable with any negligence of their agents appointed to inspect the steamer.

This action was brought by the Switzerland Marine Insurance Company to recover losses sustained by its assured through jettison to and damage of cargo occasioned by a leak in the steamer Flamborough.

The Flamborough had taken cargo at New York for transportation to West Indian ports and when two days out encountered bad weather, and a few hours later began to leak. Thereupon some goods were jettisoned, but the leak continuing the steamer returned to New York. She was then docked for examination and it was found that 17 of her plates were worn out and that the leak had occurred through one of the plates wasting. The steamer was 27 years old and had been purchased from her former owners five months previous to the voyage. Her new owners were not familiar with shipping and at the time of purchase caused the steamer to be examined by an inspector on their behalf. After purchasing, they placed her under the management of an experienced agent in New York and did not themselves take part in such management. The steamer was not docked at the time of purchase, nor at any time subsequent thereto before the voyage upon which the damage arose. The condition of the plates was such that an examination upon a dock, or a careful examination while the vessel was afloat would have disclosed their weakness.

Butler, Stillman & Hubbard and Mr. Mynderse, for libelant.
Wing, Putnam & Burlingham, for the Flamborough.

BROWN, District Judge. The condition of the vessel, 27 years old, is proved by Mr. Congdon's examination to have been so worn in her plates and unserviceable that I find the inspection theretofore made could not be such as "due diligence" under the "Harter Act" requires. 27 Stat. 445.

I also find the owners chargeable in this respect with any negligence of their agents appointed to inspect.

Decree for libelants, with costs.

THE MANHANSET.

BACCUS v. THE MANHANSET et al.

(District Court, S. D. New York. June 6, 1895.)

SHIPPING—INJURY TO STEVEDORE—NEGLIGENCE OF OFFICER.

A stevedore's laborer working in the hold cannot recover against the ship for injuries occasioned by the fall of one of its officers upon him, through carelessness in walking upon an unguarded beam while in the discharge of his duties.

This was a libel by Rosario Baccus against the steamship Manhanset (Francis Duck, claimant), impleaded with Charles Hogan and others, respondents.

The libel was for injuries sustained by a stevedore's laborer, occasioned by the mate of the steamship falling down on him from an orlop deck beam. There was no flooring on the orlop beams, which were about 10 inches wide. In the course of his duties the mate was walking across one of the beams and testified he was in the exercise of care. Libelant's evidence was that the mate was in liquor. The mate lost his balance, and falling on the back of libelant, who was slinging tin, crushed him to the floor, damaging his kneecap.

Francis L. Corrao, for libelant.

Convers & Kirlin, for claimant.

BROWN, District Judge. There is not sufficient evidence of any negligence in the duties of the ship. Libelant's injury arose from the personal carelessness and fault of the officer in walking along the beam. I find no case in which a ship has been held for such a secondary result from the fall of a careless officer or member of the crew.

Libel dismissed, without costs.

THE FLINTSHIRE.

ULLMANN et al. v. THE FLINTSHIRE.

(District Court, S. D. New York. July 22, 1895.)

SHIPPING—DAMAGE TO CARGO BY SWEATING—EXCEPTED PERILS—BURDEN OF PROOF.

Where damage by sweating is expressly excepted in the bill of lading, the shipper, in order to recover for damage due to that cause, has the bur-

den of proof to show that the carrier was negligent, in that he failed to take all the usual precautions to prevent sweating.

This was a libel by Joseph Ullmann and others against the steamship *Flintshire* to recover damage to a consignment of dogskins on a voyage from China to New York.

George A. Black, for libelants.

Convers & Kirlin, for claimant.

BROWN, District Judge. The circumstances proved show that the fractured scupper pipe in the 'tween decks had nothing to do with the damage to the dogskins. The damage, I find, arose from sweating of the cargo. This was a peril expressly excepted in the bill of lading. The contract, therefore, was not that there should be no damage from sweat; and the carrier's duty in that regard was only to take all usual precautions against that liability to damage, and such as might be reasonably foreseen to be necessary. The evidence shows that such precautions were taken. The burden of proof to show negligence in that respect is on the libelants. They have not shown it. No witness has even been called to testify that the cargo ought to have been differently stowed, or differently dunnaged, or more dunnaged; the port warden's report approves it; and no defects of the ship connected with the damage are shown.

The libelants' main contention in their three briefs has been that the damage was from the scupper pipe, and not by sweat at all. Their contention in effect is, that in fact no further precautions against sweat were necessary, since there was no sweat damage; but if it was sweat damage, which they do not believe, then more precautions were necessary. That is mere claim from the event, but without proving negligence before the event.

The warden's report does not seem to refer to the libelants' dogskins, which were in the hold. The marks are not given. As he was not called as a witness, his report of sea-water damage, as respects these dogskins, would be of little weight as against the opposite proofs, even if the report referred to these skins. Libel dismissed with costs.

THE GLENMAVIS.

SPRECKELS SUGAR-REFINING CO. v. THE GLENMAVIS.

(District Court, E. D. Pennsylvania. August 20, 1895.)

No. 8.

1. SHIPPING—DAMAGE TO CARGO—UNSEAWORTHINESS.

Where, at the end of a voyage, the water pipe leading to one of the water-ballast tanks was broken, so that in an attempt to fill the tank the water ran into the hold, and damaged the cargo, *held*, that there was a breach of the implied warranty of seaworthiness, in that, at the beginning of the voyage, the casing inclosing the pipe consisted only of a long board box, without corner posts or other means of stiffening or strengthening it against the tendency to work loose from bending and springing through

pressure of the cargo and the motions of the vessel, and was fastened at the bottom, and probably also at the top, merely by cleats.

2. **SAME—STIPULATION AGAINST LIABILITY FOR NEGLIGENCE—LAW OF FLAG AND PLACE OF CONTRACT—PUBLIC POLICY.**

A bill of lading made in Germany in behalf of a British ship, prior to the act of congress of 1893, relating to the liability of shipowners, contained a clause exempting the ship and carrier from liability for negligence in the navigation of the vessel, and a further provision that the law of the flag should govern. *Held* that, on grounds of public policy as established in this country at the time the contract was made, the courts of the United States would refuse to enforce the stipulation respecting negligence, although it was valid under the laws of both England and Germany.

3. **SAME—NEGLIGENCE IN "NAVIGATION."**

Quere: Whether negligence in filling water-ballast tanks after arrival in port, for the purpose of facilitating the discharge of cargo, is negligence in the "navigation" of the vessel, within the meaning of an exception in the bill of lading?

This was a libel by the Spreckels Sugar-Refining Company against the British steamship *Glenmavis* to recover for damage to cargo.

Morton P. Henry and Albert B. Roney, for libelant.

Henry R. Edmunds and Convers & Kirlin, for respondent.

BUTLER, District Judge. The respondent having contracted to carry sugar from Hamburg to Philadelphia, received the cargo in good condition, and delivered a part of it seriously damaged. She must therefore compensate for this loss, unless she can excuse herself from liability. She points to the following clause of the contract:

"The ship and carrier shall not be liable for the loss or damage occasioned by the perils of the seas or other waters, * * * for any latent defect in hull, machinery, or appurtenances, for accidents of navigation, of whatsoever kind, even when occasioned by the negligence, default, or error in judgment of the master, mariners, or other servants of the shipowner, * * * nor for any loss or damage occasioned by causes beyond his control, steamer having liberty to coal in U. K. * * * Any questions arising under this bill of lading to be settled according to the laws of the flag of the vessel carrying the goods."

She follows this with an assertion that the damage resulted from "perils of the sea or other waters," or "accident of navigation," and that it is therefore covered by the exemption clause cited; and furthermore that if it did not so result, but is ascribable to negligence of the master or crew, this negligence is also covered by the clause.

Thus it becomes necessary to determine how the damage occurred. Fortunately, there is little room, if any, for controversy respecting this. On reaching Philadelphia the ship undertook to fill her aft water-ballast tanks, to improve her situation for unloading other cargo carried; and in consequence of a break in a pipe connected with one of the tanks, the water turned on ran into her hold among the sugar. The observance of proper care in filling the tanks would have discovered the break, and avoided the damage. No care whatever was exercised in this respect. The voyage had been somewhat tempestuous, and the pipe, in consequence of its situation and the condition of its casing, was liable to break, especially on such a voyage; and yet the water was turned on and allowed to flow for

three-quarters of an hour after the tanks were full, without the slightest effort to determine whether it was overflowing into the hold or not. About two hours after it had been turned on a sounding was made, and although the water was still allowed to flow in, no further measures were taken to ascertain the situation until the following morning, when the hold was found to be flooded, several feet in depth. Continuous soundings until the water was shut off, or opening the sluiceway doors, to allow an escape into the engine room, would have avoided all danger.

The case presents but two questions of fact which need be considered: (1) Should the breaking of the pipe be attributed to "peril of the sea or other water," or to unseaworthiness of the ship? And if it should be attributed to the former, then (2) was there carelessness in filling the tanks at Philadelphia? As respects the latter I need add nothing to what has been said. The question does not seem debatable. As respects the former there is room for doubt; but I think the weight of the evidence is against the respondent. Conceding that the burden of proof is on the libellant I think the evidence warrants a conclusion that the ship was unseaworthy in this respect. The experts called disagree, as usual. But when it is borne in mind that the respondent *warranted* the ship fit and safe in all respects for the voyage and cargo—not simply that she seemed to be so, exhibiting no defects to common observation, or that she was honestly believed to be so, but that she actually was fit and safe—and the situation of the pipe and the condition of its casing are considered, it seems difficult to avoid the conclusion that the warranty was broken. The time when the pipe separated, and precisely what caused it, cannot be known. It seems reasonable to believe that it occurred on the voyage. The fact that it broke does not of itself warrant a belief that it was defective when the vessel started; because if there was nothing else to consider, the break might, and should, be attributed to "peril of the sea." And the same may be said of the displacement of its casing. I am not satisfied that there was any defect in the pipe on starting. I cannot avoid the conclusion, however, that the casing was imperfect and unsafe at that time. Casing was essential to the safety of the pipe. Without it the latter would clearly have been insecure, and the ship have been subject to condemnation on that account. Any shifting of the cargo, such as might result from settling, or the motion of the ship in ordinary weather would be likely to break it, if exposed. The sole object of the casing is to afford protection against such danger. It is necessary to this end, therefore, that the casing shall be very substantial, and be securely fastened in place. If defective in either respect the casing tends to increase the danger, for if it gives way the sudden blow thus inflicted would be more likely to break the pipe, than the gradual pressure from the cargo. After a careful reading of the testimony describing this casing and its fastenings, I am satisfied that it was insufficient; that it was unsubstantial, if not flimsy. I believe that in the settling which ordinarily occurs in such a cargo, or the strain to which the ship is subjected in ordinary weather, on such a voyage, it was likely to give way, as it did. How it was

secured at the top is uncertain; the evidence is conflicting. It was probably cleated there as well as at the bottom; but it would seem difficult, if not impossible to secure such a casing as this—which consisted simply of a long board box, without corner posts, or other means of stiffening and strengthening—in such way that it would not work loose in bending and springing, as it necessarily must, from the pressure of the cargo and the motions of the vessel even in ordinary weather. It was the respondent's duty to have the pipe and casing absolutely safe; and in this I believe she failed.

There is another ground, however, on which the case may be rested, possibly with greater safety. I have found the respondent guilty of negligence in filling the tanks, which contributed directly to the damage; and this negligence deprives her of the exemption from liability for injury from sea peril or accident of navigation, unless the consequences of such negligence are also covered by the clause cited. The respondent avers that they are so covered; that the negligence was connected with the navigation of the ship, and is therefore within the terms of the clause. Possibly this averment is true; but I seriously doubt it, notwithstanding what is said in *The Castleventry*, reported in respondent's brief, Appendix B.¹ Granting it to be true, however, and that the negligence is therefore, within the terms, will our court enforce these terms? Such a provision is unlawful here. If its unlawfulness arose from conflict with our

¹ "Appendix B" is herewith reprinted from respondent's brief.

Appendix B.

Hanseatic Gericht (Hamburg).

In the Action of *Slevenright, Bacon & Co.*, owners of the English Ship *Castleventry*, versus *Anson Nielsen & Co.*, of Bremen.

BY THE COURT. Plaintiffs' claim for freight has been recognized by defendants as correct in itself, and especially as regards the amount thereof. On the other hand, defendants raise a counterclaim for compensation of damages caused to them by water having penetrated into the cargo of rice during its discharge from plaintiffs' ship *Castleventry*, at the port of destination, *Geestemunde*, whilst filling the water tanks, whereby 900 bags of rice have been spoilt. Defendants hold plaintiffs responsible for said damages, whereas plaintiffs dispute any such liability.

The first point in dispute between the parties of this suit is whether the legal connections between them have to be regulated either by the bill of lading only or by the charter party as mentioned in the bills of lading. (The court hereafter comes to the conclusion that only the bill of lading is to be considered as the basis of the legal connections between parties.) In due consideration of these facts, only that clause in the bill of lading is to be looked upon as conclusive, in the legal connections of parties in dispute, according to which plaintiffs have freed themselves from risks and accidents of sea and navigation. As regards any damages caused by default of the ship's crew, full liability exists to the extent intended by the act.

The second point in dispute between the parties in this suit concerns the question whether in the case now before the court there is any reason to speak of an accident of navigation. This question must be answered in the affirmative. The county court is right to suppose whilst referring to said verdict of the imperial supreme court (volume XI., No. 21), that the accidents of sea and navigation not only include those accidents occurring in the port of shipment, but also those occurring in the port of destination up to the time of final discharge of cargo. Any accident occurring in handling the tanks, especially whilst filling same, has to be treated as an accident due

statutes, or violation of our sense of good morals, we, certainly, would not enforce it. Judicial decisions are, however, as effectual in establishing the law as the enactment of statutes. The controlling fact is the unlawfulness of such contracts here; that they are forbidden by our laws. It is unimportant whether the laws rest upon such decisions or upon statute. We hold them to be in conflict with the public interests, and, therefore, in violation of sound public policy. Declaring them immoral would add nothing to the reason for holding them unlawful. In *Bissell v. Railroad Co.*, 25 N. Y. 442, 29 Barb. 602, however, Judge Denio denounced them as immoral. The stipulation that the parties shall be subject to the laws of England is unimportant, as it adds nothing to the implication which would arise in its absence. The ship bore the English flag, and the laws of Germany, where the contract was made, as well as those of England, sustain such provisions. That the intent of the parties in this regard is thus *expressed* is, therefore, immaterial. In every instance where the courts have declared such stipulations void, it has, of course, been against the express agreement of the parties. We have determined that such contracts are harmful and wrong; that they tend to encourage negligence, and justify oppression; that they affect injuriously not only the immediate parties, but the public at

to and caused by navigation, and therefore has to be considered to fall under the perils of navigation. This opinion has been expressed by this court in a verdict given 8/2/92 (Ann. C., 1892, No. 20; cf. No. 89), which happened in a port of shipment, and has been confirmed by the supreme court. It can therefore not be seen why the same points of view which are held conclusive for filling a tank in the port of shipment shall not hold good for the same manipulation if performed during the discharge of cargo in the port of destination; that means at a time during which the vessel still served as means of transport, and therefore the voyage had not been terminated as far as the cargo is concerned. Consequently, in itself, an "accident of navigation" must be considered to exist in this case.

However, by the acknowledgment of this fact it has not yet at all been decided that plaintiffs are not liable for said accident; for the discharge from all liability only comes into operation under the proviso that the "accident of navigation" has been caused without any blame being attached to the owners, the master, or crew. There can be no doubt that, if such a clause as in the present case (which, properly speaking, is nothing else but a circumscription and definition of the legal liability for the act of God) is adopted in the bill of lading, it only creates a change in the liability to procure proof, but does not mean to state right off that the legal liability shall be excluded without any examination of the cause of the accident. In consequence of this clause having been agreed upon between parties, not the freighter (as customary in regular cases) has to prove the act of God; but the charterers (the defendants in this action) have to assert and prove a default of the party opposite if they want to succeed in obtaining from plaintiffs a compensation for damages. Such a default has actually been asserted by defendants in two directions. They firstly raise the assertion that the master has unjustly and in a guilty manner caused the filling up of the water tanks at the port of destination, Geestemunde, which labor has nothing at all to do with the present voyage, but only must be considered as means of preparation for a new voyage. The filling has taken place during the time that a part of the cargo was still in the hold, and defendants blame the master especially that whilst filling the tanks he had acted uncaredful, because, contrary to cautions made to him, he did not wait till last with the discharge of that part of the cargo stowed in the fore lower hold. In the second line, defendants consider the owners liable because the damage

large; and that they are therefore unlawful. Why then should we lend our aid for the enforcement of such a contract because it is made abroad, instead of at home? I can see no sound reason why we should. Of course, it is true that contracts are enforceable, generally, according to the law of the place where they are made, or are to be executed, or such other place as the parties may stipulate, or circumstances may show they contemplated. Where, however, their provisions conflict with justice and sound public policy as declared by the laws of the jurisdiction, where their enforcement is sought, it is otherwise. Story, Conf. Laws, §§ 38, 244; Rousillon v. Rousillon, 14 Ch. Div. 357; 2 Kent, Comm. 458. This question was before the district court for southern New York in *The Hugo*, 57 Fed. 403, and was decided against the carrier. That case is now pending on appeal, as I am informed, in the supreme court. The question was also involved, and decided in the same way, in *The Guildhall*, 58 Fed. 796. The question was also involved, I think, and was similarly decided by the supreme court, in *Railroad Co. v. Lockwood*, 17 Wall. 357. In the latter case the contract was for carriage on *land*, but no difference exists, in the respect under consideration, between such a contract and one for carriage on water. *The Montana* [Liverpool, etc., Steam Co. v. Phenix Ins. Co.] 129 U.

of the cargo has been caused by the untight state of the tanks, and therefore is the result of an unfit condition of the vessel.

Plaintiffs deny any liability in both directions. They do so justly, as regards the latter point,—that means to say, as far it concerns the asserted unseaworthy condition of the vessel. It will suffice in this direction to point to the reasons of the judge who dealt with this case in a former instance. Said judge comes to the conclusion that, if actually an unfit state of the tanks has existed, it could not prejudice the seaworthiness of plaintiffs' steamer for the completed voyage, as no water ballast has been used during said voyage. Whether or not any blame must be attached to the master's dealings cannot be decided at present by the evidence now before the court.

Plaintiffs, contrary to defendants' statements, assert that the filling up of the water tanks during the time of discharging the cargo is not to be considered as a kind of preparatory work for the next voyage, but this was a necessary and requisite part of work of the old voyage in consideration of the vessel's construction, and in consideration of the fact that the weak and thin bags of rice would burst and tear much easier the more the vessel's body was out of the water and the longer the planks had to be constructed for discharging the cargo. It will therefore become necessary, as regards this point, to obtain further proof, which has been offered on both sides, and according to the result of this only point in dispute it must be decided whether the master must be blamed or not.

I hereby certify that the foregoing is a true and correct translation of an extract from the "Hanseatische Gerichtszeitung," dated April, 1894.

Hamburg, November 5, 1894.

[Sd.]

R. Breitruck, Sworn Translator.

[Seal.]

We, the undersigned German lawyers and members of the bar of the Hanseatic court of appeal at Hamburg, do hereby declare and certify that the foregoing translation is a true and correct one, as well to the wording as to the meaning of the decision, and we further certify that this decision does state the law of the empire of Germany up to date, and is one of the leading cases on the question decided therein.

Hamburg, November 7, 1894.

Drs. Nolte and Schroeder.
Dr. Gustav Nolte.

S. 397 [9 Sup. Ct. 469]. The law of New York, where the contract was made, authorized it, and yet the supreme court held it to be contrary to sound public policy, and therefore refused to recognize and enforce it. It will be seen by reference to the report of this case that the eminent counsel who represented the carrier rested their contention exclusively on the fact that the law of New York, to which the parties impliedly bound themselves to submit, authorized the contract. In *The Montana*, the contract was for carriage by water; the terms were similar, and the decision was the same—the court citing *Railroad Co. v. Lockwood*, as controlling. I do not see how these cases can be distinguished in principle from the one before me. If the parties there had expressly stipulated for the application of the laws of New York, the result must, of course, have been the same. The stipulation would not have added anything to the force of the express agreement for exemption, or the implied agreement to abide by the laws of New York. The fact that these contracts were made in New York, and not in England, affords no just ground for a distinction; the stipulations were as valid by the laws of New York as this is by the laws of England; and no reason can be seen why the laws of New York should not have been allowed to prevail in those cases, and the laws of England should in this. That state is as distinct and independent a jurisdiction, in this respect, as England is, with the same right to authorize such contracts. Proceeding upon this view the supreme court of Pennsylvania, in *Forepaugh v. Railroad Co.*, 128 Pa. St. 217 [18 Atl. 503], decided that such contracts made in New York are enforceable in Pennsylvania, (though invalid if made here) a majority of the judges disregarding the decisions in *Railroad Co. v. Lockwood* and *The Montana* as respects the question of public policy, while a minority dissented in this latter respect.

In the cases cited by the respondent, generally, the precise question before me does not seem to have been raised or considered, though in some of them it seems to have been involved. I am not referring to cases in state courts. Very little weight should, I think, be attached to the fact that the judge who delivered the opinion in *The Montana* pointed to the circumstance that the contract there involved was not made in England. It by no means follows that the decision would have been otherwise, if it had.

Counsel for the respondent suggested that our statute of 1893, relating to navigation, etc., shows a change in our views of public policy in this regard. That statute relieves vessels and owners from the consequences of negligence thereafter, of masters and crews under specified circumstances, giving to shippers, as compensation for this loss of security, the carriers' responsibility for proper care in the selection of such agents. It will be a mistake, I think, to suppose that a mere formal or perfunctory discharge of this duty of selection will satisfy the terms and spirit of the statute. We must, however, deal with the question in hand according to the law as it existed when the right of action accrued, which was antecedent to the date of the statute.

A decree must be entered sustaining the libel.

ROYAL WEST INDIA CO. v. THE CITY OF PARA.

(District Court, U. D. Virginia. August 14, 1895.)

SALVAGE—COMPENSATION.

A regular passenger steamship, running on time, due to arrive at New York March 23d, and to leave there March 30th, picked up, 300 miles out at sea, and out of the course, after a gale had abated, but while the sea ran high, and while there were cross seas, a deeply-laden passenger and mail steamship, which had lost the blades of her propeller, but which had a sailing apparatus useful for steadying purposes, and skillfully towed her to Hampton Roads, without meeting any other steamer, losing $3\frac{1}{2}$ days by the deviation, though being able to leave New York on time. The values risked were \$325,000, and those saved \$335,000. *Held*, that \$6,000 over the actual expenses of the service was a proper compensation.

This is a libel by the Royal West India Company against the Pacific Mail steamer City of Para to recover a reward for salvage service. Decree for libellant.

This libel is brought to recover a reward for salvage service rendered by the libellant's Dutch steel steamship *Prins Willem IV.*, Herman Sluiter, master, to the Pacific Mail steamship City of Para, James B. Lockwood, master, in March, 1895. On Friday morning, the 22d of that month, the latter steamer was seen to be in a helpless condition, flying a signal of distress, in the Atlantic Ocean, in $74^{\circ} 21'$ W. longitude, and $32^{\circ} 04'$ N. latitude, which is a point some 400 miles due east of the port of Savannah, Ga. The *Prins Willem* was running on schedule time, was bound to and due to arrive at the port of New York on the 23d, and to leave there for Amsterdam on the 30th of March. She was a regular passenger steamer, and had 24 passengers on board at the time. The values which she carried were as follows: Of the ship, \$100,000; of cargo, \$224,000; and of freight money (apportioning \$4,000 to the West Indies for Hampton Roads), say \$1,250; these values aggregating \$325,250. Her gross tonnage was 1,724 tons; her length, 281 feet; beam, 36; and depth in water, $21\frac{1}{2}$ feet. Her full rate of speed is 14 knots an hour. The City of Para was bound south. The two steamers were far out to the east of the course of vessels coming up from Cuba and ports of the mainland for New York and to the north of Hampton Roads. The Para's gross tonnage was 3,582; her length, 345 feet; beam, $38\frac{3}{4}$; and depth in water, 29 feet. She was running as a mail and passenger steamer on scheduled time, and had on board about 40 passengers. Her value was \$197,000, her cargo was worth \$116,000, and her freight money \$22,000; the aggregate value of the property saved being \$335,000. The *Willem* promptly bore down towards the Para, upon observing her condition and seeing her signal. She was found to have lost the blades of her propeller, which was entirely useless. Her sailing apparatus, though good of its kind, was such that she could have made but little headway by using them, though they were useful to her for steadying purposes. She was deeply laden with a full cargo of merchandise and a large supply of coal. Before the morning of the 22d there had been gales of wind and high seas. On the morning of Friday, when the two vessels first saw each other, the wind had blown a gale, and the sea had run high. On this Friday morning there was still a large swell of the sea, which continued, though abating gradually, during the first two days and nights of the towing. There were also cross swells of sea. This condition of the water made the towing of so heavy and massive a ship as the Para an arduous labor, attended constantly by more or less risk of accident. As soon as practicable after the *Willem* had borne down to the Para, on Friday morning, the 22d of March, hawsers were rigged and made fast to the two vessels, and the towing commenced. The towing line consisted first of the Para's anchor chain, 30 fathoms long; next of a new Manilla hawser, belonging to the Para, 90 feet long; and last of a new wire hawser, belonging to the *Willem*, 100 to 120 feet long. The sea was not so rough as to prevent the use of a yawl boat back and forth between the two ships in rigging hawsers. There was necessarily a great strain upon the

hawser line during the whole time of this towing, in consequence of the great weight of the Para and roughness of the sea. On two occasions the hawser line broke, and delay was incurred in refitting it. The Para's master requested at first to be towed back to New York, but it was soon agreed that she should be taken into Hampton Roads. The towing was off the dangerous coast of the Carolinas, passing Capes Lookout, Fear, and Hatteras, and near to and abreast of Currituck Sound, 16 miles out. The towing was done with care and skill on the part of the Willem, her master and engineer. Most of the labor connected with the hawsers was done by the crew of the Para, in consequence of their being more numerous, and less occupied otherwise than the crew of the Willem, and were directly and deeply interested in the success of the salving operations. The towing lasted until the afternoon of Monday, the 25th of March, when the two ships, having passed safely into Hampton Roads, came to anchor there at about 5 o'clock p. m. No other steamer had been met or sighted during the trip. The engines of the Willem were kept at their fullest speed throughout the towing service. The distance traversed was 325 miles. The Willem lost 3½ days by deviating from her course, but she was able, nevertheless, to leave New York on her outward voyage on the 30th of March, her scheduled time. At the conclusion of the towing, by some inadvertence, the wire hawser slipped from the Willem, but was caught and secured by the Para. It was returned to the owners of the Willem in New York, and it is conceded at the trial that it was injured by the service it had performed to the amount of \$240. The actual expenses and outlay of the Willem in and about the towing amounted to the sum of \$1,314, and are not contested.

Mr. Putnam, for libellant.

Sharp & Hughes, for respondent.

HUGHES, District Judge (after stating the facts). The question in the case is as to the amount of award over and above actual expenses and costs, aggregating \$1,554, which should be granted to the Willem for deviating from her course, undertaking this service, and encountering the serious and numerous risks which the enterprise involved. The fact that the Para was in a helpless condition, far out in the ocean, with no other ship than the Willem in sight or in reach, constituted this a salvage service. The prompt, efficient, and successful manner in which the service was rendered, attended by much necessary risk, and by a delay almost necessarily injurious and prejudicial to a passenger steamer running on schedule time, made this a highly meritorious service. If the values risked by the libellant and saved to the respondent were small, I should be constrained to fix the bounty due for the service at a comparatively small figure. But in this case the value of the property taken hold of, hundreds of miles out at sea, in a boisterous season of the year, on a stormy coast, was \$335,000, and the value of the property risked in undertaking this service was \$325,000. I think that these extraordinary values, and the other facts of the case, justify me in fixing the bounty to be awarded the libellant at \$6,000; and I will sign a decree in favor of the libellant for \$7,554 and costs.

PLACE v. STATE OF ILLINOIS ex rel. WILKINSON.

(Circuit Court of Appeals, Seventh Circuit. June 14, 1894.)

No. 167.

REMOVAL OF CAUSES—CITIZENSHIP—QUO WARRANTO—CORPORATIONS.

A quo warranto suit to test the defendant's title to office in a corporation organized under the laws of the state in which the suit is brought is not removable on the ground that the defendant and the relator are citizens of different states.

Quo warranto by the state of Illinois on the relation of Reuben Wilkinson against Orrin F. Place to determine defendant's title to the office of president of the Crowned King Mining Company, a corporation organized and existing under and by virtue of the laws of the state of Illinois. The suit was begun in the circuit court of Christian county, Ill., and was removed on petition of the defendant on the ground that defendant was a citizen of Arizona, and relator a citizen of Illinois. There was judgment of ouster. Defendant brings error.

J. C. McBride and Crawford & Blair, for plaintiff in error.

Taylor & Abrams and John G. Drennan, for defendant in error.

Before HARLAN, Circuit Justice, WOODS, Circuit Judge, and BUNN, District Judge.

No opinion. Reversed, with instructions to remand to state court.

LA CHAPELLE v. BUBB, United States Indian Agent, et al.

(Circuit Court, D. Washington, E. D. April 19, 1895.)

1. PUBLIC LANDS—HOMESTEAD RIGHTS—JURISDICTION OF COURTS—INJUNCTION.

A homestead settler whose land has been included by the government in allotments made to Indians in fulfillment of treaty stipulations, but who has not perfected his right by making proof in the land office of full compliance with the law, is not entitled, in a suit against certain Indians and an army officer, who threatens to put them in possession, to a decree declaring him to be the owner of the land, and quieting his title. But, as a bona fide settler and owner of the improvements, he is entitled to an injunction protecting him in his possessory rights until the questions of law involved can be determined in a court of competent jurisdiction.

2. INJUNCTION—TRESPASS BY ARMY OFFICER.

Injunction may issue from a federal court to restrain an army officer from committing a trespass on lands, where he justifies his proposed action on the ground that he is simply obeying the orders of his superiors.

This was a bill by Alfred W. La Chapelle against Capt. John W. Bubb, United States army, as Indian agent of the Colville Indian Agency, in the state of Washington, and certain Indian defendants, for an injunction to restrain said Indian agent from forcibly ousting the complainant from certain lands, which he claims as a settler under the homestead laws. The lands in question had been included by the government in allotments made to the Indians in fulfillment of treaty stipulations.

T. M. Reed, Jr., for complainant.

Wm. H. Brinker, U. S. Atty., and F. C. Robertson, Asst. U. S. Atty., for defendants.

HANFORD, District Judge. After due consideration of the pleadings, evidence, and arguments on final hearing, I have concluded that the complainant's prayer for a decree declaring him to be owner of the land in controversy, and quieting the title in him, must be denied, for the reason that the legal title is in the United States, and complainant's right to the land as a settler under the homestead law has not been perfected by making proof in the land office of full compliance with the law. The government is not a party to this suit, and cannot be brought into court to answer the bill of complaint. *U. S. v. Jones*, 131 U. S. 1, 9 Sup. Ct. 669. Therefore, the court is without jurisdiction to render any decree affecting the title, or the complainant's rights, other than his right of possession.

As a bona fide settler, and owner of the improvements which he has made on the land, he is entitled to protection in his possessory rights until the questions of law involved in the dispute between him and the Indian defendants can be determined by the judgment of a court of competent jurisdiction. *Colwell v. Smith*, 1 Wash. T. 92; *Ward v. Moorey*, Id. 104. For the reasons given in the opinion of this court filed at the time of granting an injunction pendente lite in this case (62 Fed. 545), the use of force by Indian Agent Bubb, outside the limits of an Indian reservation, without process of law, is unwarranted, and contrary to the express provisions of the constitution of the United States and the laws of this state. Under ordinary circumstances, this court would not grant an injunction to prevent a trespass; but the defendant Bubb justifies his proposed action on the ground that he is an officer of the United States government, acting only in obedience to orders from his superior officers in the Indian department, and, for that reason, I deem it entirely proper for this court to restrain him from committing a tort while assuming to act in his official capacity. Let there be a decree making the injunction perpetual, but without prejudice to the right of the defendants to bring an action in any court of competent jurisdiction to recover possession of the land.

PENNSYLVANIA CO. FOR INSURANCE ON LIVES AND GRANTING
ANNUITIES v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court, E. D. Pennsylvania. July 18, 1895.)

No. 9.

1. RAILROAD MORTGAGES—RIGHT TO FORECLOSE FOR INTEREST.

Where a railroad mortgage is expressly to secure interest as well as principal, and both are equally within the positive terms of the condition, a default in payment of the interest gives the mortgagee a right to bring a foreclosure suit, especially where, by the express terms of the instru-

ment, he is forbidden to proceed for the collection of interest by ordinary judgment and execution at law.

2. SAME—DEMAND.

It seems that a paper addressed to a railroad company, and reciting that payment of certain interest coupons of its mortgage bonds had been demanded and refused, and that the holder would look to the company for payment thereof, is substantially a "demand made in writing," within the meaning of a provision in the mortgage.

This was a foreclosure bill brought by the Pennsylvania Company for Insurance on Lives and Granting Annuities against the Philadelphia & Reading Railroad Company and others. Defendants demur to the bill.

John G. Johnson, F. W. Whitridge, and George L. Rives, for complainant.

C. Stuart Patterson, Samuel Dickson, and Thomas Hart, Jr., for defendants.

ACHESON, Circuit Judge. The paper of July 1, 1893, addressed to the Philadelphia & Reading Railroad Company, after reciting that payment of 418 coupons of the company's general mortgage bonds, that day due, had been demanded and refused, declared that the holder would look to the company for payment thereof. I strongly incline to the opinion that this was substantially a "demand made in writing," within the fair meaning of article 4 of the mortgage. It certainly was an explicit warning that the holder expected the company to pay these matured coupons, and it fulfilled the purpose—to guard against inadvertence and surprise—which that provision was intended to subserve.

If, however, it were to be conceded that the paper was technically deficient for lack of a present demand formally expressed therein, still, in my judgment, these demurrers cannot be sustained. The bill is not one exclusively in aid of the powers conferred upon the plaintiff by the mortgage. The bill shows that the default in the payment of the interest upon the company's general mortgage bonds which occurred on July 1, 1893, has been followed by like default with respect to the interest thereon which fell due at the end of each half year thereafter, and that none of this overdue interest has been paid; that on February 20, 1893, under a decree of this court, the railroads and all the property of the company passed into the hands of receivers, who are still acting; that the receivers have repeatedly announced their inability, for want of funds, to pay this accrued interest; and that the company itself is without means to pay it, and, under the restraining order of the court, would not be at liberty to do so, even if it had the means. The prayers for relief contained in the bill are appropriate to this state of facts. Now, the declared purpose of the mortgage is the securing the payment of the interest, as well as the principal, of the bonds, and both interest and principal are equally within the positive terms of the condition of the mortgage. Upon sound reason, then, a default in the payment of a half year's interest on the appointed day is as much a breach of the condition of

the mortgage as would be a like default in the payment of the principal of the bonds. In support of this view, and of its sequence,—that upon such a failure to pay interest the mortgagee has a right to bring a bill for a foreclosure,—we have decisions of great weight. *Gladwyn v. Hitchman*, 2 Vern. 135; *Burrowes v. Molloy*, 2 Jones & L. 521, 526; *Edwards v. Martin*, 25 Law J. Ch. 284. To deny to a Philadelphia & Reading general mortgage bondholder the right to proceed by bill to enforce his mortgage security upon default in the payment of the semiannual interest might work the greatest injustice, for, by the provisions of the mortgage, a bondholder is precluded from levying upon, taking in execution, or selling, under an ordinary judgment at law, for interest, any part of the mortgaged premises. Now, the bonds run until the year 1958. Therefore, if a bondholder cannot resort to a bill for a foreclosure upon the nonpayment of interest, he might be, and, unless he could procure the co-operation of the bondholders, representing the requisite amount, surely would be, left practically remediless. A construction of the mortgage involving consequences so unreasonable is not to be accepted.

And now, July 18, 1895, the demurrer of the Philadelphia & Reading Railroad Company and the Philadelphia & Reading Coal & Iron Company, the demurrer of Thomas McKean, and the demurrer of Robert M. Gallaway, Isaac N. Seligman, David G. Legget, Simon Wormser, and Emmanuel Lehman are overruled, with leave to the named defendants to answer the bill of complaint on or before the first Monday of September, 1895.

THOMSON v. SHIRLEY.

(Circuit Court, D. Oregon. July 31, 1895.)

No. 2,112.

FORECLOSURE OF MORTGAGES—APPOINTMENT OF RECEIVERS—RENTS AND PROFITS.

Under a statute declaring that a mortgage of real property shall not be deemed a conveyance so as to enable the mortgagee to recover possession without foreclosure and sale (Gen. Laws Or. 1845-64, p. 228, § 323), the mortgagee has no right to take the rents, profits, and crops before he has secured possession by actual foreclosure and sale according to law; and it is not in the power of the parties, even by express stipulation, to give him such right. Therefore, a provision in a mortgage of farm lands that, in case foreclosure proceedings are instituted, a receiver may be appointed to take the rents, profits, and crops, and apply them on the debt, in no wise enlarges the mortgagee's rights. In a proper case, the court will appoint a receiver without any such stipulation; and, in any other case, it will not appoint one, whatever the parties may have agreed.

This was a bill by William Thomson, Jr., against James Q. Shirley, to foreclose a mortgage on certain farming lands.

John H. Woodward, for plaintiff.

John J. Balleray and J. L. Rand, for defendant.

BELLINGER, District Judge. This is a suit to foreclose a mortgage upon farm lands. The mortgage provides that, in case foreclosure proceedings are instituted to collect the note which the mortgage secures, the court may appoint a receiver to take the rents, issues, profits, and crops, and apply them in payment of the mortgage. The defendant executed other mortgages, subsequent to that of complainant, and, in addition to these, has suffered several judgments to be taken against him. Upon the filing of the complaint herein, on March 26, 1894, a receiver was appointed under the provision of the mortgage therefor. The appointment was made *ex parte*, on complainant's application. On July 25th following the receiver was removed, on the ground that he was a party in interest in the suit, being the holder of the second mortgage. Prior to his removal, the receiver had entered into certain contracts of farming or leasing of said lands on shares. After his removal he continued to act as receiver, and disposed of the crops earned under the farming contracts, and on April 13, 1895, made his final report. This report shows a balance of profits from sales of farm products amounting to \$1,017.93, which balance the master's report recommends should be applied, after paying for the services of the receiver, to the payment of the second mortgage. The first mortgage was wholly satisfied by the proceeds of the sale of the mortgaged premises.

The laws of Oregon provide that:

"A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale, according to law." Gen. Laws 1845-64, p. 228, § 323.

Under this statute the mortgagee is not entitled to the rents and profits before actual possession, even when the mortgagor covenants in the mortgage to surrender the mortgaged property on default in payment of the debt, and nevertheless refuses to deliver it after default. *Teal v. Walker*, 111 U. S. 242, 4 Sup. Ct. 420. In the case just cited the court held that the complainant could not be aided by the stipulation, in the defeasance exacted by the mortgagee, that Goldsmith and Teal would, upon default in the payment of the note secured by the mortgage, deliver to the trustee the possession of the mortgaged premises; that such contract was contrary to the public policy of the state of Oregon, as expressed in the statute cited, and was not binding on the mortgagor or his vendee, and could not be enforced. The court classes such contracts with those where common carriers have sought to relieve themselves from liability resulting from their own negligence by contract, and with fraudulent and other contracts forbidden by public policy. The stipulation in the mortgage in this suit for the appointment of a receiver, in case of foreclosure, to take the rents, issues, profits, and crops, and apply them in the payment of the mortgage, is intended to enable the mortgagee, in case of default by the mortgagor, to oust the mortgagor's possession in advance of a sale on foreclosure. The covenant in *Teal v. Walker* to surrender the mortgaged property on default is not different in legal effect from that in this case, that, in case of default, a receiver may be appointed to take the rents, issues, profits, and

crops, and apply them on the mortgage. If the mortgagee is not entitled to the rents and profits in the one case, he is not entitled to them in the other. The mortgagee cannot by means of a receiver defeat the obvious purpose of this statute, and get possession by a short cut; and this is what he does, in effect, when he seizes the rents and crops in such case and applies them in advance of a foreclosure sale. The stipulation in the mortgage that upon the mortgagor's default a receiver may be appointed to take the crops, in no wise enlarges the rights of the mortgagee. In a proper case a receiver will be appointed without such a stipulation. In no other case should one be appointed, no matter what the parties may agree beforehand.

In *Hazeltine v. Granger*, 44 Mich. 503, 7 N. W. 74, it is held that any provision in a mortgage of lands which allows an ex parte order for a receiver of rents and profits, or destroys in advance the equity of redemption, is contrary to equity, and will not be enforced by a court of chancery. The court says that the old practice under which a receiver was appointed (1) where the security was inadequate, and (2) where the mortgagor was insolvent, is changed by the statute which secures the mortgagor in his possession until a foreclosure has become absolute. The reason for the statute, and the result that would follow from the enforcement of such stipulations in mortgages as that under consideration, are thus stated by the court:

"Every mortgage made in common-law form contains words whereby, if applied as they read, possession would belong to the mortgagee, and his title would become absolute by default. The whole aim of equity was to arrest this forfeiture, and not allow the language of a mortgage to have any force against the equity of redemption. The statute is a further step in the same direction, for the protection of mortgagors against agreements which, as literally drawn, and as therefore expounded, were deemed dangerous and against public policy. The language of this mortgage expressly granting rents and profits on default is no stronger than the previous words of grant, and is really narrowed. It was no doubt intended to go further, and to evade the statute. If it had contained an agreement that ejectment should lie, it could not very well be enforced against the clause of the statute prohibiting it. It can have no greater force in enlarging the jurisdiction of equity to appoint receivers, which we held in *Wagar v. Stone* had been abolished. Any such an attempt to create a forfeiture is contrary to equity and equity will not enforce it. The same principle which makes all original agreements void which destroy the equity of redemption in advance must cover a partial as well as complete destruction. In *Batty v. Snook*, 5 Mich. 231, it was held that, where an agreement was in fact a mortgage, an executory agreement to give up the equity of redemption on default was void, and would violate the doctrine which had annulled the common-law forfeiture. If mortgagees can evade the law by requiring a forfeiture of something a little less than the entire freehold, but nevertheless covering its usufruct, the beneficial effect of the modern legislation, and, to a considerable extent, of the previous equitable doctrine, will be wiped out."

The case of *Wagar v. Stone*, 36 Mich. 364, referred to in the above quotation, holds that, the mortgagor being entitled under the statute to the possession, and consequently to the rents and profits, of the mortgaged premises, until such time as his title is divested by a perfected foreclosure, it is not competent to cut short his rights in this regard by means of a receiver appointed in the foreclosure suit.

The only exception to the well-established rule which excludes the mortgagee from possession of rents and profits by a receiver is in

that class of cases where the value of the property mortgaged is threatened with loss or destruction. Where the value of the property mortgaged depends upon its operation,—upon its character as a going concern,—it may become necessary, in a proper case, to appoint a receiver to operate the property and thus preserve it. Such are the cases of railroads, which are liable for want of proper management to fall into disrepair, or to suffer a diversion of their traffic, or to become disintegrated, where such a road forms a system made up of different lines, or of a main and branch lines. These considerations do not apply to ordinary real-estate mortgages, and least of all to mortgages of farm lands. The practice is frequently resorted to of seizing such lands by means of a receiver, as was done in this case, just before harvest, in order that the mortgagee, through the agency of a receiver, may reap where the mortgagor has sown. I have in one or more cases appointed receivers in such cases, who have thus harvested the mortgagor's crop and applied it to the mortgagee's debt. But so far this has been done without objection on the part of the parties in interest, and without consideration by the court. My attention has now, for the first time, been called to the unlawfulness of this practice, and to its violation of the right of possession in the mortgagor until a foreclosure has become absolute. In this case it turned out that the receiver is a second mortgagee, and a party in the foreclosure suit, who was removed because of such interest. After his removal he proceeded to harvest and market the crops grown on the mortgaged premises. For the service so rendered he asks to be compensated out of the residue in his hands, and that the balance of such residue be applied upon his debt. The money on hand will not be so applied. It represents the earnings of the property during the time the mortgagor was entitled to the possession, and equitably belongs to him. And the order of the court will direct its payment to him or his assignee.

SHAINWALD et al. v. LEWIS.

(District Court, N. D. California. August 14, 1895.)

No. 260.

1. EQUITY—JURISDICTION—ANCILLARY SUITS.

One S., assignee in bankruptcy of the firm of S. C. & Co., brought suit against one L. to set aside certain fraudulent conveyances, and obtained a decree setting the same aside, requiring L. to pay over to S., as assignee, a sum of money, and adjudging that L. held in trust certain moneys and property of the bankrupt firm. Within five years of the rendition of this decree, that being the limitation of the local statute for suits upon judgments, S. filed another bill to revive and continue the former decree, and obtained a decree reviving and continuing it in full force and effect, except as to certain sums already paid. Within five years from the rendition of this decree, S. filed a third bill, styled a "bill of revivor and supplement," to revive and continue in force the two former decrees. *Held* that, although S. might have a remedy at law, equity had jurisdiction to entertain the bill either as an ancillary bill for the enforcement of its original decree or by virtue of the trust declared to attach to the funds in the hands of L.

2. SAME—PLEADING.

Held, further, the bill being in substance one to revive and carry into execution the former decrees, and containing proper allegations for that purpose, equity could entertain it, whether properly or not styled a "bill of revivor and supplement."

3. SAME—LACHES.

Held, further, that the bill was not barred either by laches or by the statute of limitations.

4. SAME—SECOND REVIVOR.

Held, further, that the bill properly sought to revive the first decree of revivor, and thereby, ipso facto, the original decree; and the fact that the original decree was not set out in *hæc verba* in the first decree of revivor was no objection to the present bill, it having been intelligibly referred to and described.

5. EQUITY PRACTICE—NE EXEAT—DEMURRER.

The question of the propriety of issuing a writ of ne exeat cannot be raised by demurrer.

This was a suit by Herman Shainwald, as assignee in bankruptcy of the firm of Schoenfeld, Cohen & Co., and of Louis S. Schoenfeld, Simon Cohen, and Isaac Newman, individually, against Harris Lewis, to revive and continue in force two decrees rendered in favor of the same plaintiff against the same defendant on November 5, 1880, and on June 14, 1890, respectively. The defendant demurred to the bill, and excepted to certain parts of it.

Sidney McMechen Van Wyck, Jr. (James L. Crittenden, of counsel), for complainant.

Wal. J. Tuska, for respondent.

MORROW, District Judge. The bill in equity in this case seeks to revive, continue, and enforce a judgment and decree of this court, rendered on June 14, 1890 (46 Fed. 839), in case No. 241. This last decree had revived and continued in force a judgment and decree made in an original suit, No. 221, on November 5, 1880 (6 Fed. 753). This is, therefore, the second suit which has been brought to revive and continue in force the judgment originally rendered in case No. 221 in favor of the complainant. There is no change of parties or of their interest. This bill and the proceedings under it must be regarded, therefore, as merely ancillary and supplementary to the original suit in case No. 221 and the subsequent ancillary suit in case No. 241.

That the nature and scope of the present bill, as well as the relief originally afforded by the former judgments of this court, and now sought to be enforced, may be the better understood, it will be necessary to refer to the early history of the proceedings out of which the present action has taken rise. During the years 1875, 1876, 1877, and the early part of 1878, a copartnership under the firm name of Schoenfeld, Cohen & Co. was engaged in a mercantile business in San Francisco, selling willow ware, fancy goods, toys, and notions. On the 26th day of April, 1878, Louis S. Schoenfeld and Simon Cohen, members of this copartnership, filed their petition in this court to be adjudicated bankrupts, as copartners and as individuals, and to be discharged from their debts, under the bankrupt act. The petition sets forth that Isaac Newman, a member

of the copartnership, had refused to join in the petition, and it was asked that he be made a party to the proceedings. In a schedule annexed to the petition, the debts of the copartnership were set forth, amounting to \$44,257.25, and in another schedule, purporting to contain an inventory of the estate of the copartnership, it was alleged that "one H. Lewis has in his possession mines, property, and accounts due the firm of Schoenfeld, Cohen & Co., the value of which is \$68,989.18, said property, money, and accounts having been obtained by fraud on the part of the said Lewis, and held adversely to said firm." It was also stated in this petition that the accounts, books, and papers of Schoenfeld, Cohen & Co. were in the possession of the said H. Lewis. No other property or assets of any kind or description belonging to either the firm or to its individual members appeared in the petition or schedule. In other words, the petition alleged that the entire property of this copartnership, together with all the books of accounts and papers, had passed into the hands of one H. Lewis, who had obtained the same by fraud. The petition was referred to the Register in bankruptcy, and on December 6, 1878, Louis S. Schoenfeld, Simon Cohen, and the firm of Schoenfeld, Cohen & Co. were adjudicated bankrupts, individually and as copartners. The first meeting of creditors was held on March 29, 1879, when Herman Shainwald, of San Francisco, was chosen assignee of the estate. He qualified on April 7, 1879, and immediately entered upon the discharge of his duties as such assignee. On October 3, 1879, Shainwald, as assignee, filed a bill in equity in this court against Harris Lewis (the party referred to as H. Lewis in the petition in bankruptcy) for the purpose of having a certain judgment, execution, sheriff's sale, and other proceedings in a suit at law in the Nineteenth district court of this state, entitled "Harris Lewis vs. Louis S. Schoenfeld, Isaac Newman, and Simon Cohen," declared to be a fraud upon the creditors of the firm of Schoenfeld, Cohen & Co., and upon the assignee of such firm in bankruptcy, and upon Simon Cohen, and upon said firm; also, for the purpose of having it declared and decreed that certain promissory notes, upon which the said suit was brought, to wit, a note for \$17,000, a note for \$8,000, and a note for \$5,000, were fraudulent and void, as against said firm, for want of consideration; also, for the purpose of having it declared and decreed that certain transfers of money, bills of lading, promissory notes, and other property made to Harris Lewis by said Schoenfeld and Newman were fraudulent and void, as against the creditors of said firm, the assignee, and Simon Cohen, a member of said firm; and also for the purpose of having it declared and decreed that Harris Lewis was a trustee for the benefit of the assignee of all the moneys, bills of lading, accounts, merchandise, chattels, and other property obtained by said Lewis through or by means of the said action, attachment, judgment, execution, or sheriff's sale, or transferred or delivered to or received by him from said Schoenfeld, from said Newman, or from any other person; and, also, for such further and other relief, etc.; also, for an injunction and a writ of ne exeat. This case is No. 221 in the records of this court, and is so designated to dis-

tinguish it from other actions between the same parties. Though the suit was brought subsequently to the repeal of the bankrupt law (Act June 7, 1878; 20 Stat. 99), the right to sue was within the proviso of the repealing act saving all further proceedings in any pending bankruptcy matter. Other suits have also been instituted against persons other than Harris Lewis, who had participated with him in fraudulently obtaining the assets of said firm. The litigation involved in these suits has been complicated, bitter, and protracted, engaging the attention of this court, in some form or another, for now 16 years past.

The testimony taken in the original suit (case No. 221) disclosed a series of fraudulent transactions devised and executed for the purpose of enabling the firm of Schoenfeld, Cohen & Co. to defraud its foreign and Eastern creditors out of the several amounts due them, aggregating more than \$30,000. It appears that in January, 1877, it was determined between Schoenfeld and Newman that Schoenfeld should proceed to the Eastern states and Europe and procure a large stock of goods on credit. In this he was successful. Returning to San Francisco in June, 1877, Newman reported the firm in an embarrassed condition, whereupon certain fraudulent notes, amounting to about \$30,000, were executed by Newman and Schoenfeld in the name of the firm, and placed in the hands of Harris Lewis, to enable him to wreck the concern by bringing an attachment suit against the firm in the state court. This suit was accordingly commenced June 27, 1877, and the property in the hands of the firm attached. An attorney was employed for the ostensible purpose of defending the suit, but the real purpose was to enable Lewis to obtain judgment and execution in the case, and a sale of the property of the firm, and this purpose was in fact accomplished. Lewis, by an arrangement, became a purchaser at the sheriff's sale of a large part of the merchandise and accounts of the firm at a very low price, whereupon he opened a store with this stock in another part of the city, in the name of H. Lewis & Co. Schoenfeld and Newman were, however, connected with this new store under an agreement to divide the proceeds after certain claims had been paid. It does not appear that Mr. Cohen was a party to this conspiracy, or knew the character of the transactions involved in its execution. The amount realized by H. Lewis & Co. from this property, near the end of the year 1877, was about \$69,000. It appears that, after this fraudulent scheme had been so far consummated that Harris Lewis had become possessed of almost the entire assets of the firm, he repudiated an obligation which, it is claimed, he assumed as a part of the conspiracy, and, as a result of the dissensions growing out of this affair, proceedings in bankruptcy were instituted. In commenting on the testimony relating to these transactions, the late Judge Hoffman said:

"It is perhaps not easy to imagine a grosser case of conspiracy by merchants of fair repute to cheat and defraud their creditors, or one where the proofs could be more convincing and indisputable." 6 Sawy. 556, 557, 6 Fed. 753.

In this case (No. 221) Judge Hoffman, on November 5, 1880, after a careful consideration of all the evidence in the case, directed a decree to be entered in favor of Shainwald, as assignee of the estate of Schoenfeld, Cohen & Co., bankrupts, and against Harris Lewis, for the sum of \$81,425.07, with interest in the amount of \$17,099.26, making a total of \$98,524.33. The judgment and decree in No. 221 remaining unsatisfied, the complainant exhibited his bill on November 2, 1885, in case No. 241, to revive and continue in force his judgment in case No. 221, and, after proceedings duly had in this court, a judgment and decree was entered on June 14, 1890, whereby the judgment of November 5, 1880, in case No. 221, was continued "in full force and effect," excepting that the sum of \$30,650, paid by one Hyams, and \$20,000, paid by one Naphtaly, both of whom had been implicated in the combination and scheme to defraud, and had been proceeded against in another action, and also the further sum of \$11,919.63, received by Ralph L. Shainwald, the receiver appointed by the court, were applied in part satisfaction of the original judgment for the sum of \$98,524.33, with interest and costs, leaving a balance still due of \$69,829.25, in which amount the court entered its judgment for complainant, with interest and costs. An injunction restraining Harris Lewis or any other person from disposing of or interfering with the trust funds decreed to be represented by the amount of the judgment was also granted, but the application for a writ of ne exeat was denied. To revive and continue in force this last judgment, and ipso facto that of November 5, 1880, the present bill in equity, styled by counsel for complainant "bill in revivor and supplement," has been filed. An injunction, as above, and a writ of ne exeat, is also prayed for. A demurrer is now interposed to the bill. Exceptions also have been made to matters in the bill claimed to be scandalous and impertinent. Taking these objections up in their order, the main grounds of demurrer urged are that the complainant does not make, in and by his bill, such a case as entitles him to apply to a court of equity for the relief he seeks; that he has an adequate remedy at law; that his claim is barred by laches and the statutes of limitation of the state of California; that his bill is ambiguous and uncertain, in that it cannot be ascertained therefrom whether he seeks to recover on the decree of November 5, 1880, or on that of June 14, 1890, or on both.

In support of the first objection, it is claimed that the suit is to all intents and purposes for the recovery of a liquidated sum of money, viz. a money judgment, to accomplish which the complainant has an adequate remedy at law. Conceding that the sum sued for is a liquidated amount, and that a court of law could afford as complete and adequate a remedy, yet this, of itself, does not divest this court, as a court of equity, of its jurisdiction over the bill. For it is a well-settled maxim of equity jurisprudence that, where a court of equity obtains jurisdiction for one purpose, it will retain it for all purposes, and render complete justice, even though, in doing so, it is necessary to establish purely legal rights and grant legal remedies which would otherwise be beyond the scope of its

authority. The fact that the action is cognizable by a court of law does not, as a general rule, impair or divest the right of a court of equity, having once obtained jurisdiction, to entertain the suit. 1 Pom. Eq. Jur., pp. 211-214, §§ 181, 182; 1 Story, Eq. Jur. (11th Ed.) §§ 64k, 65, 71. In *King v. Baldwin*, 17 Johns. 384, Spencer, C. J., said:

"I consider it an established principle that where a court of equity once had jurisdiction it will insist on retaining it, though the original ground of jurisdiction—the inability of the party to recover at law—no longer exists. 1 Madd. 23. In *Atkinson v. Leonard*, 3 Brown, Ch. 218, Lord Thurlow said: 'It did not follow, because a court of law will give relief, that this court loses the concurrent jurisdiction it has always had; and, till the law is clear on the subject, the court would not do justice in refusing to entertain the jurisdiction.'"

Therefore, if a court of equity, having acquired jurisdiction for one purpose, may go on to a complete remedy, and adjudicate as to legal rights and grant legal remedies, a fortiori will it retain jurisdiction of purely ancillary and supplementary proceedings to enforce its own decrees. And it is immaterial whether the amount sued for is a liquidated money judgment, and that as complete and adequate a remedy could be had in a court of law. The remarks of Chancellor Kent in *Kershaw v. Thompson*, 4 Johns. Ch. 609, 612, though relating to the foreclosure of a mortgage and the possession of the mortgaged premises, are pertinent to the law of this case. He says:

"The distribution of power among the courts would be injudicious, and the administration of justice exceedingly defective, and chargeable with much useless delay and expense, if it were necessary to resort, in the first instance, to a court of equity, and afterwards to a court of law, to obtain a perfect foreclosure of a mortgage. It seems to be absurd to require the assistance of two distinct and separate jurisdictions for one and the same remedy, viz. the foreclosure and possession of the forfeited pledge. But this does not, upon due examination, appear to be the case; and it may be safely laid down, as a general rule, that the power to apply the remedy is coextensive with the jurisdiction over the subject-matter."

But it is to be observed that this suit is not an action merely to recover a liquidated sum of money, to wit, a money judgment, as counsel for respondent contends. It is something more. It is to revive and enforce the former judgments of this court, which adjudge that Harris Lewis holds in trust for the benefit of Herman Shainwald, the complainant and duly-appointed assignee in bankruptcy of the firm of Schoenfeld, Cohen & Co., and for the benefit of the creditors thereof, certain moneys and property of said firm adjudged to have been fraudulently procured and obtained by said Lewis, and now aggregating in value the sum of \$69,829.25; and, furthermore, it is sought to give effect to and enforce the former judgments of this court by processes peculiar to courts of equity alone, as, for instance, enjoining Lewis and all others from in any way disposing of or interfering with such trust funds, and granting such other or further relief as to the court may seem proper. While it is true that the chief and ultimate object of this ancillary bill is to recover of and from the respondent the sum of \$69,829.25, with interest and costs, yet the important feature must not be over-

looked that it is sought to compel the payment of this amount as so much trust funds in the hands of Lewis. There being an element of trust in the case, this feature alone would confer jurisdiction upon the court, sitting as a court of equity. *Oelrichs v. Spain*, 15 Wall. 211, 228.

However, aside from these considerations, which seem to place the question of jurisdiction beyond the peradventure of a doubt, there is still another and more convincing reason in favor of the jurisdiction of the court, and that is the inherent power of a court of equity to enforce its own decrees. Having the power to adjudicate, it must have the power to enforce its adjudications, or, in the language of Mr. Justice Field, then on the supreme bench of California, in the case of *Montgomery v. Tutt*, 11 Cal. 190, "where the court possesses jurisdiction to make a decree, it possesses the power to enforce its execution." Although the jurisdiction of this court, as a court of equity, is purely statutory, and limited to but few subjects, yet within the confines of such jurisdiction it possesses complete authority, and is vested with all the attributes of a court of chancery. It is a general and elementary rule that such courts have plenary power to issue all processes that may be necessary to carry their decrees or orders into effectual execution. 2 Daniell, Ch. Prac. (4th Ed.) p. 1042, note 7; *Ludlow v. Lansing*, 1 Hopk. Ch. 231; *Charles River Bridge v. Warren Bridge*, 6 Pick. 395; *Jones v. Mill Corp.*, 4 Pick. 509; *Grew v. Breed*, 12 Metc. (Mass.) 363, 370, 371; *Scott v. Jailer*, 1 Grant, Cas. 237; *White v. Hampton*, 13 Iowa, 259; *Root v. Woolworth*, 150 U. S. 401, 410, 14 Sup. Ct. 136. That this inherent and plenary power extends to and includes the right to entertain bills to carry their decrees into execution is but a corollary to the above rule. The function of bills in equity for this purpose, and their utility, is well settled, and is peculiarly appropriate to courts of equity. They constitute, in effect, but continuations of the original suit. Story, in discussing these bills to carry decrees into execution, says in his work on *Equity Pleading* (Redfield's Ed. p. 394):

"Sometimes, from the neglect of parties, or some other cause, it becomes impossible to carry a decree into execution without the further decree of the court. This happens, generally, in cases where, the party having neglected to proceed upon the decree, their rights under it become so embarrassed by a variety of subsequent events that it is necessary to have the decree of the court to settle and ascertain them. Sometimes such a bill is exhibited by a person who was not a party, or who does not claim under any party to the original decree, but who claims in a similar interest, or who is unable to obtain the determination of his own rights till the decree is carried into execution. Or it may be brought by or against any person claiming as assignee of a party to the decree."

Precisely the same language is found in *Mittf. Eq. Pl.* (3d Ed., 1812) p. 86. See, also, 6 Am. & Eng. Enc. Law, p. 773, and references therein contained; 2 Daniell, Ch. Prac. (4th Am. Ed.) pp. 1585, 1586. In *Owings v. Rhodes*, 65 Md. 414, 9 Atl. 903, it was said:

"When the rights of a party to a suit which has its inception in a bill for an interpleader have been determined by a final decree, it may, at some period

subsequent to the passage of the decree, become necessary to enforce the determination of the court; and this may be done by the institution of new proceedings growing out of the original suit, which has been ended."

In *Shields v. Thomas*, 18 How. 253, 262, this language is used:

"Amongst the original and undoubted powers of a court of equity is that of entertaining a bill filed for enforcing and carrying into effect a decree of the same, or of a different court, as the exigencies of the case or the interests of the parties may require."

In *Railroad Cos. v. Chamberlain*, 6 Wall. 748, it appeared that a bill in equity had been filed to set aside a judgment, and a lease, in the nature of a mortgage, to secure the same, and another railroad corporation created by the same state, having become the equitable owner of the lease and mortgage, was admitted as defendant, and filed a cross bill to have the judgment enforced. The supreme court, through Mr. Justice Nelson, in reviewing and reversing the action of the circuit court in dismissing the cross bill, said:

"We think that the court erred in dismissing the cross bill. It was filed for the purpose of enforcing the judgment, which was in the circuit court, and could be filed in no other court, and was but ancillary to and dependent upon the original suit; an appropriate proceeding for the purpose of obtaining satisfaction."

See, also, *Thompson v. Maxwell*, 95 U. S. 391, 400; *Chicago, M. & St. P. Ry. Co. v. Third Nat. Bank of Chicago*, 134 U. S. 276, 10 Sup. Ct. 550.

In *Root v. Woolworth*, 150 U. S. 401, 410, 14 Sup. Ct. 136, the supreme court say:

"It is well settled that a court of equity has jurisdiction to carry into effect its own orders, decrees, and judgments, which remain unreversed, when the subject matter and the parties are the same in both proceedings."

After referring to the general rule on this subject as stated in *Story, Eq. Pl.*, and applying that rule to the case at hand, the opinion continues:

"The jurisdiction of courts of equity to interfere and effectuate their own decrees by injunctions or writs of assistance, in order to avoid the relitigation of questions once settled between the same parties, is well settled. *Story, Eq. Jur.* § 959; *Kershaw v. Thompson*, 4 Johns. Ch. 609, 612; *Schenck v. Conover*, 13 N. J. Eq. 220; *Buffum's Case*, 13 N. H. 14; *Shepherd v. Towgood*, Turn. & R. 379; *Davis v. Bluck*, 6 Beav. 393."

Further citation of authority in support of the proposition is unnecessary. I have no doubt as to the jurisdiction of the court to entertain this bill to enforce its previous decrees and judgments.

The next point to be disposed of is whether the complainant's bill is in the proper form. *Story*, in his work on *Equity Pleading*, speaking of bills to carry decrees into execution, says:

"A bill for this purpose is generally partly an original bill, and partly a bill in the nature of an original bill, although not strictly original; and sometimes it is likewise a bill of revivor, or a supplemental bill, or both. The frame of the bill is varied accordingly." Section 432, p. 395 (*Redfield's Ed.*).

The bill is styled a "bill of revivor and supplement." An examination of its terms shows that it partakes of the nature of both. It seeks, in the first place, to revive a former judgment of this court,

and, in the second place, to carry such judgment into execution. In so far as the present bill is supplementary, it is unquestionably proper, for that is one of the recognized uses of supplementary bills. But it is claimed by counsel for respondent that, in so far as it is a bill of revivor, it is improper, for the reason that such an action can only be instituted upon the original suit. The bill appears to have precisely this character. It seeks to keep alive the original action, as has been done before, and is the exercise of that reasonable diligence required by courts of equity in the prosecution of demands. Section 336 of the Code of Civil Procedure of this state provides a period of five years within which an action may be commenced upon a judgment or decree of any court of the United States. To guard against any possible consequences resulting from the running of this statute, the present bill is filed to revive and continue in force the original action. In form and substance, discarding rigid and technical rules of equity pleading, it is a bill to carry a decree into execution. That is the object plainly deduced from the averments of the bill, and whether it be termed by counsel a "bill of revivor and supplement," or either one or the other, can and should make no difference, if the complainant is entitled to the equitable relief prayed for upon the showing made in his bill. The remarks of Wilde, J., in *Grew v. Breed*, 12 Metc. (Mass.) 363, are directly in point:

"The question is whether the decree mentioned in the bill, that the insurance company should pay four thousand four hundred and sixty-five dollars and eighty-four cents to C. P. and B. R. Curtis, solicitors of the plaintiffs in the former bill, can be now enforced against the said company and Andrew Breed, one of the defendants, their debtor. It is objected that, although the court had jurisdiction in the original suit, it is not extended to this suit, which is on a new bill. It is true that this is a new bill; and so are bills of revivor. But it is not strictly original."

After advertng to the nature of a bill to carry a decree into execution, the learned judge continues:

"But, however this bill may be denominated or defined, it is certainly founded on the decree of the court in the former suit; and the sole question is whether we have authority to cause it to be done in the form prayed for."

The authority to do so was affirmed, and the demurrer to the bill overruled.

It is next objected that the bill reviving the original action is barred by laches and the state statute of limitations as contained in sections 336 and 343 of the Code of Civil Procedure. So far as it appears from the pleadings, it would seem that the complainant, instead of being guilty of laches, has been at all times vigilant and diligent to protect and enforce his rights. The decree upon the original bill was filed November 5, 1880. Within five years thereafter, to wit, on November 2, 1885, the complainant commenced ancillary proceedings to revive and keep in force the former decree, and obtained a decree in his favor on June 14, 1890. Within five years after this last decree, to wit, on June 8, 1894, the bill at present under consideration was filed. This objection is, therefore, not well founded.

It is further claimed that the bill is ambiguous and uncertain, in that it does not appear which judgment the complainant is seeking to revive; that if he sues on, and seeks to revive, the judgment rendered on November 5, 1880, that is now dead, having been made more than five years next preceding the bringing of the present bill. On the other hand, it is claimed that if he sues on the judgment rendered June 14, 1890, that decree is too indefinite and insufficient for any purpose, and that the portions of the decree continued in force should have been set out in *hæc verba* in the decree of revivor. But these objections are without substantial merit. In the first place, the judgment and decree of November 5, 1880, is not dead. It was expressly revived and continued in force by the decree of June 14, 1890, in suit No. 241. The present suit is to revive and continue in force this last decree, thereby, in effect, so to speak, giving the decree of November 5th a new lease of life. The judgment which it is sought to enforce, the rights adjudicated upon, were determined in the original suit; but to keep this judgment alive, and to preserve the rights of the parties theretofore adjudicated, the ancillary bill, which resulted in the decree of June 14, 1890, in case No. 241, was filed. It would seem logical and proper, therefore, to revive this last decree, and thereby, ipso facto, that of November 5, 1880, in the original case No. 221. The objection that the decree sought to be revived is insufficient,—indefinite,—and that the portions continued in force should have been set out in *hæc verba* in the decree of revivor, is, as stated above, untenable. It is entirely unnecessary to set out the decree revived in *hæc verba*, provided a sufficient reference be made to it to show what decree it is intended to revive. The statement in the decree of June 14, 1890, "that the judgment heretofore rendered and entered on the 5th day of November, A. D. 1880, in the district court of the United States of America for the district of California, in an action numbered 221, wherein the complainant herein was complainant and the respondent herein was respondent, be and the same is hereby continued in full force and effect," is amply sufficient to justify a reference to the judgment and decree of November 5, 1880. It is a general rule that papers and documents which are sufficiently referred to and identified may be made part of a pleading. *De Sepulveda v. Baugh*, 74 Cal. 468, 16 Pac. 223, overruling other conflicting decisions; *Rosenthal v. Matthews*, 100 Cal. 81, 34 Pac. 624.

A demurrer is also made to that part of the bill which seeks and prays for a writ of *ne exeat republica*. I am of the opinion that the propriety of issuing such process cannot be raised by a demurrer, nor at this time. The contention is made that the bill is improper in this respect, for the reason that the decree of November 5, 1880, as revived by the decree of June 14, 1890, does not direct that such a writ shall issue; and the point is made that the office of a bill to enforce a decree is simply restricted to enforcing the decree as rendered, and that there can be no substantial variation of its terms, and that, therefore, the court in this case cannot issue such writ. Without entering into a consideration of this question, it is sufficient to say that the writ of *ne exeat republica* is not in itself a remedy. It is a means to effectuate a remedy, viz. by keeping a

party within the jurisdiction of the court. Rule 21 of the general equity rules of the supreme court required the complainant, if he required such writ "pending the suit," to ask for it in his bill. In the case of *Lewis v. Shainwald*, 7 Sawy. 403-417, 48 Fed. 492, decided in this circuit, it was held that the writ may be granted at or after the decree, although the bill contains no such prayer. However, it will be time enough to consider this question when it comes finally before the court.

There is no merit in the exceptions for matter claimed to be scandalous and impertinent. The demurrer will be overruled and the exceptions disallowed.

BRODRICK v. BROWN.

(Circuit Court, S. D. California. July 22, 1895.)

No. 644.

BANKS AND BANKING—VOLUNTARY ASSESSMENT.

The F. National Bank suspended business for lack of funds, and was placed in charge of a bank examiner, who required that \$50,000 should be raised and placed in the bank before it could resume business. The stockholders, including one B., the president, thereupon raised this sum in amounts equal to 50 per cent. of their stock, and placed it in the bank. The examiner caused entries to be made on the books indicating that this contribution was a voluntary assessment subject, after one year, to the liabilities of the bank, and permitted the bank to resume. B., at a meeting of the directors subsequently held, protested against these book entries, but afterwards signed reports in which the \$50,000 was included as surplus. At the time of the advance the bank held two notes of B., and discounted another note of his a few days before the expiration of a year from the advance. Shortly after the expiration of the year, the bank again suspended payment. *Held*, that the advance to the bank was a voluntary assessment, and not a loan, and could not be set off by B. in an action against him on the notes by the receiver of the bank.

This was an action by William J. Brodrick, as receiver of the First National Bank of San Bernardino, against Joseph Brown. The case was heard by the court without a jury.

Curtis, Oster & Curtis, for plaintiff.

Rolfe & Rolfe, for defendant.

WELLBORN, District Judge. Plaintiff, as receiver of the First National Bank of San Bernardino, brings this action to recover of the defendant on three promissory notes, each payable, on demand, to First National Bank of San Bernardino, bearing interest at the rate of 10 per cent. per annum,—one for \$3,000, another for \$5,000, and another for \$7,000, bearing dates, respectively, March 17, 1892, May 18, 1893, and July 9, 1894. There is no denial of the making and delivery of the notes. The answer sets up, however, by way of counterclaim, that on or about the 10th day of July, 1893, defendant loaned to said bank the sum of \$20,500, and that no part of same has been paid. The only issue between the parties arises on this answer, plaintiff insisting that the money therein mentioned was advanced by the defendant to said bank, not as a loan, but as

a contribution, voluntarily made, for the betterment of the stock, to enable said bank to resume business.

On the trial of the case the following facts were made to appear by stipulation of the parties: That said bank was created and organized under an act of congress known as the "National Bank Act," with a capital stock of \$100,000, divided into 1,000 shares, of the par value of \$100 each, and that defendant at all times owned 410 of these shares. That on June 23, 1893, for lack of funds to pay depositors in the due course of business, said bank closed its doors, and immediately thereafter notified the comptroller of the currency of the United States of its condition; and that thereafter, on or about the ——— day of June, 1893, said bank was by the said comptroller of the currency of the United States placed in charge of Bank Examiner J. B. Lazier, who remained in charge and control of said bank until it resumed business on the 21st day of July, 1893. That during the time said Lazier was in charge of said bank he informed the directors thereof that, before the said bank would be permitted by the said comptroller of the currency of the United States to resume business, the sum of \$50,000 would have to be raised and placed in said bank; and that, acting on said information, and in order to enable said bank to resume business, said stockholders thereof severally raised, and between the 15th and 21st days of July, 1893, placed in the hands of said Lazier, for the use of said bank, sums of money, equal to 50 per cent. of the par value of the capital stock owned by them respectively; and thereupon said Lazier caused to be entered on page 237 of the general cash book of said bank the following entry:

"The fifty thousand dollars voluntary assessment which has been paid in by the stockholders remains undisturbed in the bank for one year, after which time any losses in present valuations of assets will be charged against same, and balance subject to stockholders; the said fifty thousand dollars having been paid as follows: 50 per cent. on capital stock by—

Brown, Joseph.....	\$20,500
" Mrs. ".....	250
Barton, Mary.....	1,500
Brinkmeyer, H.....	2,000
Crandall, W. N.....	1,000
" L. D.....	1,000
Curtis, W. J.....	1,500
" Frances.....	500
" Lucy M.....	500
Flanders, J.....	2,000
Garner, M. B.....	5,000
Hall, J. W.....	4,000
James, John M.....	1,500
" Mrs. D. C.....	500
Johnson, F. M.....	500
Kohl, O. H.....	5,000
" F.....	500
Kohl, L.....	500
Rolfe & Freeman.....	250
Vail, A. H.....	500
Warner, S. M.....	500
" F. E.....	500

Amt. carried to surplus ~~2~~2..... \$50,000"

—That on the teller book of said bank No. 13, under date of July 15, 1893, is the following entry: "Stockholders' voluntary assessment, \$50,000;" and that on the general ledger of said bank, on page 5, is the following entry: "Shareholders' voluntary assessment, to surplus #2, \$50,000." That on October 10, 1893, December 28, 1893, March 9, 1894, May 14, 1894, July 28, 1894, and October 12, 1894, reports of the condition of said bank, verified by the oath of O. H. Kohl, its cashier, and signed by three of its directors, were made to the said comptroller of the currency, in each of which reports the said \$50,000 is entered as follows: "Surplus #2, \$50,000;" and that each and all of said reports, except the one made on the said 14th day of May, 1894, were signed by Joseph Brown, the defendant herein. That on the 21st day of July, 1893, said bank (having obtained permission from the comptroller of the currency of the United States to resume business, the said Lazier having turned over and delivered to the officers of said bank all of its assets, including said sum of \$50,000) opened its doors and resumed business, and from that time until the 8th day of November, 1894, continued to transact the business of banking, as it had done prior to the closing of its doors on the said 23d day of June, 1893. That on the 8th day of November, 1894, on account of the lack of funds to pay its depositors in the due course of business, said bank again closed its doors, and thereafter was placed in charge of William J. Brodrick as receiver. That ever since the 10th day of February, 1890, Joseph Brown, the defendant herein, has been a director and president of said bank.

Defendant testified that, at the first meeting of the directors after the bank's resumption of business, he called attention and objected to the entry which Lazier caused to be made, on page 237 of the general cash book, to the effect that the \$50,000 was a voluntary assessment, and chargeable with depreciations in assets. Three other witnesses, besides himself, were introduced on behalf of the defendant, and testified, substantially, that they were stockholders in said bank, and that they understood that the moneys advanced by the stockholders were to be paid back one year after the advances were made; but they did not say from or with whom this understanding was received or had. Witnesses for the plaintiff, two in number, stockholders of the bank, testified, on the contrary, that there was no understanding by them that the moneys advanced by the stockholders were to be repaid, but that such advances were understood to be voluntary assessments. The cashier of the bank, O. H. Kohl, witness for the plaintiff, testified that none of the stockholders had ever demanded repayment of their advances. H. Brinkmeyer, witness for defendant, said that he had on one occasion called for repayment of the amount advanced by him. These, in brief, are the facts of the case, so far as relates to the ground on which my decision rests.

The law is well settled that where stockholders voluntarily assess themselves, to relieve the corporation from pecuniary embarrassment, or for the betterment of their stock, whatever may be the occasion of the assessment, the advances thus made are not

debts against, but assets of, the corporation. *Bidwell v. Railroad Co.* (Pa. Sup.) 6 Atl. 729; *Leavitt v. Mining Co.* (Utah) 1 Pac. 360; 2 *Thomp. Corp.*, § 1717. While there is some conflict in the oral testimony as to the nature of the transaction which eventuated in the raising of the \$50,000 of which defendant's payment of \$20,500 was a part, careful consideration of all the evidence satisfies me that the advances thus made were not loans, but voluntary contributions by the stockholders, for the betterment of their stock, and to enable the bank to resume business. The chief contention of the defendant is that where money is deposited with a bank generally, without any special agreement in reference thereto, such deposit is a loan, and therefore a debt against the bank in favor of the depositor. This proposition, rightly understood, is unquestionably correct, and abundantly sustained by authority. In the case of *Scammon v. Kimball*, 92 U. S. 370, cited and quoted from in defendant's brief, the principle is thus stated:

"Sums which are paid, said Lord Denman, to the credit of a customer with a banker, though usually called deposits, are, in truth, loans by the customer to the banker; and the party who seeks to recover the balance of such an account must prove that the loan was in reality intended to be his, and that it was received as such. *Sims v. Bond*, 5 Barn. & Adol. 392.

"Exactly the same rule was laid down in the court of exchequer, where it was held that money deposited with a banker by his customer, in the ordinary way, is money lent to the banker, with a superadded obligation that it is to be paid when demanded by a check. *Pott v. Clegg*, 16 Mees. & W. 327."

From this quotation, particularly the latter paragraph, it will be seen that to make the deposit of money in bank a loan, in the absence of an express contract, it is essential that the money be deposited "in the ordinary way." This statement of the law reveals the vulnerable point in defendant's argument, for manifestly the money paid by defendant to J. B. Lazier, the bank examiner, for the use of the bank, was not money deposited "in the ordinary way." The bank, at the time, was not doing business "in the ordinary way"; indeed, there was an entire suspension of its usual business. The bank was closed, and in the charge of the comptroller of the currency of the United States. There was no one who could on its account have received deposits "in the ordinary way." No such power resided even in the comptroller. The most and all that he could do was to prescribe the conditions on which there could be a resumption of business. This course he did adopt, and the prescribed condition was that the stockholders should raise, and turn over for the use of the bank, \$50,000. This condition was complied with. The money thus raised and turned over could not have been a loan, for the obvious reason that no one at the time was authorized to borrow money for the bank. The only possible theory consistent with the situation of the bank and the circumstances of the parties is that the transaction was a voluntary assessment. Furthermore, and as showing the defendant's understanding, on five different occasions between and including October 10, 1893, and October 12, 1894, this money was reported to the comptroller of the currency as "Surplus \$2, \$50,000," and each one of said reports was

signed by the defendant. It is incredible that the defendant would have thus habitually and constantly reported this money as surplus,—that is, an asset of the bank,—had he believed it to be a liability. Again, the facts that at the time defendant's advance was made the bank held his notes, one for \$3,000 and the other for \$5,000, being two of the three notes sued on, and that no account was taken of those notes; and that, a few days before the expiration of one year from the time of the advance, the defendant executed another note to the bank, for \$7,000, also one of the notes sued on,—are circumstances tending to discredit defendant's contention of a loan, and to strengthen the position of the plaintiff that the transaction was a voluntary assessment. Furthermore, all the entries upon the books of the bank, made by the examiner during the time he had charge, point in the same direction; and when it is remembered that the defendant was president of the bank, largely interested, and actively participating in the efforts then being made for its resumption of business, it is a fair inference that he had knowledge of and was familiar with these entries. The fact that after the whole arrangement had been consummated, and the money paid thereunder, the defendant objected to one of these entries at a meeting of the directors, cannot alter or affect the nature of the transaction, which had already been accomplished. Again, the receipts given by the examiner to two or three of the stockholders at the time their advances were made, as well as the entries above mentioned, show conclusively that he considered the arrangement a voluntary assessment. In view of the close relations which the defendant bore to the bank, and his efforts for reopening the same, can it be presumed for a moment that he was ignorant of or at war with the views of the examiner? I think not.

For the reasons above indicated, my finding is that the \$20,500 mentioned in defendant's answer was a voluntary contribution for the betterment of his stock, and therefore is not a debt against the bank. This view of the facts renders it unnecessary for me to decide the other question, made in argument, as to the right of set-off. Judgment will be entered for plaintiff in accordance with the demand of his complaint.

BARBER et al. v. PITTSBURGH, FT. W. & C. RY. CO. et al.

(Circuit Court, W. D. Pennsylvania. August 2, 1895.)

No. 10.

1. FEDERAL COURTS—CONCLUSIVENESS OF STATE DECISIONS—EJECTMENT SUITS.

A single verdict and judgment in ejectment in Pennsylvania not being conclusive in the state courts, a decision by the supreme court of the state upon the construction of a will, in a first ejectment suit, is not conclusive in a federal court, but is entitled to peculiar regard as a precedent.

2. EVIDENCE IN EJECTMENT SUITS—RECORD OF PROBATE—ADMISSIBILITY.

It seems that, where both parties to an ejectment suit claim under the probate of a will, a statement in the record of such probate to the effect that the attesting witnesses deposed before the register that on a date named they subscribed their names to the will as witnesses, at the request

and in the presence of the testator, who then declared that it was his last will and testament, is competent evidence to show the date of the attestation and publication of the will.

8. WILLS—CONSTRUCTION—ESTATES TAIL.

Testator devised certain lots to Amanda Stephens, and subsequently declared that, "in the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided" among other persons designated. *Held* that, under the Pennsylvania decisions, this will did not create merely a defeasible fee, and, if it did not vest in the devisee a fee simple, it at least gave her an estate tail.

This was a suit in ejectment brought by Barber and others against the Pittsburgh, Ft. Wayne & Chicago Railway Company and others to recover possession of certain lots in the city of Pittsburgh, Pa.

S. Duffield Mitchell and J. S. Ferguson, for plaintiffs.

Scott & Gordon, for defendants.

Before **ACHESON**, Circuit Judge, and **BUFFINGTON**, District Judge.

ACHESON, Circuit Judge. The parties to this suit respectively claim title to the land in controversy under the following provisions of the will of James S. Stevenson, deceased:

"I, James S. Stevenson, of the city of Pittsburgh, in the state of Pennsylvania, aged fifty years on the 12th day of January, 1831, reflecting on the certainty of death, and desirous of making a distribution of my property in the event of my decease, do hereby declare this writing to be my last will and testament, made this twelfth day of March in the year of our Lord one thousand eight hundred and thirty-one.

"I give and bequeath to Amanda Stephens, daughter of Margaret Stephens, lots 67, 68, 69, and 70 in the city of Pittsburgh, in their full extent, bounded by Penn street, Wayne street, the Allegheny river, and by lot 71. Said Amanda Stephens is now five years old (born April 7, 1826). — Stephens and — his wife, the parents of Amanda's mother, live near Connellsville, in Fayette county, Penna.

"In the event of Amanda dying unmarried, or, if married, dying without offspring by her husband, then these lots are to be sold, and the proceeds to be divided equally amongst the heirs of John Barber, of Columbia, Penna."

The testator died October 16, 1831. His will was probated on the 18th day of the same month and year. Amanda Stephens survived the testator, and in the year 1847 intermarried with Samuel Haight. On July 27, 1848, Amanda and her husband, by deed to Jacob Haight, executed, acknowledged, and recorded agreeably to the provisions of the statute for barring estates tail, barred any estate tail that Amanda had in the devised lots of ground. Afterwards the title of Amanda, freed from any entail, became vested in the defendants. Amanda had several children by her husband, Samuel Haight, but they all died in the lifetime of their mother, without having had issue. Amanda died September 28, 1891. Her husband died previously. The plaintiffs are children and grandchildren of John Barber, deceased. Their position is that Amanda Stephens took no greater estate in the devised lots of ground than a qualified fee, defeasible in the event of her dying without offspring by her husband surviving her, and, this event

having happened, that the devise over to the heirs of John Barber took effect. The defendants insist, primarily, that Amanda took an estate in fee simple; but, if not, then they contend that she took, at least, an estate in fee tail.

The will of James S. Stevenson was considered by the supreme court of Pennsylvania in the case of *Mitchell v. Railway Co.*, 165 Pa. St. 645, 31 Atl. 67. The court held that, although the testator died before the wills act of 1833, the words in the preamble of his will, "desirous of making a distribution of my property," showed an intent to dispose of his whole interest, and were to be carried down into the body of the will, and that those words imported an intent to give to Amanda an estate in fee simple in this particular property, notwithstanding the devise over to "the heirs of John Barber"; that the contingency upon which the estate was to go to them was the death of Amanda, "without offspring by her husband," in the lifetime of the testator; and that Amanda, having survived him, took a fee simple. The defendants maintain that this decision is conclusive here. But to that proposition we are not able to assent. A single verdict and judgment in ejectment in Pennsylvania, not being conclusive in the courts of the state, is not conclusive in the courts of the United States. *Gibson v. Lyon*, 115 U. S. 439, 6 Sup. Ct. 129. This decision of the supreme court of Pennsylvania, indeed, as a precedent is entitled to peculiar regard, and we would be disposed to follow it, even though we might doubt the correctness of the construction which that court gave to the devise to Amanda Stephens.

The plaintiffs, however, have introduced (under exceptions) some evidence that was not, it seems, before the courts in the former litigation, with reference to the state of facts under which, as they allege, the will of James S. Stevenson was made; facts which they contend are competent aids in construing the will, and call for a different conclusion from that reached by the supreme court of Pennsylvania. On the strength of this evidence it is asserted, in the first place, that Amanda Stephens was the natural child of James S. Stevenson. We are of opinion, however, that there is no competent evidence to establish the truth of this allegation, if it be material. The declarations here mainly relied on were made by a person who was not related either by blood or marriage to James S. Stevenson, and they were made many years after his death. Again, the plaintiffs claim to have shown that Stevenson was dangerously ill for two weeks preceding his death, and of this we think there is satisfactory evidence. Then they have offered the register's record of the probate of the will, which sets forth that the two attesting witnesses deposed before him that on the 16th day of October, 1831,—the date of Stevenson's death, as appears aliunde,—they subscribed their names to the will as witnesses at the request and in the presence of the testator, who then declared that it was his last will and testament. As this probate was the judicial act of the register, and both sides claim under it, we incline to think that the contemporaneous and customary record made by the register in the course of his official duty is com-

petent evidence to show the date on which the testator caused the will to be attested, and published it in the presence of the subscribing witnesses. But upon the question whether the evidence here relied on warrants a different construction of the will from that adopted in *Mitchell v. Railway Co.*, supra, we do not feel called upon to express an opinion. If we were to hold that the devise to Amanda Stephens did not pass to her an estate in fee simple, this conclusion would not help the plaintiffs, for we cannot agree with them in their contention that Amanda took only a defeasible fee. In our view of this will, if Amanda did not take a fee simple, she took, at least, an estate tail. "Offspring" is a word of limitation, not of purchase. *Allen v. Markle*, 36 Pa. St. 117. Speaking of the devise in question, the court in *Mitchell v. Railway Co.*, supra, said:

"The word 'offspring,' here used, is but a synonym for 'issue'; and 'issue' cannot be lawful without marriage. The devise, then, is in the first instance to Amanda, and, in the event of her dying without issue, over to alternative beneficiaries."

In *Vaughan v. Dickes*, 20 Pa. St. 509, the testator, after a devise to his wife for her life, directed as follows:

"And, after the decease of my said wife, I give, bequeath, and devise all the aforesaid real estate above described to my son, Peter Dickes, and daughter, Catharine Albertson, to them and their heirs forever, share and share alike, equally to be divided between them; * * * and it is further my will that, should my son Peter Dickes not marry and have lawful issue, then the said real estate heretofore devised to him shall go to my said daughter, Catharine Dickes, and her heirs forever."

The court held that these words created an estate tail in Peter. In *Matlack v. Roberts*, 54 Pa. St. 148, the court decided that the words, "I give and devise to my sons all the residue of my estate, real and personal. * * * And, in case of the death of either of my children unmarried or without issue, then I do order that the share of said child or children so dying may be divided equally among my surviving daughters or their heirs,"—created an estate tail in the sons. The authority of these decisions is unshaken. It will be perceived from the above quotation from the opinion in *Mitchell v. Railway Co.*, supra, that the court treated the word "unmarried" as unimportant, holding that the devise over was in the event of Amanda's dying without issue. Now, it is firmly established by an unbroken line of authorities, among which are *Vaughan v. Dickes*, supra, and *Matlack v. Roberts*, supra, that a devise over to named living persons upon the failure of the issue of the first taker does not import a definite failure of issue. In the leading case of *Eichelberger v. Barnitz*, 9 Watts, 447, 449, the devise which there was adjudged to create an estate tail contained these words:

"And, further, my will is, because my son Henry is not yet married, that, if he should die without leaving any lawful issue, that then his full share shall fall or go in equal share to my other three children, Adam and Anna Mary and Susannah, to one of them as much as to the other."

Here the devise over was not only to named living children of the testator, but it was to them distributively in equal shares. To

hold at this late day that such a devise over imports a definite failure of issue would shake a multitude of titles. The authority of *Eichelberger v. Barnitz*, supra, was fully recognized in the recent case of *Hackney v. Tracy*, 137 Pa. St. 53, 20 Atl. 560. The case of *Middleswarth v. Blackmore*, 74 Pa. St. 414, was decided upon the peculiar provisions of the will there involved. It does not furnish a rule for this case. Amanda Stephens was the preferred object of the testator's bounty, and the construction should incline towards making the gift as effectual to her as possible. We are satisfied that upon any admissible construction of the will of James S. Stevenson the title to the land in dispute is in the defendants.

BUFFINGTON, District Judge, concurs.

RITTER v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Circuit Court, E. D. Pennsylvania. April 4, 1895.)

1. LIFE INSURANCE—SUICIDE—INSANITY.

If one whose life is insured kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequences, and effect, his self-destruction will not, of itself, prevent a recovery on the policy. But by capacity to understand the "moral character of his act" is to be understood a capacity to understand what he was doing, and the consequences thereof to himself, his character, his family, and others, and to comprehend the wrongfulness of the act, as a sane man would.

2. SAME.

The contract of life insurance contains an implied condition that the insured will not intentionally terminate his own life.

3. SAME—PRESUMPTION OF SANITY.

The presumption of sanity is not overthrown by the act of committing suicide. Suicide may be used as evidence of insanity, but, of itself, is insufficient to establish it, and the burden of proof is still on the party alleging it.

This was an action by A. Howard Ritter, executor of the estate of William M. Runk, deceased, to recover upon policies of life insurance. The deceased carried policies aggregating \$75,000, and the defense to the action was suicide.

Barnes, Wintersteen & Bispham, for plaintiff.

John G. Johnson and Chas. P. Sherman, for defendant.

BUTLER, District Judge (charging jury, orally). This case, as it has been said to you, is one of great importance; one which deserves your careful attention, which can only be decided justly by understanding the law that governs it and adhering strictly to the evidence.

As frequently occurs, a good deal of testimony has been heard and several questions raised that will be found in the view the court now takes of the case, to be entirely unimportant. I only regret that we could not know at the outset how the case would present

itself to our mind at the close that we might have avoided the unnecessary expenditure of time, and unnecessary taxing of your strength and patience, and devoted ourselves to what turns out to be the consideration upon which the case must be decided.

The counsel for plaintiff have presented to the court several points on which we are asked to charge, for the purpose of getting their view of the law before you. The plaintiff's first, second and third points are disaffirmed. The fourth is also disaffirmed for the reasons given in answering the defendant's first point, of which I will speak directly.

The fifth point reads as follows:

"If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence, and effect, such self-destruction will not of itself prevent recovery upon the policies."

This is affirmed.

I will say, however, that we must understand what is meant and intended by the term "moral character of his act." It is a term which has been used by courts, and it is correctly inserted in the point; but it is a term that might be misunderstood. We are not to enter the domain of metaphysics in determining what constitutes insanity, so far as the subject is involved in this case. If Mr. Runk understood what he was doing, and the consequences of his act or acts, to himself as well as to others; in other words if he understood as a man of sound mind would, the consequences to follow from his contemplated suicide, to himself, his character, his family and others, and was able to comprehend the wrongfulness of what he was about to do as a sane man would, then he is to be regarded by you as sane. Otherwise he is not.

The defendant's first point reads as follows:

"There can be no recovery by the estate of the dead man of the amount of policies of insurance upon his life, if he takes his own life designedly, whilst of sound mind."

This point is affirmed. The defendant's first point which I have just read to you and affirmed, and the plaintiff's fourth point which I have disaffirmed, raise the same question and it is one of very great difficulty. It is very remarkable that the question has never been directly passed upon by any court of last resort, nor so far as has been discovered, by any other, in this country or in England. When the points were presented I said in your presence that in the absence of authority, or of custom on the part of insurance companies, or the business of insuring, bearing on the subject, I would feel little hesitation in holding that suicide by the insured, while in a sane condition of mind, constitutes a defense to the payment of the policy, but that I was inclined to believe there is authority to the contrary.

It is conceded, however, that there is nothing to be found on the subject but dicta; and this is conflicting, and there is no evidence before the court of any custom in the business of insurance bearing on the subject.

I regret that I must pass on the question without opportunity for examination or reflection. It seems to me, however, that every contract of life insurance contains an implied condition that the insured will not intentionally terminate his life, but that the insurer shall have the benefit of the chances of its continuance until terminated in the natural, ordinary course of events. It is upon these chances that the premium is calculated and based, and the contract is founded. It cannot be doubted that if one having a policy on his buildings, insuring against fire, should intentionally burn them, his act would be a defense to the policy; nor that one taking a policy on the life of his debtor, whom he subsequently murders, cannot recover the insurance. In principle I am unable to distinguish these cases from that where the insured commits suicide.

The fraud upon the insurer seems to me to be as clear in the latter case as in either of the others.

A different construction of the policy would seem to make it a contract to pay the insurance immediately if the insured commits suicide; thus offering an inducement to commit this act. If the insured lives out the ordinary term of life, the time of payment may be very remote, and therefore the inducement to commit suicide is very great if payment follows this event. Of course no insurer would intentionally enter into such a contract; it would be destruction of his interest. His premiums are calculated, and his prospect of gain based, on the insured's chances of life under ordinary circumstances; and if the latter may render the insurance payable immediately by committing suicide, the former is completely at his mercy. If, however, an insurer should enter into such a contract, the law would declare it void, because of its violation of public policy. It would seem, in effect, to be a contract to pay money for the commission of suicide.

If suicide results from insanity, it is not, in legal contemplation, the intentional act of the insured.

What constitutes insanity, in the sense in which we are using the term, has been described to you, and need not be repeated. If this man understood the consequences and effect of what he was doing or contemplating, to himself and to others; if he understood the wrongfulness of it, as a sane man would, then he was sane, so far as we have occasion to consider the subject, otherwise he was not. Here the insured committed suicide, and, as the evidence shows, did it for the purpose as expressed in his communication to the executor of his will, as well as in letters written to his aunt and his partner, for the purpose of enabling the executor to recover on the policy, and use the money to pay his obligations.

I, therefore, charge you that, if he was in a sane condition of mind at the time, as I have described, able to understand the moral character and consequences of his act, his suicide is a defense to this suit.

The only question, therefore, for consideration is this question of sanity. There is nothing else in the case. That he committed suicide, and committed it with a view to the collection of this money from the insurance companies and having it applied to the payment

of his own obligations, is not controverted and not controvertible. It is shown by his declarations, possibly not verbal, but written.

The only question, therefore, is whether or not he was in a sane condition of mind, or whether his mind was so impaired that he would not, as I have described, properly comprehend and understand the character of the act he was about to commit.

In the absence of evidence on the subject, he must be presumed to have been sane. The presumption of sanity is not overthrown by the act of committing suicide. Suicide may be used as evidence of insanity, but, standing alone it is insufficient to establish it. It is sometimes thoughtlessly said—if a man commits a high crime or takes his life, he was insane, was crazy. The fact that the man commits a high crime is not evidence of insanity, and the fact that he takes his life does not of itself overthrow the presumption of sanity.

There must be something more than this. Therefore, we start with the presumption of sanity in the defendant's favor, and the burden of showing insanity on the plaintiff.

You have heard the evidence on the subject and the comments of counsel respecting it, and from this you must determine how the question should be decided.

I believe the wife and sister alone expressed an opinion that his mind was "unbalanced;" whether either of them formed this opinion before his death I am uncertain. The wife said she did not. If the opinion is based on the fact alone that he committed suicide it is of no value. If it is based on this fact, and his previous conduct, condition or conversation, it may and should be considered; its value still is for you. These witnesses, together with two or three others, and probably more, you will remember, testified to his conversation, his conduct, his nervousness, the change in his appearance, etc., shortly before his death.

You must judge in how far this testimony tends to show an insane condition of mind such as I have described. Might or might not the natural worry and distress occasioned by his unfortunate circumstances and the contemplation of self-destruction as a means of relief, account for his conduct and appearance, without the existence of such insanity?

On the other hand, the defendant has called your attention, on this subject, to the fact that he conducted the business of his firm during his partner's absence and up to within a very short time of his death. You have seen how methodically he prepared for his end,—the letters he wrote, the instructions prepared for his executor, etc. Now, from all the evidence on the subject, and your attention has been very fully called to this by counsel, and there need be no repetition of it, you must determine the question of sanity.

While I thus submit the question, and remind you that the responsibility of deciding it rests upon you alone, I consider it a duty to say that I do not regard the evidence on which the plaintiff relies as strong. It may be sufficient; that is a question entirely for you.

If you find him to have been insane, as I have described, your

verdict will be for the plaintiff. Otherwise, it will be for the defendant. There is nothing more I need say. I can render you no further assistance.

I will repeat, however, that you must be very careful to guard your mind against the influence of sympathy or prejudice.

Each of the parties is entitled to equal consideration at your hands. If you are not guided and controlled by the law as stated by the court, and the evidence as heard here, you will do great wrong to the parties and wrong to yourselves.

McMULLAN v. HOFFMAN.

(Circuit Court, D. Oregon. August 26, 1895.)

No. 2,204.

CONTRACTS—ILLEGALITY—COLLUSIVE BIDDING.

A secret contract, between persons proposing to bid upon the construction of a public work, by which their bids are to be put in, apparently in competition, but really in concert, with the intention of securing as high a price as possible, and dividing the profits, is illegal, and contrary to public policy, and will not be enforced, though one of the parties to it has secured the contract for the public work, and has executed the same, and received the profits.

L. B. Cox, for plaintiff.

Rufus Mallory, for defendant.

BELLINGER, District Judge. The questions in this case for decision arise upon exceptions to the answer of Hoffman. The suit is upon a written contract between the parties, by which they agreed to share equally in a certain contract, for the construction of the Bull Run pipe line, entered into between the city of Portland and the defendant.

The complaint alleges that prior to March 6, 1892, the city of Portland, through its water committee, invited bids for the construction of a system of waterworks; that, before the time within which bids were to be received for such work, it was agreed between complainant and defendant that they would jointly endeavor to obtain the contract therefor, and that in their joint interest a bid should be put in for the construction of said waterworks, and that, in case they were successful, they should share equally in such contract as resulted from such joint bid; that, in pursuance of this agreement, a bid was put in, in the firm name of Hoffman & Bates, under which name the defendant was doing business, for the manufacture and laying of steel pipe from the head works of the water system to Mt. Tabor, which bid was found to be the lowest bid made for such work; that the contract for which such bid was made was thereupon awarded to the defendant, Hoffman; that thereupon, in evidence of their agreement, complainant and the defendant entered into a written agreement that they would share equally in the expenses, profits, and losses of such contract as should be en-

tered into between the city of Portland and Hoffman & Bates in respect to the work covered by the bid referred to; that thereafter the defendant, in the name of Hoffman & Bates, entered into a contract with the city of Portland for the work in question, and the complainant and defendant proceeded with said work, and completed the same about January 1, 1895; that the complainant contributed valuable services, by himself personally and by his employes and agents in California and elsewhere, in such work, and contributed money and property for equipment therein, to the amount of \$2,414.46, or thereabouts, and has at all times been ready and willing to do anything necessary and required of him in that behalf; that the complainant and defendant did other work for bringing Bull Run water to Portland, in connection with and supplementary to the work done under the contract mentioned; that, at the time of the execution of the contract between the parties hereto, it was agreed that, within the state of Oregon, the defendant was to have superintendence of the work, manage all matters in connection therewith, and receive from the city all payments due on account of such construction contract, and that defendant so did act and manage, and receive payments from the city; that the defendant refuses to account to the complainant for the profits earned under said contract, which complainant believes to amount to \$80,000, or to allow complainant to inspect the records or books of account kept by defendant touching said work.

The defendant admits that, before the time for receiving bids had elapsed, it was agreed between the parties in the suit that they would endeavor to obtain the contract in question, but denies that it was agreed that they would act jointly to that end, but alleges: That, on the contrary, it was agreed between them that they should not act jointly, but severally, defendant acting in the name of Hoffman & Bates, and complainant acting in the name of the San Francisco Bridge Company. "That it was mutually and secretly agreed by and between the complainant and the defendant, before the bids hereafter mentioned were filed with the said water committee, that the complainant should make and file with the said water committee several bids, for portions of said work, in the name of the said San Francisco Bridge Company, and the defendant should in like manner make and file several bids with said committee, for the same portions of said work, in the name of Hoffman & Bates; and that said bids should be made so as not to compete with each other, but so as to avoid it. That it was further agreed that for that purpose, and to more surely effectuate the object of getting a contract for said work at as high a figure as possible, and for the purpose of enhancing the profits of complainant and defendant, both the complainant and defendant, before said bids were filed, should examine the same, and know the contents thereof; and that, pursuant to said understanding, the complainant did submit to the defendant, for his examination and approval, the bids which he proposed to file with said committee for said work and the furnishing of material, and in like manner the defendant submitted to the complainant, for his approval, the bid which he proposed to file with

said committee for said work and the furnishing of material; and the defendant disapproved of the complainant's bid, and required that the same be raised about (\$98,000) ninety-eight thousand dollars above and more than complainant proposed and intended and was about to bid for said work, which was done; and the complainant disapproved of the defendant's bid, and required that the same be reduced about \$13,000 below what the defendant proposed and intended to bid for said work and the furnishing of material named in said bid, which was also done; and the said bids, containing the new amounts secretly agreed upon by said parties, were then filed with said water committee, and complainant and defendant mutually agreed to share the profits and losses in the execution and performance of said contract; and this defendant, for greater certainty, asks to refer to each and all of said bids upon the trial of this cause. * * * That in preparing bids for the materials and work afterwards awarded to the defendant, as hereinbefore stated, complainant and defendant agreed and combined together to obtain the highest possible price from the city for the same, and so arranged their respective bids for the various kinds of work and materials required as that they should not operate as competing bids, although appearing to said committee to be so." The answer contains, among others, the following additional averments:

"Defendant further avers and alleges: That complainant not only refused to furnish any surety in the bond required under the bid of Hoffman and Bates, accepted by the city water committee, to insure the performance of the contract by the bidder, and required and compelled the defendant to furnish the said bond, and all the sureties thereon, and refused to furnish his proportionate share of the money required and necessary to carry on the work under said contract, and to pay the bills for labor and materials as they fell due, but complained of defendant that he would not and did not refuse to pay supply and other necessary bills of expenses incurred in carrying on said work, and recommended that, instead of paying such bills, the defendant should 'stand the creditors off'; declared that defendant was very foolish to try to meet every payment promptly; said 'he would stand them off for everything, or pay them 50 %, or whatever he could out of the estimates, and such things as supplies for camps he would not pay for six months, if he did not feel like it'; although the defendant had been obliged, in securing supplies and labor, to contract for paying the same at the end of each month, as complainant well knew, yet the complainant, refusing to put in his share of the money to pay these bills as aforesaid, desired the defendant to disregard his contracts, and 'stand off' his creditors, as aforesaid. * * * Defendant further avers and alleges that on the 16th day of September, 1893, he had already advanced and expended, of his own funds, in carrying on said work under said contract with the city of Portland, \$15,990; that bills for said work to fall due on the 25th day of September, 1893, amounted to about \$22,500; that on the 11th day of September, 1893, defendant was notified by the said committee that it was without funds with which to pay the estimates for the completed work for the month of August, and had no assurance when money for that purpose could be obtained; that, in order to be prepared to meet the payments so to fall due on the 25th day of September, defendant, on his own account, by furnishing his own collaterals, secured, at considerable loss and sacrifice, \$14,000, which would not have been necessary or required if complainant had not refused to provide the money he promised and agreed to furnish; that the said plant purchased by defendant at Seattle, by request of complainant, was purchased from the San Francisco Bridge Company, and bills therefor were rendered by said company to Hoffman & Bates, as well as for the said hydraulic punch and shears in said bill of complaint mentioned, and that said Hoffman & Bates forwarded

and tendered to said San Francisco Bridge Company, at San Francisco, Cal., full and complete payment of the several sums and amounts claimed in said bills; that said San Francisco Bridge Company refused to accept the money so tendered; that said defendant has, at all times since said bills were rendered, been ready, able, and willing, and is now ready, able, and willing, to pay for said material, punch, and shears in full."

To these several portions of the answer the complainant excepts for impertinence, on the ground that the alleged fraud in procuring the construction contract from the city of Portland is not material in a suit for profits arising upon an independent contract between the parties for the construction of the work under the contract so procured. The case mainly relied upon by complainant is that of *Brooks v. Martin*, 2 Wall. 70. That was a case of partnership to buy soldiers' claims, and land warrants issued therefor, to locate lands under such warrants, and sell the same. Congress, to protect the soldier from his own improvidence, had enacted that any sale or contract going to affect the title or claim to any such bounty, made prior to the issue of such warrant, should be null and void to all intents and purposes whatsoever. Martin, the complainant in the suit, advanced all the money used in the enterprise, to the amount of \$50,000. He trusted the business entirely to the management of his two partners, who managed it at a distance of 2,000 miles from Martin's home. The business was very profitable, of which fact Martin was kept in ignorance, and he was finally induced, by various fraudulent expedients, to sell his interest to his partners for what the court refers to in its opinion as "substantially nothing." His share in the profits at the time were \$30,000. Upon being advised of the fraud that had been practiced upon him, he brought suit to cancel the sale of his interest, and for an account and division of the profits. The court decided that after a partnership contract confessedly against public policy has been carried out, and money contributed by one of the partners has passed into other forms,—the results of the contemplated operation completed,—a partner in whose hands the profits are cannot refuse to account for and divide them on the ground of the illegal character of the original contract. The court cites the case of *Sharp v. Taylor*, 2 Phil. Ch. 801, where the parties, who were British subjects, bought an American vessel, which had stranded off the port of Liverpool, rescued and repaired her, and put her in service between British and American ports. The ship was registered in the name of a citizen of the United States, to evade an act of parliament which prohibited other than British ships to engage in such service under British ownership. One of the owners having refused to account to the other for profits earned, suit was brought, and relief decreed. The lord chancellor said:

"He [the complainant] is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor received the money, and the plaintiff is now only seeking payment for his share of the realized profits. The violation of law suggested was not any fraud upon the revenue, or omission to pay what might be due, but, at most, an invasion of a parliamentary provision supposed to be beneficial to the shipowners of this country; an evil, if any, which must remain the same, whether the freight be divided between Sharp and Taylor according to their shares or remain altogether in

the hands of Taylor. As between these two, can this supposed evasion of the law be set up as a defense by one against the clear title of the other?"

In *Planters' Bank v. Union Bank*, 16 Wall. 483, it was held that an action would lie for the recovery of the proceeds of a sale of Confederate bonds, which had been sold by the defendant on the account of the plaintiff. Assuming that a contract for the sale of such bonds was unlawful, the court held that when the illegal transaction had been consummated, and the proceeds of sale had been actually received, and carried to the credit of the plaintiffs, such proceeds may be a legal consideration between the parties for a promise, express or implied.

The doctrine thus laid down is applied in *Burke v. Flood*, 1 Fed. 541; in *Western Union Tel. Co. v. Union Pac. Ry. Co.*, 3 Fed. 423; in *Wann v. Kelly*, 5 Fed. 584; and in *Buchanan v. Bank*, 5 C. C. A. 83, 55 Fed. 223. The first of these cases involved the Bonanza mine owners Flood, O'Brien, Mackey, and Fair, and related to the manipulation of corporations controlled by them for the benefit of themselves as partners. The court said:

"I take it there can be no doubt that a partner is entitled to contribution from his copartner when he has paid more than his share of the firm liabilities, even though the liabilities grow out of a tortious act of the firm. When money has come into the hands of a partnership, on a partnership transaction, however wrongfully or unlawfully acquired, as between the members, it is partnership assets, and must be accounted for as such between themselves."

The case was not tried upon its merits, but was disposed of on a question of parties. It did not necessarily involve actual fraud or moral delinquency. As to this, the opinion is as follows:

"As now presented, no answer ever having been filed, the matter rests upon naked allegations upon information and belief. It is impossible to anticipate what may turn out in the proofs. It may possibly turn out, in some legal aspects of the case, that defendants may be adjudged to account, whether rightfully or not, under circumstances disclosing no actual fraud, and no moral delinquency at all. In such a case a right to contribution would certainly arise in favor of the party who is called upon to pay more than his share, even though there is no partnership between them."

In the second case—*Western Union Tel. Co. v. Union Pac. Ry. Co.*—the question was raised as to the right to transfer a franchise to build and operate a telegraph line on the right of way of the railway company. The court held that, even if it assumed "that the contract is void, the property accumulated or constructed under it must, as between the parties, be disposed of according to equity; and the court will not refuse to deal with that property on the ground that it was acquired under an illegal contract." The case of *Wann v. Kelly* involved a stock-gambling transaction. It is held that, although the business was contrary to public policy, and illegal, when the business was closed, and one of the partners had received the profits, he was in duty bound to pay over to the other party his part of it. The case of *Buchanan v. Bank* was a case of a partnership to pasture cattle in the Cherokee country, without contract with the Cherokee Nation or authority of congress. The partners borrowed \$25,000 to carry on this unauthorized business, and gave their note for it. Upon maturity of this note, they

gave two others, of \$12,500 each, to pay the first, and, upon suit being brought on one of these notes, defended on the ground that the first note provided means for an illegal transaction, and was therefore for an illegal consideration, and that the second notes, given for the first, inherited its vice. This defense, it goes without saying, failed.

The doctrine of these cases applies in all cases where recovery is sought on account of contracts that are forbidden by law, or, in case of corporation contracts, that are ultra vires. While such contracts will not be enforced, yet, if they have been executed, the party having their benefits must fulfill his own obligations in consequence of them. In none of the cases cited was there actual fraud, or other moral delinquency. The profits derived from the purchase and location of soldiers' warrants in *Brooks v. Martin*, 2 Wall. 70, do not appear to have been at the expense or to the injury of the soldiers from whom the warrants were purchased. So far as appears, such warrants may have been paid for at their full value, and under circumstances that were advantageous to those selling them. The policy of the law forbade such dealings in order, solely, to guard the soldiers from their own improvidence. So, in the case of *Sharp v. Taylor*, the policy of the law prohibited British owners from using other than British ships in the particular trade in question. "The violation of law suggested in the case was not," said the lord chancellor, "any fraud upon the revenue, or omission to pay what might be due, but, at most, an invasion of a parliamentary provision supposed to be beneficial to shipowners of the country." In none of the cases did the right to be enforced depend upon considerations that appeared to be immoral or wrong in themselves. While the statement, in the opinion in *Burke v. Flood*, that a partner is entitled to contribution where he has paid more than his share, even though the liability grows out of a tortious act of the firm, seems broad enough to authorize the conclusion that the profits of an immoral completed transaction may be recovered, yet there was no such question in the case, and the matter is freed from doubt, both as to the facts of the case in this respect and the conclusion to be drawn from the opinion, by the statement of the court that "it may possibly turn out, in some legal aspects of the case, that defendants may be adjudged to account, whether rightfully or not, under circumstances disclosing no actual fraud, and no moral delinquency at all." "In such a case," says the court, "a right to contribution would certainly arise." In *Watson v. Murray*, 23 N. J. Eq. 257, the court recognizes the distinction that exists between enforcing the execution of an agreement to do an illegal act and the distribution of the realized profits of the act, but held that the distinction is not to be regarded as of universal or general application, and that such distinction is excluded, in cases of attempted apportionment of gains resulting from criminal practices, by manifest considerations of example and influence,—considerations not deemed to exist in the cases where the distinction has been allowed. These considerations

necessarily exist in all cases of actual fraud or other moral delinquency. The judicial sanction given to fraudulent acts in the apportionment of the realized profits therefrom among the guilty parties would be destructive of private and public morals. The profits of fraud belong in the same category with those of gambling and other immoral practices.

But whether or not there is a distinction between cases where the contract in question is intrinsically fraudulent and bad and cases where its illegality is merely in the prohibition of the statute, the question upon which this case depends may be disposed of on the ground upon which it is placed by the plaintiff; namely, that, where the illegal contract has been fully executed, a party is entitled to a remedy to recover his share of the profits arising from it. In this case the profits sought to be recovered do not grow out of the contract in suit. The plaintiff was not a party to the contract for the construction of the city waterworks, and admittedly had no interest in that contract, except such as he may be entitled to under the contract upon which suit is brought. There was no privity between him and the city water committee. On the contrary, he represented himself, by his bid, as against the bid of defendant, and as adverse to the interests of the defendant in the proposed contract. He assumed no obligation in the executed contract. The right which he asserts does not in any way depend upon that contract, to which he was not a party, and in which he was in nowise obligated. It is not, therefore, a case of an executed contract, legal or otherwise, under which complainant's rights in suit have arisen. The right claimed in this suit is under, not the executed contract between the defendant and the city of Portland to build the city pipe line, but the unexecuted agreement between the parties for a division of the profits of that contract. In all the cases cited by plaintiff, the courts have refused to permit the defense of illegality of the contracts involved to avail, because such contracts were executed. The courts, in granting relief, were, therefore, not required to aid illegal transactions, but merely enforced rights which rested upon new and independent considerations. In *Brooks v. Martin* the contract had become executed. The illegal transaction was an accomplished fact, and would "not be in any manner affected" by what the court was asked to do between the parties. In decreeing the relief prayed for in that case, the court did not in any manner aid the illegal business, or further what the violated statute was intended to prevent. It did not enforce any provision of the illegal contract. It merely enforced the payment of money which had accrued in the hands of one of the parties, to the benefit of the other, as a result of the execution of the contract in question. The contract under which the profits in this case were realized was not to do an illegal act. The case does not depend upon the city contract, but upon an alleged unlawful agreement for a division of the profits of such contract. The contract on which the profits were realized has been executed, but the express agreement by

which these profits were to be apportioned—the agreement in suit—has not been executed. Otherwise, the occasion for this suit would not exist.

The case is within the principle adopted in *Meguire v. Corwine*, 101 U. S. 108. There was a contract by which one party was to procure the appointment of another as special counsel in certain cases against the United States, and aid the appointee in the defense of such causes, in consideration of which he was to receive one-half of the fee paid by the government for the services rendered. The appointment was procured, and the services rendered, as stipulated, and the defendant received \$29,950 as a fee, but refused to account to plaintiff for any part of it. It was held that the plaintiff could not recover. The court said:

"The law touching contracts like the one here in question has been often considered by this court, and is well settled by our adjudications. *Marshall v. Railroad Co.*, 16 How. 314; *Tool Co. v. Norris*, 2 Wall. 45; *Trist v. Child*, 21 Wall. 441; *Coppell v. Hall*, 7 Wall. 542. It cannot be necessary to go over the same ground again. To do so would be a waste of time. The object of this opinion is rather to vindicate the application of our former rulings to this record than to give them new support. They do not need it. Frauds of the class to which the one here disclosed belongs are an unmixed evil. Whether forbidden by a statute or condemned by public policy, the result is the same. No legal right can spring from such a source. They are the sappers and miners of the public welfare, and of free government as well. * * * The contract is clearly illegal, and this action was brought to enforce it."

In the case of *Trist v. Child*, cited above, the action was for a percentage of a claim collected from the government, through the efforts of plaintiff as a lobbyist, under an agreement by which he was to receive such percentage. Included in the contract there were services rendered "in drafting a petition setting forth the claim, attending to the taking of testimony, collecting facts, preparing arguments, and submitting them orally or in writing to a committee or other proper authority, with other services of like character, intended to reach only the understanding of the persons sought to be influenced." But because these meritorious services were "blended and confused" with those which were forbidden, the entire contract was held to be fatally affected, and relief was refused. In *Buck v. Albee*, 62 Am. Dec. 564, the court held that a contract connected with and growing immediately out of an illegal act would not be enforced; that whenever it is necessary for the plaintiff to prove such illegal contract, in order to recover, no recovery can be had.

The case of *Hannah v. Fife*, 27 Mich. 172, lays down a principle that is decisive of this case. This was a case where the party to whom a contract was awarded for the construction of a swamp-land state road entered into a contract with his competitor by which the latter took the contract upon terms somewhat more favorable for the public than the bid upon which the award was made, and agreed to pay the successful bidder eight sections of land as a bonus for the relinquishment of his bid. The law allowed two sections of land per mile of road as the maximum quantity for the work. Each of the two bids was for this amount. The bid, however, of the

unsuccessful bidder, who subsequently took the contract by agreement as stated, was for a roadbed only 16 feet wide, while the state requirements were for one 20 feet wide. The court said that there was no evidence of a previous agreement between the parties, except such inferences as may be drawn from the circumstances and the contracts made, and that it was "difficult to resist the conclusion that these things tend pretty strongly to show the existence of some such previous understanding." But the court held that whether there was in fact any such secret understanding was immaterial; that, without such understanding, the tendency of all such contracts between bidders as that in existence in the case "must be to afford encouragement and give facilities to bidders to enter into and give full effect to such secret agreements and combinations, and to enable them to defeat the plain intent and object of the legislature in requiring such contracts to be let to the lowest responsible bidder"; that it was "this tendency, rather than the fact of actual fraud in the particular transaction, which is generally recognized as rendering contracts void as against public policy"; and that the contract sued upon must be held void upon this ground. The doctrine of the case, in short, is that secret agreements between bidders for their mutual profit, and to avoid competition with each other, while keeping up the appearance of competition, and all agreements having that tendency, are void, and will not be enforced; nor will an agreement between different sets of bidders for a public contract, by which one agrees, in consideration of a sum of money to be paid by the other, to withdraw his bid, and assist the latter to obtain the contract, be enforced. *Sharp v. Wright*, 35 Barb. 236; *Gulick v. Ward*, 18 Am. Dec. 389.

As has already been stated, any relief decreed the plaintiff requires the enforcement of the unexecuted provisions of the contract by which plaintiff was to share with the defendant the profits of the work on the contract awarded Hoffman in the name of Hoffman & Bates. What was that contract? Plaintiff insists that the court cannot look beyond the written agreement set out in the complaint. The written contract is to share equally in the expenses and profits of any contract that should be entered into between the defendant and the city on an award already made the defendant, as the lowest bidder for such work. The complaint alleges an agreement between plaintiff and defendant, anterior to the bid, by which, in effect, the plaintiff should have a joint interest with the defendant in the latter's bid, and that the written contract was in evidence of this agreement. The averments of the answer refer to this identical agreement, and allege considerations embodied in it to show its illegal and fraudulent character. In other words, the answer impeaches the precise transaction alleged in the complaint as the ground of plaintiff's right. The contract thus shown is indefensible. It was a secret contract by which the parties were to pretend to be competitors for the work to be let, while, in fact, they were not so. The bids were for four classes or items of work, and were so arranged between the parties beforehand that the bid of plaintiff was lower than defendant's bid as to three of such items,

while the defendant's bid was so far below that of plaintiff, as to the remaining single item as to make the aggregate of his bid \$35,000, in round numbers, less than that of plaintiff. It is alleged that plaintiff was prepared to bid, and, but for the secret agreement, would have bid, for such work, at a figure some \$40,000 less than that at which the contract was let. As to this, it is argued, in plaintiff's behalf, that he was under no obligation to bid upon said work, and might refrain from doing so, at his option. But when he seeks to recover for withholding such bid, it is another matter. The tendency of such a recovery will be to encourage combinations among bidders, destroy competition, defeat the object the legislature had in view in requiring such work to be awarded upon bids, and greatly increase the public burdens. If there was nothing more in the case than an agreement not to bid, there could be no recovery under the contract based upon such a consideration. But when the parties presented themselves as competitors for the work, they were guilty of a fraud. The tendency of what was thus done was to cause the water committee to believe that the bid of defendant was a favorable one for the city. Moreover, plaintiff's pretended bid had the effect of a representation to the committee that, in plaintiff's opinion, the work could not be profitably done for less than a figure \$35,000 higher than that bid by defendant, although, as a matter of fact, plaintiff believed such work could be done, and, except for the collusive agreement with defendant, would have offered to do it, for an amount \$75,000 less than that at which the contract was let. Upon all the cases cited or to be found, and in any view of the case consistent with public policy and the principles of equity, there can be no relief in such a case.

It is not necessary to discuss the minor questions raised by the exceptions to parts of the answer. The third, ninth, tenth, and thirteenth exceptions, for impertinence and scandal, are allowed. All other exceptions are overruled.

MOORE v. STELJES.

(Circuit Court, S. D. New York. July 8, 1895.)

LANDLORD AND TENANT—DEFECTIVE PREMISES—INJURY TO TENANT'S CHILD.

A landlord letting a house with a warranty of the safety and sufficiency of the ceiling is liable (not on the warranty itself, but on the ground of negligence) for an injury to the tenant's infant child, resulting from the fall of the ceiling upon it.

This was an action at law by Rachel Moore against Martin Steljes to recover damages for personal injuries. Defendant demurs to the complaint.

Edwin G. Davis, for plaintiff.

Coleman & Donahue, for defendant.

WHEELER, District Judge. According to the complaint, which is demurred to, the ceiling of premises hired of the defendant by the plaintiff's father for himself and family, including the plaintiff, an

infant,—the safety and sufficiency of which the defendant warranted,—through his negligence, fell upon the plaintiff, to her great injury. The demurrer has been argued for the defendant as if the suit was brought upon the warranty; but the hiring and warranty seem to be material only as showing that the plaintiff was rightfully on the premises, and that the negligence of the defendant continued to the time of, and caused, the injury, and did not become, after the hiring, the negligence of the father. The gist of the action is this continuing negligence, and the question is whether the allegations of the complaint maintain it. This passage from Wood, Landl. & Ten. (13th Ed.) 735, is quoted in defendant's brief to show that they do not:

"As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant, and not the landlord, is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition; and the only exceptions to the rule appear to arise when the landlord has either (1) contracted with the tenant to repair, or (2) where he has let the premises in ruinous condition, or (3) where he has expressly licensed the tenant to do acts amounting to a nuisance."

Warranting the safety and sufficiency of the ceiling would hold the defendant to the duty of maintaining it, as much as contracting for its repair, and bring this case within the first exception. A ceiling that will fall is ruinous, and the letting expressly assuming the risk would be a letting in a ruinous condition, and bring the case within the second exception. *Payne v. Rogers*, 2 H. Bl. 349, was an action against the owner of a house in the occupation of a tenant, for an injury owing to want of repair of supports under the pavement. Objection was made that it should have been brought against the occupier, but the action was maintained because, although the tenant might be liable, the landlord would be liable in the first instance, and to save circuity of action. *Shear. & R. Neg.* § 502, say:

"Nor does the entire surrender of control over land to a lessee relieve the owner from liability to third persons for defects which existed in it when he parted with his control."

Want of privity between the plaintiff and defendant is most strenuously relied upon. It was, also, in *Devlin v. Smith*, 89 N. Y. 470, where one who built a scaffold under contract with a painter, defectively, was held liable, against this objection, to an employé of the painter, for injuries received in consequence of the defect. *Rapallo, J.*, said:

"The liability of the builder or manufacturer for such defects is, in general, only to the person with whom he contracted. But, notwithstanding this rule, liability to third parties has been held to exist when the defect is such as to render the article in itself imminently dangerous, and serious injury to any person using it is a natural and probable consequence of its use."

The premises were let to the father for occupation by his family, including the plaintiff, and injury to her would be a natural consequence of the dangerous ceiling; and the warranty was made in view of this consequence. And, although the plaintiff could not maintain an action upon the warranty, it serves to fix the negligence which caused the injury to her upon the defendant. Demurrer overruled.

HART et al. v. MINCHEN et al.

(Circuit Court, S. D. Iowa, C. D. January 2, 1895.)

No. 3,576.

GUARANTY—NOTIFICATION OF ACCEPTANCE—INTERPRETATION OF LETTER.

N., an Iowa merchant, having been refused credit by complainants in Chicago, procured from defendant a letter addressed to them, and offering to guaranty payment of such purchases as N. might make for his fall and winter trade. On the strength of this letter, plaintiffs sold N. goods, and, on the same day, wrote to defendant, acknowledging the receipt of his letter "guarantying whatever N. may purchase of us for his fall and winter stock," and saying, "His purchases up to this time amount to \$3,390.50, which we are getting ready for shipment." Held that, in view of the situation of the parties, this letter was a valid notice of acceptance of the offer of guaranty, so as to make the guarantor liable for the amount of the purchases.

This was an action at law by Harry Hart, Max Hart, Joseph Schaffner, and Marcus Marx against William T. Minchen and others, on an alleged contract of guaranty.

Stone & Dawson and Tenney, McConnell & Coffeen, for plaintiffs.

A. U. Quint and L. W. Ross, for defendant Minchen.

WOOLSON, District Judge. The following facts are found, as herein proven:

Plaintiffs were in August, 1893, and have ever since been residents and citizens of the state of Illinois, and defendant Minchen at said date was, and now is, a resident and citizen of the state of Iowa. At said date, defendant Jonas Nichols was also a citizen and resident of the state of Iowa, and engaged in business as a clothing merchant in Carroll, Iowa. Prior thereto, for some years, Minchen and Nichols had been in said clothing business, as copartners, at said Carroll. Nichols, on May 2, 1893, succeeded to this business. In August, 1893, said Nichols was desirous of purchasing an additional stock of clothing from plaintiffs, who then composed the firm of Hart, Schaffner & Marx, with place of business at Chicago, Ill. Defendant Minchen at said date held a note, payable on demand, signed by said Nichols, for \$19,000. Of this \$19,000, \$2,000 represented advances. Nichols had applied to plaintiffs for a purchase of goods, but, as he informed Minchen, his credit had been "written down" so that he could not buy goods. Whereupon, on August 14, 1893, defendant Minchen wrote, and delivered to defendant Nichols, the following:

Hart, Schaffner & Marx, Chicago—Gentlemen: I will guaranty the payment of such purchases as Jonas Nichols may make of you, in the line of merchandise in [which] you deal, for this fall and winter trade.

Yours, respectfully,

W. T. Minchen.

Nichols took this letter, in person, to Chicago, and delivered it to plaintiff's firm, and on the credit of this letter said firm sold and delivered to said Nichols goods amounting to \$3,442.75. These sales and deliveries extended from August 24, 1893, to September

22d of same year, \$3,035 being so sold on August 24th. The terms of sale were four months from November 1, 1893. The goods began to arrive at the store of said Nichols, at said Carroll, in a few days after said first purchase by Nichols, and were received by him, and placed in his stock in his said store. Upon August 24, 1893, plaintiffs wrote, and duly mailed to defendant Minchen, the following letter:

Chicago, Aug. 24, 1893.

Mr. W. T. Minchen, Carroll, Iowa—Dear Sir: We desire to acknowledge receipt of your favor of the 14th, guarantying whatever Jonas Nichols may purchase of us for his fall and winter stock. His purchases up to this time amount to \$3,390.50, which we are getting ready for shipment.

Yours, truly,

Hart, Schaffner & Marx.

Upon October 30, 1893, plaintiffs wrote, and duly mailed to defendant Minchen, the following letter:

Chicago, October 30, 1893.

Mr. W. T. Minchen, Carroll, Iowa: We inclose statement of goods amounting to \$3,342 ⁷⁵/₁₀₀ dollars, purchased of us by Jonas Nichols, covered by your guaranty of August 14, 1893. The bills are dated Nov. 1, and are subject to a discount of 7%, provided they are paid by the 10th of November. We write you this so that you may avail yourself of the discount terms, if you wish. The account matures March 1, at which time we shall look to you for prompt payment, in case you do not discount meanwhile.

Hart, Schaffner & Marx.

On September 25, 1893, the sheriff of Carroll county, Iowa, at the suit of defendant Minchen, attached and took possession of the stock of goods then owned by Nichols, and in his said store at Carroll; and, on the next day, Nichols, in consideration of a receipt from defendant Minchen in full of his indebtedness to said Minchen, passed to said Minchen his interest in this stock of goods, and the sheriff released them to said Minchen. At this date, Nichols was insolvent. Indeed, said Nichols, at the date of the execution by Minchen of his letter of August 14, 1893, was unable to pay the debts then owing by him, and this condition was known to defendant Minchen. When the bills for goods fell due, plaintiffs demanded of defendant Minchen payment for amount of such bills.

The substituted petition filed herein September 27, 1894, sets up the letter above quoted, of August 14, 1893; avers the sale of said goods to Nichols was made on the credit of said letter; that plaintiffs, within a reasonable time after the receipt of said letter, notified defendant Minchen of their acceptance thereof, and also, within a reasonable time after the completion of said sales, plaintiffs notified said Minchen of the amount thereof, and that said Nichols was insolvent at the time when notice of amount of such sales should be made to said Minchen, and when said bills therefor fell due according to the terms of such sales; that said Minchen had actual knowledge of such sales by plaintiffs to said Nichols, and of the amount thereof; and that due demand for payment has been made, and no part of such bills have been paid. Defendant Minchen's answer is a denial "of each and every allegation in petition contained."

The points at issue herein, according to the evidence and the theory on which the defense was urged at the trial, are correctly and

concisely summed up in the concluding lines of the brief presented by counsel for defendant Minchen, as follows:

In conclusion, we feel that the case is just one of construction of the letters, if the court should believe that Minchen received the letter of August 24. That he did not receive it, makes him very positive in his denial of it.

The decisive points, according to the theory on which the case was argued and defense urged, are (1) that defendant Minchen did not receive the letter of August 24th from plaintiffs to him; (2) that said letter is not an acceptance of the letter of offer of guaranty (Minchen's letter of August 14th) above set out. No claim is made that the goods were not sold to Nichols by plaintiff, and no claim of payment is made.

The evidence as to whether the letter of August 24th, *supra*, was actually received by defendant Minchen, is conflicting. Nichols testifies as to conversations with Minchen, wherein the latter told the former that he had received it, and also that plaintiffs were "not so cute" as another firm, because the other firm had sent him a printed form of guaranty, which he had signed and sent back. Nichols also testifies that Minchen showed him the letter, and he says that the letter of August 24th, as herein introduced, is a copy, as nearly as he can remember it. Nichols also testifies that Minchen, in this conversation, asked him whether he (Nichols) did not think he had gone a little strong, in purchasing the amount named in this letter. Minchen, on the other hand, denies these statements, and denies that he ever received or saw any such letter. The evidence shows, without contradiction, that Minchen had a desk—in fact, had his office, for the transaction of some of his business—in Nichols' store at the time it is alleged this letter was received by him. And evidence was introduced, on the one hand, showing that about this time a letter from plaintiffs, addressed to Minchen, was seen on his desk; while, on the other hand, this is denied. So, too, as to Minchen being present about the store while the goods were being received is in conflict. But a careful consideration of all the evidence brings my mind to the conclusion—and I so find—that this letter was received by Minchen. It is shown to have been mailed with the return card printed on the envelope, and that it was never returned to plaintiffs. Minchen certainly was interested, and deeply interested, in these purchases by Nichols. The evidence is convincing that at this time Nichols had not sufficient means to pay the indebtedness Minchen held against him. And the latter must have felt at least some anxiety as to the purchases made on the credit of his guaranty. But the testimony of defendant Minchen nowhere reveals any inquiry or examination or other investigation made by said Minchen to ascertain what transactions the plaintiffs had had with Nichols on the strength of the letter of guaranty which said Minchen had given. It seems incredible that Minchen, knowing as he did the facts as to Nichols' insolvency, would have been thus careless as to the possible liability of his own for Nichols' purchases of plaintiff, had he not been advised by this letter of the facts. I do not deem it necessary to inquire whether the fact that plaintiffs duly mailed this

letter of August 24th would be sufficient to constitute, in law, an acceptance, without proof that the letter was actually received by Minchen; nor to inquire whether the letter of October 30th, from plaintiffs to said Minchen (whose receipt the latter admits), was, under the circumstances proven, a sufficient acceptance, nor whether, as claimed by plaintiffs, the facts attending the sale, billing, and delivery of the goods were so within Minchen's knowledge as to constitute such acceptance, within the statement in *Reynolds v. Douglass*, 12 Pet. 497:

Such notice of acceptance need not be in any set form, or even in writing, but may be inferred by the jury from the facts and circumstances which shall warrant such inference.

The further claim of defendant Minchen is that this letter is not, in law or fact, an acceptance, but that the same is (using the phraseology found in the brief of counsel for defendant) "merely a business courtesy, in acknowledgment of a communication." There can be no serious difference as to the general rules applicable in construing this letter. And we may derive assistance from some of the decisions of the supreme court, wherein letters of guaranty have been under consideration. In *Mauran v. Bullus*, 16 Pet. 528, the court say:

In the construction of all instruments, to ascertain the intention of the parties is the great object of the court. And this is especially the case in acting upon guaranties.

And the court declare that only by reference to the facts and circumstances under which the instrument was given can it be correctly understood and construed. The language used by the same court in *Lawrence v. McCalmont*, 2 How. 426, though made with reference to construction of letters of guaranty, has here great pertinence.

The words should receive a fair and reasonable interpretation, so as to attain the object for which the instrument is designed, and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments generally drawn up by merchants in brief language, sometimes inartificial, and often loose in their structure and form. And to construe the words of such instrument with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits so often sought in the present active business of commerce throughout the world.

In *Bell v. Bruen*, 1 How. 169, the supreme court, in speaking of letters of guaranty, declare that they—

Are usually drawn by merchants, rarely with caution, and scarcely ever with precision. They refer in most cases * * * to various circumstances and extensive commercial dealings in the briefest and most casual manner, without any regard to form; leaving much to inference, and their meaning open to ascertainment from extrinsic circumstances and facts accompanying the transaction, without referring to which they could rarely be properly understood by merchants, or by courts of justice. The attempt, therefore, to bring them to a standard of construction founded on principles neither known nor regarded by the writers could not do otherwise than to produce confusion. Such has been the consequence of the attempt to subject this description of commercial engagements to the same rules of interpretation applicable to bonds and similar precise contracts. * * * We think the courts should adopt a construction which, under all the circumstances of the case, ascribes

the most reasonable, probable, and natural conduct of the parties. * * * "It is to be construed according to what is fairly to be presumed to have been the understanding of the parties, without any strict technical nicety," as declared in *Lee v. Dick*, 10 Pet. 493. The presumption is, of course, to be ascertained from the facts and circumstances accompanying the entire transaction.

The language above quoted, while used with reference to letters of guaranty, will apply with suggestive force to letters of acceptance. For the facts accompanying and surrounding the writing such letters of acceptance usually lie within the general statement just quoted, and, equally with that relating to letters of guaranty, would it be unreasonable and unfair to measure and construe letters of acceptance with "technical nicety." On the contrary, such letters rightfully demand to be interpreted and construed "according to what is fairly to be presumed to have been the understanding of the parties," as "ascertained from the facts and circumstances accompanying the entire transaction." *Bell v. Bruen*, *supra*.

In the case at bar we have a letter, confessedly an offer to guaranty, written by defendant Minchen with the expectation and intention of its being used by Nichols as the basis of credit to be by plaintiffs extended on goods sold. The goods are sold. This Minchen knew. And he receives a letter from plaintiffs, and there is shown no state of facts, outside of the letter of guaranty which Minchen had sent to plaintiffs, which could in any manner, or to any degree, impose on plaintiffs the duty or apparent desire to notify Minchen of the transactions which had passed between plaintiffs and Nichols, and with which transactions, except through said letter of guaranty, Minchen had not the least concern or interest, so far as plaintiffs knew. No basis appears in the evidence, or is presented in the argument of counsel, why plaintiffs should either advise Minchen of the receipt of his letter of guaranty, or of the amount of purchases which Nichols had thus far made, save and except as plaintiffs desired to advise Minchen of what they had done and were doing on the credit of such letter. There existed between them, otherwise, no business obligation demanding or suggesting this letter of August 24th. "Business courtesy" certainly did not require its writing. It bears on its face evidence of having been written as a letter of advice. Advice as to what? It states the receipt of his letter of guaranty, and advises Minchen of the amount of sales up to the letter's date, and that plaintiffs were shipping the goods. Now, in the light of "the facts and circumstances accompanying the entire transaction," and "giving the words a fair and reasonable interpretation, so as to attain the object for which the instrument was designed," and construing the letter "according to what is fairly to be presumed to have been the understanding of the parties" at the time the letter was written by plaintiffs and received by defendant Minchen, and so construing it "without technical nicety," can there be other than the one answer,—that plaintiffs wrote it, as they testify, to indicate their acceptance of the letter of guaranty, and their action thereunder, and that Minchen, when he received it, so recognized and understood it? And could jury or court fail to find, from the facts and cir-

cumstances, that such letter constituted, and warranted the inference that it was, a notification of the acceptance of the offer of guaranty? Indeed, what other view could defendant Minchen have taken of it at the time he received it? Could he have regarded it other than as intended by plaintiffs,—as indicating to him their having accepted and acted on his letter of guaranty? What possible reason existed for his regarding it in any other manner than thus intended by plaintiffs?

I find, then, that, within a reasonable time after receipt by plaintiffs of the letter of guaranty, written by defendant Minchen, plaintiffs advised Minchen of their acceptance thereof. I find due from defendant Minchen to plaintiffs the sum of \$3,442.75, with 6 per cent. interest thereon from September 1, 1894, for which, and costs, judgment will be rendered herein accordingly. To all of which defendant Minchen duly excepts, and is given 90 days from this date to prepare, have signed and filed, his bill of exceptions. And, as to defendant Nichols, this cause is continued.

ST. LOUIS & S. F. RY. CO. et al. v. BENNETT.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 581.

1. RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—INJURIES TO PERSONS ON TRACK.

The only duty which a railroad company owes to those who, without its knowledge or consent, enter upon its track, not at a crossing or other public place, is not wantonly and unnecessarily to inflict injury upon them after its employes have discovered them. It owes them no duty to keep a lookout for them before they are discovered.

2. SAME—LICENSE TO USE TRACK.

The continued use by strangers of a railroad track for their own purposes, without any express license or invitation, and without any notice or knowledge thereof by the railroad company, can raise no implied license in respect to such use, and would impose upon the company no duty of active vigilance to the persons engaged therein.

3. NEGLIGENCE—UNFORESEEN INJURIES.

Injuries which could not have been foreseen or reasonably anticipated as the probable result of an act of negligence, or which are not the natural consequences thereof, and would not have resulted from it but for the imposition of a new and independent cause, are not actionable.

4. SAME—CONTRIBUTORY NEGLIGENCE.

One who is injured in a dangerous place, where he has voluntarily placed himself with knowledge that he would inevitably be injured there unless he speedily removed himself, necessarily contributes to an injury which results before he removes himself.

5. RAILROAD COMPANIES—INJURIES TO PERSONS ON TRACK.

A railroad spur track ran between two sheds owned by a lumber company, and when the track was not in use the lumber company's employes were accustomed, without the consent or knowledge of the railroad company, to transfer lumber from one shed to the other by means of a movable tramway which they placed across the track from one platform to the other. When an engine came in upon this track the employes of the lumber company would jump quickly to the ground, and push the tramway back under one of the platforms. Deceased was engaged with others in thus transferring lumber, when a switch engine came in from the

main track, leaving the switch open. The tramway had been placed across the track, in an opening in a line of box cars standing thereon. On seeing the switch engine, deceased and three others started to remove the tramway, when a freight train, moving rapidly upon the main track, ran into the switch, shoved the cars along, and crushed the workmen between them. The latter had left no one in a position to see the train or give notice of the danger, and they were not seen by those upon the train. *Held*, that it was error to charge that under these circumstances the want of notice, either of deceased's position, or of this accustomed use of the track, was no defense to the action, and that there was no evidence of contributory negligence.

6. CONDUCT OF TRIAL—UNWARRANTABLE ARGUMENTS AND COMMENTS.

While considerable latitude may be allowed to counsel in their criticism of the testimony, they ought not to indulge in extended discussion of questions not presented by the evidence, for the purpose of exciting passion and prejudice on the part of the jury, or in gross misstatements of the evidence, or in clearly erroneous declarations of the law, when it has been announced by the court.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

This was an action by Margaret L. Bennett, administratrix of the estate of W. W. Bennett, the defendant in error, to recover damages from the St. Louis & San Francisco Railway Company and its receivers, the plaintiffs in error, for the death of the intestate, which she alleged was caused by the negligence of the company in leaving a switch open, and in running a freight train at an excessive rate of speed. The company denied negligence, and alleged that the injuries were caused by the negligence of the intestate. There was no dispute about the essential facts of the case. The scene of the accident was a spur track of the railway company, which extended from its main track at Van Buren, in the state of Arkansas, between two long lumber sheds that belonged to the Long-Bell Lumber Company. The platforms of these lumber sheds were about 4 feet high, and the space between them, in which the cars ran upon this spur track, was about 16 feet wide. It was about 4 o'clock in the afternoon of a November day in 1893. A switch engine, with its crew, had entered the spur from the main track for the purpose of moving cars on the former, and the switch had been left open. There were about 14 freight cars upon the spur track, and between the 2 sheds there was an opening between 2 of these cars, which had been made before the switch engine came upon the track. This space was about 20 feet wide. In it the employes of the lumber company had placed a tramway, one end of which rested upon timbers under the platform upon one side of the track, and the other upon the platform upon the other side. When the railroad company was not using the spur track, this tramway was used by the lumber company to enable its employes to transfer lumber across the track from one of its sheds to the other. Whenever a switch engine came upon this spur track to move cars, it had been the custom for those employes of the lumber company who happened to be nearest to the tramway to immediately jump down upon the railroad track, in the space between the cars, and push the tramway back under one of the platforms. At the time of this accident there were some box cars between the engine and the space where the tramway was, and about a dozen of them beyond that space. None of the officers or employes of the railroad company knew that the lumber company or its employes had been using this tramway across its track, or had any notice or knowledge that the tramway, or any of the employes of the lumber company, were across or upon its track; and the employes of the railroad company who operated the engines on that day could not have seen them, in this space between the cars, from any place they had reached or passed before the accident. The deceased was an employe of the lumber company. When the switch engine came in upon the spur track, he and five other employes of that company jumped down upon the track between the cars and began to push the tramway back under the platform of the shed. From this hole between the lumber sheds and the platforms they could not see a train or engine approaching on the railroad

tracks nor could those approaching upon the tracks see them. They gave no notice to the employes of the railroad company that they were about to place themselves in this dangerous situation, and they stationed no one without, where he could see coming trains, to warn them of their approach. While they were in this dangerous situation a freight train came along the main track at a dangerous rate of speed, ran into the open switch, drove the switch engine and cars in upon the spur track, and the deceased and three of his collaborators were caught between the cars and killed. Upon this state of facts the court below refused to instruct the jury that the deceased was guilty of contributory negligence, refused to submit to the jury the question whether or not he was guilty of contributory negligence, and positively instructed them that if the deceased was killed by a collision that was caused by the negligence of the employes of the railroad company in running its engines and cars, or in leaving the switch open, the defendant in error was entitled to a verdict, and that it was no defense for the railroad company that its employes could not see the deceased and his collaborators, and did not know where they were when the accident occurred. There was a verdict and judgment against the company, which this writ of error was brought to review.

B. R. Davidson (Edward D. Kenna, on the brief), for plaintiffs in error.

Oscar L. Miles (U. M. Rose, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The only duty which a railroad company owes to those who, without its knowledge or consent, enter upon its tracks, not at a crossing or other like public place, is not wantonly and unnecessarily to inflict injury upon them after its employes have discovered them. It owes them no duty to keep a lookout for them before they are discovered, because they are unlawfully upon the tracks, and the railroad company is not required to watch for violations of the law. *Railroad Co. v. Howe*, 3 C. C. A. 121, 52 Fed. 362, 369; *Railway Co. v. Tartt*, 12 C. C. A. 618, 64 Fed. 823; *Railroad Co. v. Cook*, 13 C. C. A. 364, 66 Fed. 115; *Denman v. Railroad Co.*, 26 Minn. 357, 4 N. W. 605; *Railway Co. v. Monday*, 49 Ark. 257, 261, 4 S. W. 782; *Sibley v. Ratliffe*, 50 Ark. 477, 483, 8 S. W. 686; *O'Keefe v. Railroad Co.*, 32 Iowa, 467; *Yarnall v. Railway Co.*, 75 Mo. 575; *Button v. Railroad Co.*, 18 N. Y. 248, 259; *Nicholson v. Railway Co.*, 41 N. Y. 525. If it were conceded that where a railroad company has given to others an express license to use its tracks for a certain purpose, and where it has invited them to make use of the tracks for such a purpose, and has thus given them an implied license so to do, it owes to these licensees the additional duty to use ordinary care to look out for them upon its tracks, and, if discovered, to warn them of the approach of its engines and trains as they pass, yet in the absence of any such express license to use, of any invitation, and of any notice or knowledge on the part of the railroad company that strangers have used or are about to use its tracks for their own purposes, the fact that they had been so used without objection would constitute no license, express or implied, and would impose upon the company no duty of active vigilance towards those who so used them. Under such circumstances the railroad company could have no reason to anticipate danger to those who were occupying its tracks without its

knowledge, and it would owe them no other duty than not to wantonly or willfully injure them after it discovered their dangerous situation. *Richards v. Railway Co.*, 81 Iowa, 426, 430, 47 N. W. 63; *Splittorf v. State*, 108 N. Y. 205, 213, 15 N. E. 322; *Poling v. Railroad Co.* (W. Va.) 18 S. E. 782; *Sutton v. Railroad Co.*, 66 N. Y. 243, 246; *Nicholson v. Railway Co.*, 41 N. Y. 525, 529; *Sweeny v. Railroad Co.*, 10 Allen, 368, 372; *Gaynor v. Railroad Co.*, 100 Mass. 208, 214; *Wright v. Railroad Co.*, 142 Mass. 296, 299, 7 N. E. 866; *Hargreaves v. Deacon*, 25 Mich. 1.

These are indisputable principles of the law of negligence. Under them, the court below fell into an error, in its charge to the effect that the fact that the employés of the railroad company, who were operating the trains at the time and place of the accident, could not see the deceased and his colaborers and did not know where they were, and the further fact that the railroad company had no notice or knowledge of the use of this tramway over its tracks by the lumber company, and of the custom of the employés to place themselves upon the track to remove it, constituted no defense to this action. The violation of a duty to the injured party, and resulting damage, are indispensable elements to a cause of action for negligence. If there is no breach of duty, there is no wrong, and hence no remedy. If the railroad company had no notice or knowledge that the employés of the lumber company were accustomed to throw themselves down upon its track whenever a switch engine approached on the spur, and if, as they came in along the tracks, the employés of the railroad company operating these engines could not see the workmen upon this track, and did not know where they were, no one in their situation could have foreseen, or could have reasonably anticipated, that an open switch and a fast-running freight train would catch four strangers to the railroad company upon this track between two box cars, and kill them. Their injury and death were not the natural and probable consequence of running a freight train against standing cars upon this spur track. This result would not have followed, had it not been for the unexpected intervention of a new and independent cause, that they could not foresee,—the voluntary descent of these unfortunate workmen upon this track without notice. But an injury that could not have been foreseen nor reasonably anticipated as the probable result of an act of negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of, and would not have resulted from it but for the interposition of some new and independent cause. *Railway Co. v. Elliott*, 5 C. C. A. 347, 350, 352, 55 Fed. 949; *Railway Co. v. Callaghan*, 6 C. C. A. 205, 208, 56 Fed. 988; *Railway Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. 921; *Insurance Co. v. Melick*, 12 C. C. A. 544, 550, 65 Fed. 178; *Railway Co. v. Kellogg*, 94 U. S. 469; *Hoag v. Railroad Co.*, 85 Pa. St. 293, 298, 299.

The court below fell into another error in its ruling that there was no evidence of contributory negligence by the deceased in the record of this case. One who is injured in a dangerous place, in which he has voluntarily placed himself, with knowledge that he will inevitably be injured there unless he speedily removes himself from his

dangerous situation, necessarily contributes to an injury which results before he removes himself. If he had not placed himself in the dangerous situation, he would not have been injured. When he has put himself in that situation, with knowledge of the danger, he has committed an act of negligence that he knows will inevitably cause him injury unless a new and independent cause interposes to prevent it. If the new cause does not interpose, his original act of negligence works out its natural and probable effect, and produces the anticipated injury. That is the unfortunate situation in which the deceased and his fellow workmen placed themselves on the day of this accident. They knew that the place upon the railroad bed of this spur track, about 16 feet square, closed in by two box cars on two sides, and by two platforms 4 feet high on the other side, was a dangerous place. If this had been a public crossing, and they had not known that cars were about to move across it, they would have been required to take notice that it was dangerous. The supreme court declares:

"The track itself, as it seems necessary to iterate and reiterate, is itself a warning. It is a place of danger. It can never be assumed that cars are not approaching on a track, or that there is no danger therefrom." *Elliott v. Railway Co.*, 150 U. S. 245, 248, 14 Sup. Ct. 85.

But this was not a public crossing, and, in addition to the warning of the presence of the track, they knew that there was an engine on this track, and that cars were about to be moved by it over the very part of the track where they went to work. Indeed, it was because they knew this that they went upon the track at all. They went there to remove the tramway out of the way of the cars they expected would be moved along this track, across which it then extended. From their pen upon this track they could not see approaching trains upon the railroad tracks, nor could the men upon the trains see them; yet they did not notify the employes of the railroad company that they intended to go upon, or were concealed upon, this track, nor did they station any sentinel without their inclosure, where he could see approaching trains, to watch for and warn them of their coming. Their knowledge of their own situation and of their imminent danger imposed upon them the duty of exercising a higher degree of care to protect themselves than was required of the servants of the railroad company, who had no notice that they were upon the track. But the facts to which we have adverted would, in our opinion, have fairly sustained the inference that they were guilty of acts of negligence that inevitably contributed to their injury.

There are many other errors assigned, but the questions they present may not arise upon a second trial, and it is unnecessary to discuss them at length. We content ourselves with a few suggestions that may be of assistance to court and counsel upon the next trial. While, as we have said in *Railway Co. v. Curb*, 13 C. C. A. 587, 66 Fed. 519, considerable latitude may be allowed to counsel in their criticism of the testimony of witnesses and of the evidence in their arguments to the jury, they ought not to indulge in extended discussion of questions not presented by the evidence, for the obvious purpose of exciting passion and prejudice, or in gross misstatements of

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the evidence, or in clearly erroneous declarations of the law, when it has been announced by the court, which tend to deceive and mislead the jury and to prevent a fair and impartial trial of the case. *Railway Co. v. Farr*, 6 C. C. A. 211, 12 U. S. App. 520, 56 Fed. 994; *Railway Co. v. Myers*, 11 C. C. A. 439, 63 Fed. 793. The general rule for the measure of damages in cases of the class to which this belongs was stated by this court in *Railway Co. v. Needham*, 3 C. C. A. 129, 52 Fed. 371, 378. The judgment below must be reversed, and the cause remanded, with directions to grant a new trial, and it is so ordered.

ST. LOUIS & S. F. RY. CO. et al. v. BENNETT.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 582.

RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—INJURIES TO PERSONS ON TRACK.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

B. R. Davidson (Edward D. Kenna, on the brief), for plaintiffs in error.

Oscar L. Miles, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action by the administratrix of the estate of W. W. Bennett, the defendant in error, to recover damages from the St. Louis & San Francisco Railway Company and its receivers, the plaintiffs in error, for injuries to the deceased which she alleged were caused by the negligence of the company. There was a verdict and judgment for the defendant in error. This case arose from the same state of facts, and was tried upon the same theory of the law, as the case of *Railway Co. v. Bennett* (just decided by this court) 69 Fed. 525. For the reasons stated in the opinion in that case the judgment below must be reversed, and the case remanded, with directions to grant a new trial, and it is so ordered.

ST. LOUIS & S. F. RY. CO. et al. v. MILES.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 583.

RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—INJURIES TO PERSONS ON TRACK.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

B. R. Davidson (Edward D. Kenna, on the brief), for plaintiffs in error.

Oscar L. Miles, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action by A. F. Miles, administrator of the estate of James W. Brown, deceased, the defendant in error, to recover damages from the St. Louis & San Francisco Railway Company and its receivers, the plaintiffs in error, for injuries to the deceased, which he alleged were caused by the negligence of the company. The facts out of which the case arose, and the theory of the law upon which it was tried, were the same as in No. 581,—*Railway Co. v. Bennett* (just decided by this court) 69 Fed. 525. The judgment below must be reversed, and the cause remanded, with directions to grant a new trial, for the reasons stated in the opinion in that case.

ST. LOUIS & S. F. RY. CO. et al. v. HICKS.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 584.

RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—INJURIES TO PERSONS ON TRACK.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

B. R. Davidson (Edward D. Kenna, on the brief), for plaintiffs in error.

Oscar L. Miles, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action by Harrison Hicks, administrator of the estate of William Spoon, deceased, defendant in error, to recover damages from the St. Louis & San Francisco Railway Company and its receivers, the plaintiffs in error, for injuries to the deceased, which he alleged were caused by the negligence of the company. The essential facts in this case, and the theory of the law upon which the case was tried are the same as in No. 581,—*Railway Co. v. Bennett* (just decided by this court) 69 Fed. 525. For the reasons stated in that opinion the judgment below must be reversed, and the cause remanded, with directions to grant a new trial, and it is so ordered.

ST. LOUIS & S. F. RY. CO. et al. v. HICKS.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 585.

RAILROAD COMPANIES—LIABILITY FOR NEGLIGENCE—INJURIES TO PERSONS ON TRACK.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

B. R. Davidson (Edward D. Kenna, on the brief), for plaintiffs in error.

Oscar L. Miles, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action brought by Harrison Hicks, administrator of the estate of William Spoon, deceased, the defendant in error, to recover damages from the St. Louis & San Francisco Railway Company and its receivers, the plaintiffs in error, for the death of the deceased, which he alleged was caused by the negligence of the company. The essential facts in this case, and the theory of the law upon which the case was tried, were the same as in No. 581,—*Railway Co. v. Bennett* (just decided by this court) 69 Fed. 525. For the reasons stated in the opinion in that case the judgment below must be reversed, and the cause remanded, with directions to grant a new trial, and it is so ordered.

LINN COUNTY NAT. BANK v. CRAWFORD.

(Circuit Court, D. Oregon. July 31, 1895.)

No. 2,108.

1. JURISDICTION OF FEDERAL COURTS—ACTIONS BY NATIONAL BANK RECEIVERS.

The federal courts have jurisdiction of actions brought by the receiver of an insolvent national bank to realize its assets, irrespective of the citizenship of the parties; and it is immaterial to such jurisdiction whether the action is brought in the receiver's own name, as receiver, or by him in the name of the bank.

2. NEGOTIABLE INSTRUMENTS—ACCOMMODATION NOTES.

A stockholder and director in a national bank, being aged and infirm of sight, was requested by the president of the bank to give him an accommodation note for \$10,000. He replied that if the purpose was to draw money on the note or put it in the bank he would not give it. The president then stated that the note was merely to be put into the hands of his personal creditor as security, and that no money would be needed. A note was accordingly made, but, without the knowledge of the maker, it was payable to the bank, and was, in fact, placed in the bank, and a certificate of deposit for the amount issued to the president, and by him deposited with his creditor, who held it as security until the bank failed. *Held*, that the maker's stipulation that the note should not be used to take money from the bank was apparently made for the bank's benefit, and that, having given a valid accommodation note, he was liable thereon to the receiver of the bank, although his wishes in regard to the manner of its use had not been respected.

This was an action brought by the receiver of the Linn County National Bank, in the name of the bank, against John A. Crawford upon a note for the sum of \$10,000. Heard on a motion by defendant for a new trial.

Wirt Minor, for plaintiff.

J. W. Whalley, for defendant.

BELLINGER, District Judge. This is a motion for a new trial upon the grounds: (1) That the court is without jurisdiction; (2) error of the court in refusing to instruct the jury to the effect that, if they believed the statements of the defendant Crawford as to the circumstances under which the note sued on was given, their verdict must be for the defendant.

The action is one by the receiver of the bank, in the bank's cor-

porate name, against Crawford to recover upon a promissory note. For the purposes of this motion, the facts are assumed to be, as testified to by the defendant, as follows: The defendant is about 80 years of age, and infirm of sight. He was a stockholder and director in the Linn County National Bank, and for one or two years prior to the transaction in question was one of a committee of three to examine the bank's loans. Mr. James L. Cowan was president of the bank, and an old and trusted friend of the defendant. After banking hours on May 1, 1893, Cowan sought Crawford at his home, and requested an accommodation note of him for \$10,000. Crawford said: "If you are going to draw money on a \$10,000 note, or put it in the bank, I won't give it to you." Cowan answered that the note would not go into the bank, nor would there be money needed. He further stated as follows: "It is just an accommodation note for a short time, to put into the hands of a man or a party in Portland, whom I am owing, and I want to put that in his hands as security; and I will give you a note of the same amount, and the same kind of a note, for you to keep, and there will be no money needed on it." The parties went to the bank, when a blank form of note was filled in by Cowan for \$10,000, payable to the bank, which was signed by Crawford without knowledge that the note was payable to the bank. At the same time, and as a part of the same transaction, Cowan gave Crawford his note for a like amount, due at the same date upon which Crawford's note matured. The Crawford note was entered in the bank's register of loans by Cowan, who took the bank's certificate of deposit for the amount of the note, which certificate was transferred to Ladd & Tilton, of Portland, to be held by them on account of a debt due them from Cowan.

While it is true that national banks, for the purposes of jurisdiction in actions by or against them, are deemed to be citizens respectively of the state in which they are located, by express provision of section 4 of the act of March 3, 1887, yet it is provided that:

"The provisions of this section shall not be held to affect the jurisdiction of the courts of the United States in cases commenced by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank." 24 Stat. 552; Supp. Rev. St. 614.

Under this provision this court has jurisdiction in cases, like the present, where the receiver is engaged in winding up the affairs of a national bank. *Armstrong v. Trautman*, 36 Fed. 275. I am of the opinion that it is immaterial whether the action is brought by the receiver in his own name as receiver or by him in the name of the bank. The thing material to the jurisdiction is the fact that the whole property of the bank has been vested by operation of law in the receiver; that the bank's affairs, as an insolvent corporation, are in the control of the comptroller of the United States treasury, and are being wound up under his direction.

The next question to be considered is that of Crawford's liability, upon the facts as stated by himself. Is the verdict consistent.

with these facts? There was other testimony in the case, consistent with that of Crawford, tending to show that the bank was forced to suspend shortly after this transaction, and, generally, that its affairs were such as to make it imprudent to make any considerable loans of money about that time. Upon this testimony the jury might properly conclude, and from this testimony I am of the belief, that the condition imposed by Crawford when he made the note, if there was such condition, was in the interest of the bank rather than of himself. There was no condition as to his liability. He knew that the note was to go into the hands of third parties, to be held against him on Cowan's account. He does not state that he knew to whom Cowan intended to transfer the note, but only that it was to go to some creditors of Cowan in Portland. If the note was to be used as his testimony indicates, there was nothing to prevent Cowan's transferee from discounting the note at any bank in Portland or in Oregon, excepting only the Linn County National Bank. The understanding between Cowan and Crawford, as testified to by the latter, was perfectly consistent with any use by the Portland parties, whoever they were, to which all negotiable instruments of that character are subject, so long as it was not used to draw money out of the Linn County National Bank, or, what must mean the same thing, was not put in that bank. Crawford's position and liability were not in the least changed by the fact that that particular bank became the owner or payee of the note, as it might not do consistent with his understanding, instead of such ownership passing to some other bank, as it might do consistent with such understanding. The case, therefore, warrants, if it does not require the conclusion that Crawford's alleged stipulation was intended to keep the note out of the Linn County Bank, in order that the bank's cash resources to meet the demands of depositors should not be thereby affected. He said, in effect: "You may transfer this note as you see fit; you may set it afloat in the channels of negotiable paper,—provided, only, that you take care that it is not used to diminish the cash assets of the Linn County National Bank." He might rely upon Cowan, as the president of the bank and holder of the note, to prevent that result. It could make no difference to Crawford, as the maker of the note, that his understanding in that regard was not respected. Moreover, the testimony tends to prove that the understanding of Crawford, as testified to by him, was substantially, if not exactly, carried out; that, instead of an accommodation note transferred to parties who were creditors of Cowan in Portland, there was a note made to the Linn County Bank, from which a certificate of deposit was taken for the amount of the note, which certificate was deposited with Cowan's Portland creditors, and held by them until after the bank closed its doors.

"It is immaterial that paper executed or indorsed for accommodation is not used in precise conformity with agreement, when it does not appear that the accommodation party had any interest in the manner in which the paper was to be applied. No change in the mere mode or plan of raising the money,

though not applied to the purpose intended by the accommodation party, will constitute a misappropriation. In order to constitute a misappropriation, there must be a fraudulent diversion from the original object and design; and it is now well settled that when a note is indorsed for the accommodation of the maker, to be discounted at a particular bank, it is no fraudulent misappropriation of the note if it is discounted at another bank, or used in the payment of a debt, or otherwise for the credit of the maker." 1 Daniel, Neg. Inst. § 792.

In this case the note was intended for the use of Cowan, to be applied by him to secure his debt to some unnamed third person. It was intended that the note should pass to such person, between whom and Crawford the relation of maker for value and payee would exist. In other words, Crawford intended that the note should be transferred for Cowan's benefit, and that the transferee or any subsequent holder should have the right to exact payment from him, as the receiver seeks to do in this case. The note sued on was used for Cowan's benefit in the particular matter intended, but not in the precise mode intended. In my opinion, Crawford is liable upon the facts as testified to by himself. The motion for a new trial is denied.

In re MATTSON.

(Circuit Court, D. Oregon. July 22, 1895.)

No. 2,229.

1. CONSTITUTIONAL LAW — ADMISSION OF STATES — CONCURRENT JURISDICTION OVER RIVER.

The assumption by the state of Oregon, in its constitution, of concurrent jurisdiction on the Columbia river, and the provision, in the act of congress admitting the state into the Union, expressly confirming such jurisdiction, are effective to establish it between Oregon and Washington, notwithstanding the failure of Washington, upon becoming a state, to assent thereto, and the omission of her enabling act to provide for it. The provision by congress for concurrent jurisdiction in such case, the common boundary of the two states being the middle channel of the river, is not a limitation upon the sovereignty of the states, nor the exercise of jurisdiction within them, nor an impairment of the equality of footing with the other states upon which they are entitled to admission into the Union.

2. SAME—"CONCURRENT" JURISDICTION DEFINED.

The word "concurrent," when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river, can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction.

3. SAME—FISHING RIGHTS.

The states of Oregon and Washington own the bed of the Columbia river upon their respective sides to the middle channel, and the citizens of each within such boundary have a common right of fishing, so long as the navigation of the river is not obstructed. This right is not a mere privilege or immunity of citizenship, but a right of citizenship and property combined, which each state may make exclusive in its citizens, and which is not subject to control or regulation by the other, unless there is mutual agreement to that end.

This was a petition by Herman Mattson for a writ of habeas corpus.

C. W. Fulton, for petitioner.

James A. Haight, Asst. Atty. Gen., for the State of Washington.

C. M. Idleman, Atty. Gen., W. N. Barrett, Dist. Atty. for the Fifth Judicial District of Oregon, and J. H. Smith, for the State of Oregon.

Before HANFORD and BELLINGER, District Judges.

BELLINGER, District Judge. The petitioner is imprisoned upon a conviction, in the circuit court of the state of Oregon for Clatsop county, of Sunday fishing in the Columbia river, within the territorial limits of the state of Washington, in violation of the laws of Oregon. This imprisonment is under the authority of the provisions contained in the constitution of Oregon and in the act of congress admitting the state into the Union, which provides, in effect, that the state of Oregon shall have concurrent jurisdiction on the Columbia and all other rivers and waters bordering on the said state of Oregon, so far as the same shall form a common boundary to said state or any other state or states now or hereafter to be formed or bounded by the same. The territorial boundary of the state on the north is the middle channel of the Columbia river. By the constitution of the state of Washington and the act of congress admitting that state into the Union, the south boundary of that state is fixed at the middle channel of the Columbia river. Neither act makes any provision for the exercise of jurisdiction concurrently with Oregon on such river. It is claimed, among other things, in behalf of the petitioner, that the act of congress admitting Washington into the Union, passed subsequently to the Oregon enabling act, has the effect to repeal by implication so much of the earlier act as established concurrent jurisdiction upon the Columbia river. The assistant attorney general of the state of Washington appears in behalf of that state to contest the concurrent jurisdiction claimed by Oregon, and makes the further contention that upon the admission of the state of Washington into the Union that state became possessed of all the rights of dominion and sovereignty which belonged to the original states; that, while congress might limit her territorial boundaries, it was not within its power to withhold from her any of the rights of sovereignty possessed by the original states, within her territorial boundaries as fixed. It is argued, in support of this contention, that, while concurrent jurisdiction is uniformly established over all navigable rivers forming boundaries between states, this has been the result of compacts between the states, and that when Oregon was admitted into the Union it was with the knowledge on her part that congress was without authority to impose concurrent jurisdiction upon the future adjacent state, and that the provision therefor in her enabling act was subject to the agreement of the new state when admitted, which agreement Washington failed to make.

It is true that the concurrent jurisdiction over boundary rivers has always been assented to by the adjacent states. But in the beginning there were compacts between the original states, or be-

tween such states and the general government. The states of Kentucky, Ohio, Indiana, and Illinois were within the charter of Virginia at the commencement of the Revolution, and in the compact under which Kentucky became a state Virginia stipulated that the navigation of and jurisdiction over the Ohio river should be concurrent between the states which should possess the opposite shores. *Handley's Lessee v. Anthony*, 5 Wheat. 374. The sovereignty of Virginia entitled her to attach conditions to her grant. The compact was made for the new states, not with them, and the practice of a subsequent acquiescence of the new states is no doubt due to the fact that when new states were created out of the territory of older states, from which they were separated by navigable rivers, the territorial boundaries of such new states extended over no part of the river below low-water mark. The states out of which they were formed, upon a principle that obtains in such cases, retained the entire river within their domain. In such case, the assumption, by the new state having the right of concurrent jurisdiction secured to it, of some jurisdiction, exclusive or concurrent, was thought necessary to the existence of any jurisdiction on the river by such state. *McFall v. Com.*, 2 Metc. (Ky.) 394. But this assumption of jurisdiction by one state is not necessary to the exercise of jurisdiction by the other. Concurrent jurisdiction between states separated by navigable rivers is an established rule in this government, although in some instances the entire river is within the territorial limits of one state; and in some cases jurisdiction is limited to the execution of the civil and criminal process of each state upon the adjacent waters within the exclusive jurisdiction of the other. 4 Stat. 708 (approving compact between New York and New Jersey). Concurrent jurisdiction is a practical necessity in the administration of government over such rivers. Its existence does not deprive a new state of the dominion and sovereignty belonging to the original states. The admission of Washington subject to the exercise of a concurrent jurisdiction with Oregon over the Columbia river does not place her upon an unequal footing with the other states. On the contrary, this is the footing on which the other states most favored in this respect are placed. It is immaterial that some of the original states made such condition of jurisdiction for themselves, and that others impressed it upon the territory ceded by them. The objection relates to the fact of equality, and not to the authority by which such equality is established.

It is conceded that congress could have made the north shore of the Columbia river the boundary of the new state, but it is claimed that, having fixed the boundary at the middle of the channel, congress was without power to authorize any other jurisdiction within such boundary. If congress might limit the boundary of Washington to the shore of the river without impairing the equality of rights of the state, how can an enlargement of the state's jurisdiction concurrently with Oregon over the entire river be construed to destroy such equality? The question is not to be decided upon a technicality. Whether, in legal effect, the boundary of each state is limited by its own shore,

or by the middle channel, with concurrent jurisdiction over the river in either case, the result is the same. To say that congress may establish a concurrent jurisdiction in the one case, but not in the other, is to perplex a grave question with a mere subtlety. When, in 1853, the territory of Washington was created out of the Oregon territory, congress established concurrent jurisdiction between the two territories on the Columbia river over all offenses committed on such river. Upon the admission of Oregon into the Union this jurisdiction was confirmed and made to include matters of a civil nature. The solemnity of a compact was given to this boundary and jurisdiction by the act admitting Oregon into the Union, which could not be abrogated nor altered by the subsequent admission of Washington. It secured to the new state of Oregon, as well as the future state of Washington, such equality of right as existed between all the states separated by navigable rivers, and as was necessary to the effective enforcement of the laws of each. This was a right to which the people of both jurisdictions had long been accustomed. It was such a right as the conqueror of a country would not, under the usage of nations, abrogate. Congress, in establishing concurrent jurisdiction between new states thus situated, does not impose upon their sovereignty nor exercise a jurisdiction within them. The authority which it thus exercises is nothing more than that of fixing the boundaries between new states. This authority is necessary to perfect equality of footing between them, since it is not otherwise practicable, in such cases, to precisely fix a jurisdictional boundary, unless it is placed at one shore, leaving the entire river within the territory and jurisdiction of one state, to the disadvantage of the other. The question, then, is presented: What is this concurrent jurisdiction, and is the procedure which has resulted in the petitioner's imprisonment a lawful exercise of it? The case of *J. S. Keator Lumber Co. v. St Croix Boom Corp.* (Wis.) 38 N. W. 529, is the case most relied upon in support of the contention that "concurrent jurisdiction" does not require concurrent action by the two states, but that either state can by itself legislate for the entire river which forms the boundary between them. The state of Minnesota authorized the construction of a boom in the St. Croix river, forming a boundary between that state and Wisconsin. The supreme court of Wisconsin held this to be a proper exercise of concurrent jurisdiction by the former state; "that each state may exercise independently such legislative control over the portion of said St. Croix river which is navigable and forms such boundary line as is consistent with the exercise of similar powers by the other state, and may, in aid of navigation, authorize to that extent the reasonable occupation of such stream, not amounting to a discontinuance thereof as a public highway between the states."

The independent legislative control which one state, in such a case, may exercise, consistent with the exercise of similar powers by the other state, is clearly shown in the cases cited in the opinion. A number of these cases involve the authority of one state to authorize the erection of wharves upon its shore and the collection of wharfage tolls thereat, and it is held that such authority is not in conflict with the authority conferred upon congress by the constitution to regulate

commerce, and is not a restriction upon the freedom of navigation of the rivers where such wharves are built. The question of concurrent jurisdiction between the states adjacent to such rivers was in no way involved in any of these cases. The case of *Conway v. Taylor*, 1 Black, 603, is of a different character. The state of Kentucky granted to one of its citizens, who was a riparian proprietor, a license for a ferry across the Ohio river, and it was held by the supreme court of the United States that the concurrent action of Kentucky and Ohio was not necessary to the validity of the license. The decision is upon the ground that "a ferry is in respect to the landing, not to the water"; that "the water may be to one and the ferry to another." The court held that the franchise in question was "confined to the transit from the shore of the state" granting the license, leaving it to the other state to regulate the same right on that side. This plainly shows that the concurrent action of both states was regarded as necessary to establish a line of transit across the river from shore to shore. The navigation of the river with ferryboats was the exercise of the paramount right of navigation. The ferry franchise, as stated, was not "in respect" to this, but to the landings, and, in order that the ferry should be available, concurrent action by both states was indispensable.

The supreme court of Wisconsin, in *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, supra, also cites the case of *Pennsylvania v. Wheeling & B. Bridge Co.*, 13 How. 578, and concludes that the decision of the supreme court was necessarily on the theory that the state of Virginia had power and jurisdiction to authorize a bridge across the Ohio river, provided it did so in a way not to intrude upon the power exclusively vested in congress by the commercial clause of the constitution; and in this connection the court says:

"It must be conceded, however, that the power and jurisdiction of Virginia over the half of the river most distant from it was greater than it would otherwise have been, by reason of the terms and conditions upon which it parted with its title to the territory northwest of the Ohio."

As to this, the fact is that the state of Virginia was the original proprietor of the territory on both sides of the Ohio river, and in the cession made by Virginia, in 1783, of the Northwest Territory, it retained the entire river within its boundaries. The question of concurrent jurisdiction was not considered in the case. The obnoxious bridge was between the Virginia and Ohio shores of the river. The state of Pennsylvania objected that her commerce on the river was injuriously affected by the structure, and the question was whether the bridge impaired the free navigation of the river. There was no objection to the bridge on the ground that Ohio had not concurred in the act authorizing it.

Upon the authority of these cases, the supreme court of Wisconsin holds that it is competent for Minnesota to authorize a boom in the St. Croix river in aid of navigation, when it is consistent with the reasonable continuance of a navigable channel as a public highway between the adjacent states. The court was not unanimous in the decision, and, while it may be questioned whether

it is sustained by the decided cases, it is not in conflict with the contention made for the petitioner in this case. On the contrary, the opinion defines "concurrent jurisdiction," as applied to the case before it, to mean the exercise of such legislative powers by each state over the whole river as were consistent with the exercise of similar powers over the same portions of the river by the other state; and the meaning of this is made clear by the statement in the opinion that "the result is that neither of these states could, as against the other, rightfully assume or authorize the assumption of permanent and exclusive occupancy, possession, and control of the entire navigable portions of the river."

The case of *State v. Plants*, 25 W. Va. 119, is cited for the state of Oregon. In that case the jurisdiction of West Virginia was upheld over the offense of selling spirituous liquors in a boat afloat below low-water mark on the Ohio river on the Ohio side, fastened to the bank by a rope. The decision is upon the ground that Virginia, in her deed of cession of the Northwest Territory to the United States in 1783, did not cede any part of the Ohio river, but retained in her own territory the whole of such river. The decision follows earlier decisions by that court holding that the state of West Virginia included within its territorial limits the whole of the river. There was conflict in the cases, and dissent between the judges as to whether this boundary extended to the line of ordinary low-water mark, but the court held that the jurisdiction thus retained extended over the waters of the river, no matter what the stage was, so long as it was confined within its banks. The question in the case was whether the offense charged was committed at a place within the exclusive jurisdiction of Ohio, by reason of the fact that the liquor was sold from a boat tied to the Ohio shore. There was no question as to whether the act charged was a crime under the laws of both jurisdictions, and therefore punishable by either, except as this was involved in the claim of exclusive jurisdiction made for Ohio.

In the case of *Sherlock v. Alling*, 44 Ind. 184, the court holds that the concurrent jurisdiction of Indiana over the Ohio river may be exercised independently in such manner as the state shall elect. The case was a civil action for damages to a passenger resulting from a collision of boats on the Ohio river. The opinion in this case does not authorize the conclusion that the state of Indiana may punish as criminal under its own laws that which is lawful under the laws of Kentucky. It is held that the general legislation of Indiana extends over the Ohio river, without any special reference thereto; that the failure of the legislature to specially include the territory over which its jurisdiction is concurrent shall not be considered as showing an intention to exclude it from the operation of its laws.

The case of *Carlisle v. State*, 32 Ind. 55, is cited. That case was an indictment for murder, and the crime was no doubt punishable under both jurisdictions. The question in the case arose out of the fact that Spencer county, in Indiana, where the defendant was tried, extended to low-water mark on the Ohio river, and the

crime was committed below low-water mark, opposite such county. The court held that Spencer county had concurrent jurisdiction with Kentucky over the river opposite its boundary.

In *McFall v. Com.*, 2 Metc. (Ky.) 394, the defendant was indicted in Kentucky for solemnizing a marriage on the river in violation of the laws of Kentucky. The defense was that the laws of Ohio authorized the marriage. The sovereign power and jurisdiction of Kentucky was held to extend over the Ohio river to low-water mark on the Ohio side, upon the principle, already mentioned, that when a state, as was Virginia, to whose rights in that respect Kentucky succeeded, is the original proprietor, and grants territory on one side of a river only, it retains the river within its own domain, and the newly-erected state extends to the river only, and the low-water mark is the boundary. It was also held that while the compact with Virginia under which the Northwest Territory was ceded provided for concurrent jurisdiction over the river between the states adjacent to it on either side, yet the word "jurisdiction," as applied to a state, and as used in the compact with Virginia, imports nothing more than the power to govern by legislation, and that such power was inoperative without legislative enactments to enforce it, and the conclusion was reached that, inasmuch as there was nothing to show that Ohio had ever assumed or claimed or asserted jurisdiction, exclusive or concurrent, over the place where the offense was committed, such offense did not appear to have been committed within the jurisdiction of that state. This case, therefore, does not involve the question of the right of independent action by one state in the exercise of the concurrent jurisdiction. It merely decides that in that case the concurrent jurisdiction did not exist.

The case of *President, etc., v. Trenton City Bridge Co.*, 13 N. J. Eq. 46, holds that concurrent jurisdiction requires concurrent action or concurrence of agreement. The case was this: By agreement between the states of Delaware and New Jersey, made and ratified in 1783, it is, among other things, provided, with reference to the Delaware river, "that each state shall enjoy and exercise a concurrent jurisdiction within and upon the waters, and not upon the dry land, between the shores of said river." The complainants were the proprietors of a bridge across the Delaware river, erected in pursuance of the authority of both states, and this franchise was made exclusive by the action of one of the states, not concurred in by the other. It was held that the power of erecting a bridge within the territories of both states, and of taking tolls thereon, could only be conferred by the concurrent action of both states, and that such right, once granted, could not be made exclusive by either state, at its pleasure, by its own legislation for its own advantage. It was plausibly argued by counsel in the case that, inasmuch as the concurrence of the two states was necessary to authorize a second bridge, one of such states might contract to grant no other charter,—might contract to do what, without contract, it might lawfully do, viz. refuse to grant any further franchise. But the court said the contract by New

Jersey not to grant to others involved the grant of a franchise to the complainants, and that such grant without the consent of Pennsylvania was invalid and inoperative.

In the case of *State v. Mullen*, 35 Iowa, 199, it is held that a person may be tried in the courts of Iowa for keeping a house of ill fame on a boat on the Mississippi river, although such boat, when so used, may, for a portion of the time, as the water recedes, rest on the soil of an island on the east side of the river, near the Illinois shore.

In the case under consideration, Oregon has established a weekly close season for the Columbia river, and has made fishing in the river during such season a crime; and it undertakes to punish a citizen of Washington for fishing in violation of this restriction in that part of the river within his own state, although by the laws of such state he is permitted to fish on the day interdicted by Oregon. It is no reason for this assumption of legislative control by Oregon within the boundaries of Washington that the latter state has the right to legislate similarly with reference to the river. Washington is precluded, by the legislation of Oregon over the river, from legislating otherwise. What is thus accorded to Washington is not a right, but the necessity of acquiescence to avoid a conflict of jurisdiction. How can this state, more than Washington, determine the right of the citizens of Washington to fish in the waters of that state, or prescribe the days for such fishing? Washington is wholly foreclosed in the premises by the action of Oregon in determining the question for both states. How can this be called the exercise of a concurrent jurisdiction? The word "concurrent," in its legal and generally accepted definition, means acting in conjunction, and when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction. No comparison can be made between a case like this and cases where the concurrent jurisdiction has been invoked to punish acts that are crimes in themselves, or that are made so by the laws of both states having such jurisdiction. The two states own the bed of the Columbia river upon their respective sides to the middle channel, and the citizens of each within such boundary have a common right of fishing, so long as the navigation of the river is not obstructed. This right is held by the supreme court of the United States to be, not a mere privilege or immunity of citizenship, but a right of citizenship and property combined, which the state may make exclusive in its own citizens. *McCreedy v. Virginia*, 94 U. S. 391. It is clear, therefore, that this right in each state is not subject to control or regulation by the other, unless there is mutual agreement to that end. It can no more be brought within such control than can the enjoyment of property rights on the dry land.

It is ordered that the writ issue as prayed for.

HANFORD, District Judge, concurs.

CLARK v. CANADIAN PAC. RY. CO.

(Circuit Court, D. Vermont. September 14, 1895.)

1. PLEADING—CONTRIBUTORY NEGLIGENCE.

In an action in a federal court, brought in a state where the common-law system of pleading prevails, contributory negligence, being in those courts a matter of affirmative defense, must be pleaded.

2. SAME—TRESPASS—QUESTION AT ISSUE.

In an action of trespass against a railroad company, for running over the plaintiff, in which the general issue was pleaded, the jury was instructed that, as the train had unquestionably run against the plaintiff, he was entitled to recover, unless the defendant had shown that what the law and common prudence required had been done, and the injury could not thereby be prevented. *Held* no error.

3. RAILROAD COMPANIES—DEGREE OF CARE REQUIRED.

A railroad company is not excused from taking other proper precautions by compliance with statutory requirements as to giving signals at crossings.

This was an action of trespass by Samuel O. Clark against the Canadian Pacific Railway Company for personal injuries. After a verdict for the plaintiff, the defendant moved for a new trial.

A. K. Brown and H. E. Rustedt, for plaintiff.

F. E. Alfred and J. C. Baker, for defendant.

WHEELER, District Judge. A highway and the defendant's railway come, descending, near to, and nearly parallel with, each other, from Canada into Vermont, at Richford; the highway descending lower than the track of the railway as they approach the national line, and, turning to the eastward, rises and crosses it at grade just on the Vermont side of the line, where it has a side track on each side of a main track extending northward into Canada, and a station on the east side, south of the crossing. The plaintiff was coming in a sleigh, without bells, along this road from Canada, and going to his home in Vermont, on the east side of the railroad, when there was a long freight train, which had come from the south, standing on the side track between the main track and the road, waiting for an express train from the north to pass; and as he passed behind the van, onto the main track, the express train, coming down the grade, not working steam, at 25 to 30 miles an hour, struck the plaintiff's team, between him and his horse, and threw him one way and his horse the other, killing the horse and injuring him. This suit is brought for this injury, and has been tried upon the general issue. The plaintiff testified that he looked for the express train as he passed along to where the freight train hid the main track from him; that the van of the freight train stood on the crossing; that his horse slowed up at sight of the van; that he heard no signals or noise of a train coming, and urged his horse along, around the van, onto the main track, when he heard some one call, "Look out for the express"; but he had got too far to turn away. On cross-examination he testified that he was very familiar with the crossing, and always listened for trains there, and did then; that he was totally deaf in his left ear, but could hear well. There was much testimony as to whether the van obstructed the crossing, or not, and as

to whether the engine whistle was blown, or the bell was rung, or not; as to the speed of the plaintiff before reaching the crossing; and one of the state railroad commissioners testified that the plaintiff testified, in an examination by him as to the cause of the collision, that he usually looked and listened for a train before passing over the crossing, but at that time he did not do either. The case was tried at the February term, and the jury did not agree. It was presented by counsel at that trial, and at this, as if the rule of the supreme court of the state, that in actions for negligence, the plaintiff must show absence of contributory negligence would prevail in this suit here; and the case was so submitted to the jury. After very long deliberation the jury still disagreed, probably, from inquiries they made, upon the question of contributory negligence. Thereupon the jury was further instructed that, as the defendant's train was, without question, run against the plaintiff, he was entitled to recover for the injury so done, unless the defendant had shown that what the law required, and what common prudence under the circumstances required, about running the train, was done, and the injury could not thereby be prevented. Now, upon a motion for a new trial, which has not been withdrawn, but has been left without argument to be disposed of, the entering of judgment on the verdict depends upon the correctness of these rulings.

As to this, what issues have been made in the record may properly first be attended to. The common-law system, by which matters in avoidance of allegations of direct injuries must be pleaded, is in force in this state, and, of course, in this court. That contributory negligence of a plaintiff is, in the courts of the United States, a defense to be brought forward by the defendant, seems to be absolutely settled by the supreme court of the United States. *Farlow v. Kelly*, 108 U. S. 288; ¹ *Railroad Co. v. Mares*, 123 U. S. 710, 8 Sup. Ct. 321; *Railway Co. v. Johnson*, 151 U. S. 85, 14 Sup. Ct. 250. *Railway Co. v. Lowell*, 151 U. S. 209, 14 Sup. Ct. 281. On principle, the pleading of this defense would seem to be requisite to raising it in the United States courts, especially in proceedings according to the course of the common law; and in these cases it appears to have been pleaded. In *Weaver v. Ward*, Hob. 134, which was trespass for an assault and battery, the defendant pleaded that he and the plaintiff were trained soldiers, exercising with loaded muskets, and that he, "casualiter et per infortunium et contra voluntatem suam," in discharging his musket, hurt the plaintiff; and, on demurrer, judgment was given for the plaintiff, for "no man shall be excused of a trespass except it may be judged utterly without his fault,—as if a man, by force, take my hand and strike you; or if here the defendant had said that the plaintiff ran across his piece when it was discharging; or had set forth the case with the circumstances, so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt." That case has constantly been referred to, quoted from, and copied by text writers and judges, as affording a correct statement of law, and has not,

so far as noticed, been questioned. *Bac. Abr. tit. "Trespass," D, 2; Selw. N. P. 27; 2 Greenl. Ev. § 85; Add. Torts, § 544; Wakeman v. Robinson, 1 Bing. 213.*

In this case the plaintiff was rightfully there when struck. He had as much right to be where he was with his team as the defendant had to have its train there that struck him. "The rights of a railroad company to the use of its tracks for the movement of engines and cars is no greater in the eye of the law than the right of an individual to travel over a highway extending across such tracks." *Railroad Co. v. Converse, 139 U. S. 469 (at page 473), 11 Sup. Ct. 569.* The declaration, with much verbiage, sets forth, in effect, a trespass to person and property. *Leame v. Bray, 3 East, 593.* If some of the counts may be said to be in form on the case, and joined, as they may be, by statute, in Vermont, the pleadings must conform to those in trespass. *Rev. Laws, § 912.* The general traverse here put in issue this trespass, which would be proved by showing the running of the train with force against the plaintiff and his property, and disproved by showing that this could not, in law or prudence, be prevented. Exactly this issue was submitted to the jury, and found for the plaintiff.

The defendant makes question, however, whether a railroad company owes any other duty to travelers than that of complying with the statute as to giving signals at crossings. That they are holden to prudence in other places seems beyond question. *Quimby v. Railroad Co., 23 Vt. 387; Railroad Co. v. Stout, 17 Wall. 657.* And the operators of the Rutland Railroad were held by the supreme court of Vermont not to be excused from liability for striking a traveler on the highway with a freight train running too fast at a dangerous crossing, by giving the statutory warnings. *Marshall v. Birchard, Add. Torts (Wood's Ed.) § 547, note.* And, if the issue of contributory negligence was open, the question remains whether there was enough evidence of it to so entitle the defendant to have the evidence submitted to the jury, while under the burden of showing it, as to make the omission to do so error. To drive on to the crossing without looking and listening, while either would be of use in avoiding a train, would be getting before a coming train imprudently, and directly contributory to any being hit by it. As the plaintiff's testimony, that he looked for the express train when that would do any good, was not disputed, no question arose to be submitted to the jury about that; and, as his testimony that he listened was affected only by that of the railroad commissioner, the question as to this is whether the testimony of the latter would so overcome that of the former as to sustain the burden of proof, and warrant a verdict resting upon it. As the statement came from the plaintiff, it would be competent evidence of the fact, and not merely impeaching, if satisfactorily proved. The plaintiff would not be likely to so state away his case, and the commissioner might misunderstand. This raises too much doubt about his making it to justly let it overcome his positive testimony that he did listen. A verdict resting solely upon this proof of that statement would be quite unsatisfactory. Motion overruled, and judgment on the verdict.

SANFORD v. POE et al. (two cases). FARGO v. SAME. PLATT v. SAME.

(Circuit Court of Appeals, Sixth Circuit. July 15, 1895.)

Nos. 321, 322, 324, 325.

1. EQUITY JURISDICTION—INJUNCTION—CERTIFICATION OF TAX ASSESSMENTS.

A court of equity has jurisdiction, on the ground of avoiding a multiplicity of suits, of a bill brought by an express or telegraph company to enjoin a state board of appraisers from certifying to numerous county auditors an alleged illegal assessment of complainant's property for purposes of taxation.

2. FEDERAL COURTS—FOLLOWING STATE DECISIONS — CONSTITUTIONALITY OF STATE STATUTES.

Where a federal circuit court had declared a state statute void as contravening a state constitution, but afterwards the state supreme court sustained the validity of the statute, *held*, that the federal court, in a case involving no rights of contracts entered into on the faith of its prior decision, was bound to follow the state decision.

3. SAME—AUTHORITY OF STATE DECISIONS—FRIENDLY SUITS.

The fact that a decision of a state supreme court in relation to the constitutionality of a state statute was rendered in a friendly suit, made up in as summary a way as possible, for the purposes of a test case, does not in any way impair its authority in the federal courts.

4. CONSTITUTIONAL LAW—DUE PROCESS—ASSESSMENTS FOR TAXATION.

A state statute providing for the assessment of the property of telegraph, telephone, and express companies by a state board of appraisers (Act Ohio, April 27, 1893; the "Nichols Law") is not to be *held* void for want of due process of law, where, as construed by the highest court of the state, it gives to such companies a right to be present before the board and be heard in the matter. 64 Fed. 9, affirmed.

5. SAME—TAXATION OF TELEGRAPH AND EXPRESS COMPANIES—METHODS OF ASSESSMENT.

A state law imposing a tax on telegraph, telephone, and express companies is not invalid, under the constitution of the United States, either because the assessment is made on property largely used in interstate commerce, or because the rule of assessment requires the property of the company to be valued as a unit profit-producing plant, or because the assessors are required to look to the value of the capital stock as one factor in determining the assessment.

6. SAME.

The Ohio statute known as the "Nichols Law" (Rev. St. § 2778a), which relates to the taxation of telegraph, telephone, and express companies, and regulates the mode of appraisal, is not void under the constitution of Ohio, nor (accepting the construction placed upon it by the supreme court of Ohio, *State v. Jones*, 37 N. E. 945) does it contravene any provision of the constitution of the United States. 64 Fed. 9, affirmed.

Appeals from the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

These suits were brought to enjoin the assessment of taxes against the Adams Express Company for the years 1893 and 1894, and the American Express Company and the United States Express Company for the year 1894. The defendants are Ebenezer W. Poe, auditor of the state of Ohio, John K. Richards, attorney general of the state of Ohio, and William T. Cope, treasurer of the state of Ohio, and compose a board of tax appraisers for the assessment of telegraph, telephone, and express companies, under an act of the Ohio legislature passed April 27, 1893, and known as the "Nichols Law." To the several bills demurrers were filed, which, on full argument, were finally sustained, and the bills dismissed. The complainants have severally perfected appeals and assigned errors. The ground upon which the suits all proceed is, in substance, that the assessments complained of, and the scheme

of taxation embodied in the Nichols law, under which the assessments were made, are void as in contravention—First, of the constitution of Ohio, which provides that all property shall be taxed according to its true value in money by a uniform rule, and that the property of corporations shall be taxed “the same as the property of individuals” (Const. Ohio, art. 12, § 2, and art. 13, § 4); second, “of the constitution of the United States, because the effect of the rule of valuation prescribed by the statute and adopted in these particular assessments is, not to confine the tax to the property of the companies within the state of Ohio, but to tax something else which is not within the state of Ohio, and therefore to take the property of the companies without due process of law, and that the scheme, as a special one applied to these special agencies of interstate commerce, imposes an illegal burden upon that commerce”; third, complainants also contend that, if the Ohio statute be valid under both the constitution of Ohio and of the United States, the assessments are nevertheless void, because the assessments made were arbitrary and illegal, in that the assessors did not follow the statute or pursue any definite mode of valuation. Upon a first hearing before Circuit Judge Taft, the demurrers of the defendants were overruled, and defendants required to answer. The ground upon which Judge Taft proceeded was—First, jurisdiction in equity was predicated upon the ground that a multiplicity of suits would result unless the defendants should be restrained from certifying their assessments to the auditors of 87 counties, within each of which the defendants had property; second, that the Nichols law, under which the assessments had been made, was void as in conflict with the constitution of the state of Ohio. The opinion of the court upon these questions is reported in 61 Fed. 449. Before answers were filed, a suit involving the constitutionality of this legislation was decided by the supreme court of Ohio, and the validity of the law under the Ohio constitution sustained. *State v. Jones*, 37 N. E. 945. Upon the filing of this opinion by the Ohio court, Judge Taft granted a rehearing, and sustained the demurrers of defendants, upon the ground that the decision of the supreme court of Ohio as to the construction of the Nichols law and its validity under the constitution of Ohio was conclusive upon the courts of the United States. A very convincing opinion upon this aspect of the question was filed, and is reported in 64 Fed. 9. A further argument was heard before Judge Taft upon the question as to whether the state board of assessors had enforced the Nichols law according to the construction placed thereon by the supreme court of Ohio. Upon the latter hearing it was agreed that the bills of the several complainants should be treated as amended by the incorporation therein of the facts which had been made to appear by the two affidavits of the defendant Poe as to the manner in which the amount of the several assessments had been reached. The learned circuit judge, upon the bills as thus amended, was of opinion that the board of assessors had kept “well within the law” as construed by the Ohio court. He therefore sustained the demurrers and dismissed the several bills.

Ramsey, Maxwell & Ramsey, for plaintiffs.

J. K. Richards, Att’y. Gen., and Thos. McDougall, for defendants.

Before LURTON, Circuit Judge, and SEVERENS and HAMMOND, District Judges.

After the foregoing statement of the case, the opinion of the court was delivered by LURTON, Circuit Judge.

If the assessments complained of be illegal, for any reason, the jurisdiction of a court of equity to enjoin the defendants from certifying them to the several county auditors of the state seems to be clear, upon the ground that a multiplicity of suits would result unless the assessment be enjoined before the assessors shall certify to each county auditor the proportion of the gross assessments collectible by each county auditor under the scheme of apportionment among the counties provided by the act. To require the complain-

ants to pay each of the numerous county auditors, and then sue to recover, or to enjoin each, would be most oppressive. We think, therefore, that the jurisdiction asserted in the bill, of avoiding a multiplicity of suits, was a sufficient ground to support the original bill, as well as the bills subsequently filed to enjoin the tax of 1894, assessed after the jurisdiction in the original case had attached. *Cummings v. Bank*, 101 U. S. 153-157; *State Railroad Tax Cases*, 92 U. S. 575-618; *Express Co. v. Seibert*, 142 U. S. 339-348, 12 Sup. Ct. 250; *Shelton v. Platt*, 139 U. S. 591-599, 11 Sup. Ct. 646; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62; *Express Co. v. Poe*, 61 Fed. 470.

The question as to the constitutionality of the Nichols law under the Ohio constitution must be regarded as conclusively settled for this court by the opinion of the highest court of the state of Ohio, as announced in the case of *State v. Jones*, heretofore cited. The objection that this court ought not to feel precluded by the opinion of the Ohio court, by reason of the made-up character of the suit in which that opinion was announced, is not satisfactory. It is true that the circuit court of the United States first obtained jurisdiction of the question as to the validity of the Nichols law under the constitution of Ohio, and that that court, in a very vigorous and persuasive opinion, concluded that the Nichols law contravened the constitution of Ohio, and was therefore invalid. The courts of Ohio had not theretofore passed upon the question, and the circuit court could not escape the duty of determining for itself the true meaning and construction of the constitution of Ohio, so far as involved by the mode of assessment provided by the Nichols law. Before a final decree had been rendered, the supreme court of Ohio, in a case involving the validity of the same law, announced a contrary opinion, and held the Nichols law, as construed by the same court, an entirely valid law, so far as it was supposed to be affected by the state constitution. Under the circumstances of this case, we think the duty of the circuit court was to accept the opinion of the Ohio court as conclusive, and to render judgment accordingly. The case before it involved no rights or contracts between individuals which had been entered into upon the faith of earlier and conflicting decisions of either the courts of the United States or of the state, and therefore presented no question such as arose in *Burgess v. Seligman*, 107 U. S. 32, 2 Sup. Ct. 10, or *Carroll Co. v. Smith*, 111 U. S. 556, 4 Sup. Ct. 539, or *Douglass v. Pike Co.*, 101 U. S. 677, or *Rowan v. Runnels*, 5 How. 134. Where the construction or validity of a state statute does not involve rights acquired upon the faith of earlier and conflicting decisions, it is the clear duty of federal courts to accept and adopt the decisions of the highest court of a state in respect to the construction and conformity of state laws to the constitution of the state. The decision of such questions properly belongs to the highest courts of the state. We entirely concur with the opinion of the circuit judge upon this question, who said:

"Here is not involved the validity or construction of a law on the faith of which individuals have made contracts, advanced money, or incurred liability. We have here simply a tax law fixing the obligation of artificial

persons of a certain class to contribute to the support of the state. In respect of such a law, it would be anomalous and absurd to have a diversity of rulings between the state and federal courts. The intolerable result of such a diversity would be that companies who could invoke the jurisdiction of the federal court would not pay the tax, while all those who could not invoke that jurisdiction would be compelled to pay it. There is nothing in the decisions of the supreme court of the United States which gives the slightest warrant for supposing that, in the case of a state tax law, it would not follow the decision of the supreme court, whenever rendered, and however divergent from its own views the conclusion, provided no federal question was involved. In the *State Railroad Tax Cases*, 92 U. S. 575, 617, 618, the circuit court of the United States held that a tax law of Illinois was invalid because in violation of the state constitution. Before the cases reached the supreme court of the United States on appeal, the supreme court of the state decided that the law was valid. The circuit court decree was accordingly reversed. It is true that in that case the supreme court of the United States concurred with the state court on the merits, but Justice Miller used this language: 'But if, for no other reason, we should reverse the decrees of the circuit court in these cases because the same questions involving the considerations urged upon us here have been decided by the supreme court of the state of Illinois in a manner which leads to the reversal of these. * * * As the whole matter, then, concerns the validity of a state law as affected by the constitution of the state, that question and the other one of the true construction of that statute belong to the class of questions in regard to which this court still holds, with some few exceptions, that the decisions of the state courts are to be accepted as the rule of decisions for the federal courts. It is, nevertheless, a satisfaction that our judgment concurs with that of the state court, and leads us to the same conclusions.' In *Bauserman v. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466, *Moore v. Bank*, 104 U. S. 625, and *Green v. Neal's Lessee*, 6 Pet. 291, the supreme court reversed the ruling of the circuit court as to the effect of a state statute of limitation solely because, after the decision by the circuit court, the supreme court of the state had given the statute a different construction. In *Stutsman Co. v. Wallace*, 142 U. S. 293, 12 Sup. Ct. 227, a case involving the construction of the tax laws of the territory of Dakota, the supreme court of the territory took one view. The case was carried to the supreme court of the United States for review. Meantime the territory had become a state, and the state supreme court reversed the ruling of the territorial court. The federal supreme court thereupon reversed the judgment of the territorial court in deference to the decision of the state court. See, also, *Suydam v. Williamson*, 24 How. 427, and *Fairfield v. Gallatin Co.*, 100 U. S. 47."

The suggestion that the opinion of the Ohio court should not be followed, because the suit in which it was announced had many features of a moot-court case, cannot be seriously entertained. The facts do show that a case was made up for the purpose of obtaining the opinion of that court in as summary a way as possible, and that it was intended as a test case. The facts now relied upon to destroy the effect of the decision were also made known to the Ohio court. The conclusion that court reached was that the case was one fairly under its jurisdiction, and that the validity of the *Nichols* law under the Ohio constitution was presented in a way to give jurisdiction and demand decision. That it was in reality a friendly suit does not detract from the weight of the court's opinion as an opinion. The case was argued and duly considered. Opportunity was given the present able counsel, then and now representing the complainants, to appear and argue the case. We think that due respect for the high tribunal who heard and decided the case requires that we shall accept its judgment that the case was not a

moot case, but was one entitled to be heard and decided. This was the conclusion of the circuit court, and meets our approval.

Being of opinion that the decision of the supreme court of the state removes from this case all questions of conflict between the act and the constitution of the state, there remains for consideration the question as to whether there is in the act, as construed by the state court, or as administered, any violation of rights secured by the federal constitution to the complainants. The law under which the assessments complained of were made is entitled: "An act to amend and supplement sections 2777, 2778, 2778a and 2780 of the Revised Statutes of Ohio." Section 2778a is the only one which needs to be set out, and is as follows:

"Sec. 2778a. Every express, telegraph and telephone company embraced in section 2777, whether chartered by the laws of this state or by any other state or country, doing business in this state, shall, annually, between the first and tenth day of May, return to the auditor of state under the oath of its treasurer, the amount of its capital stock, its place of business, the par value and market value (or if there be no market value, then the actual value) of its shares at the time of said return. The return shall also contain a statement in detail of the entire real and personal property of said company, and where located, and the value thereof as assessed for taxation; the telegraph and telephone companies shall, in addition thereto, return the whole length of their lines, and the length of so much of their lines as is without and as is within the state of Ohio, which lines shall include what said telegraph and telephone companies control and use under lease or otherwise; and said board of appraisers and assessors shall, in the determining the value of the property of said companies in this state, to be taxed within the state and assessed as herein provided, be guided by the value of said property as determined by the value of the entire capital stock of said company, and such other evidence and rules as will enable said board to arrive at the true value in money of the entire property of said companies within the state of Ohio, in the proportion which the same bears to the entire property of said company, as determined by the value of the capital stock thereof, and the other evidence and rules as aforesaid. Express companies shall, in making said returns, include therein, as a part thereof a statement of their entire gross receipts for the year ending the first day of May, of the business done within the state of Ohio, giving the receipts of each office in said state, and the location thereof for said year."

By section 2780b, the assessors are required to deduct from the total value of the property of said companies, as ascertained and determined by section 2778, the valuation of any and all real estate, as assessed for taxation, situate in the state, and on which said companies pay taxes.

All of the complainant companies are corporations of states other than Ohio, and each has its principal office in another state. The questions presented by each separate bill are in substance the same. For purposes of convenience, we shall consider the averments in the bill of the Adams Express Company as presenting substantially the ground for relief made by each of the other complainants. That bill avers that much the greater part of its business done in Ohio is in the transportation of goods, wares, and merchandise from points within the state to points in other states, and from points without the state to points within; that it owns no line of railroad in the state of Ohio, but conducts its business under contracts with the owners of such railroads; that it owns no real estate in the state,

except such as is used for stabling horses used by them in the collection and distribution of goods, wares, and merchandise, and that the personal property within the state consists entirely of office furniture, and tools, horses, and wagons; that the actual cash value of its personal property in the state of Ohio in 1893 did not exceed the sum of \$53,500, and that the total value of its real estate within the state does not exceed \$25,170, and that all taxes on this real property have been paid; that the assessment for 1893 made against the said company was \$460,033.38; that the whole number of shares in the said company is 120,000, and that the market value of the shares ranged during the year preceding from \$1.40 to \$1.50 upon the dollar, a price which the bill avers is greatly in excess of the actual value of all the property of said company. It avers that the scheme of taxation set forth in the act, "while professing to require the taxation of property in the state of Ohio, does not in fact do so, inasmuch as it directs the said board of appraisers and assessors, in ascertaining and assessing the value of the property of express companies in Ohio, to be 'guided by' and to 'determine the value' of the company's property in the said state 'by the value of the company's capital stock.'" It also alleges that the value of its capital is fixed and determined by the nature, extent, and uses of its property, not only in Ohio, but in many other states of the United States, and by the skill, diligence, fidelity, and success with which its business is conducted in all these states; that it employs many thousands of men, who are constantly engaged as messengers in carrying goods, wares, and merchandise from one part of the country to another, and otherwise, and that its income is largely the result of their efforts; that it "owns valuable securities of other companies, and holds valuable contracts and business arrangements with other corporations, and all of these, none of which are held and owned in the state of Ohio, and many of them not taxable at all, together with the good will which it has earned in the course of more than fifty years of service to the public in said business, go to make up the value of the shares of its capital." It further complains that the act does not provide a method for taxation of property according to its true value in money, "but is really an attempt to enforce against express, telegraph, and telephone companies the payment of a tax for the privilege of doing business within the said state by placing a fictitious value upon their property"; "that the said pretended law is a tax upon interstate commerce, inasmuch as it attempts to establish an artificial and fictitious basis for the valuation for taxation of the property of your orator in this state, a valuation which is determined by the value of its property in other states and by reference in part to its earnings and gains in this state from business which is largely interstate;" that, in making the assessment complained of, the assessors "were guided by the value of one share of your orator's capital, and in all other respects as directed by the act." In conclusion, the bill avers that the method of taxation is unfair, unjust, and unequal, "inasmuch as it requires your orator to pay taxes in Ohio upon property situated in other states, upon which it pays taxes according to its value, and upon its gains and earnings in localities

outside of the state of Ohio, in which its gains and earnings are very much larger than those derived from an equal number of miles of line operated by it in Ohio."

By amendment, the minutes of the board and an affidavit of E. W. Poe, one of the board, and a defendant, were incorporated as parts of the bill. From these it appears that the complainants had actual notice of the meetings of the board, appeared and explained their returns, and were heard by counsel; that, in the testimony of the agents of complainants, information as to the character in detail of the property of these companies in the state, and the character of the business done, was laid before the board; and that supplementary statements were filed (not under oath) showing that the total value of the real estate of the Adams Express Company was \$3,050,272.47, and of the personalty \$1,034,481.43, and that the total value of the real estate of the American Express Company was \$4,956,585.63, and of its personalty \$1,742,402.04. No statement as to the total value of the realty or personalty of the United States Express Company was given. By schedules filed, the value of the personal property at each office in the state was given, and the gross receipts from business done in the state at each office was also shown. This affidavit further sets out that:

"In the statement of the Adams Express Company were included reports from 363 offices. From two of these offices the personal property was returned at a value of less than \$1; from 72 offices the personal property in each instance was returned at a value of over \$1; from 51 offices the personal property was returned at a value of over \$1, and under \$2. Thus, from 125 offices of the Adams Express Company the personal property was returned at less than \$2. In the statement of the American Express Company there were reports from 302 offices, and from but 46 of these offices was there any return of personal property. In the statement of the United States Express Company there were reports from 417 offices, and from only 95 of these offices were there any returns of personal property. Neither of the express companies made any return of safes, pouches, or other personal property, or the value thereof, used on the railroad lines in this state in the transaction of its business. In arriving at the value of the property of these express companies taxable in Ohio, the board did not follow any fixed rule, except the rule that property in Ohio is ordinarily taxed at not more than two-thirds of its actual value, and the law governing this board. The board considered the facts, already stated, set out in the returns and supplementary statements, and also other facts in said returns and in the testimony of the authorized agents of the companies who appeared before the board. For purposes of comparison, the board examined the gross receipts returned by these companies in preceding years. Taking all the information the board had or could secure, the value of the capital stock of the company, its gross receipts within Ohio, the return of the personal property made, and the character thereof, and evidence of undervaluations and omissions therein, the number of officers, the amount of business done, the nature and value of the property and capital required to carry on such business, and other evidence and information, the board, in each instance, ascertained what it considered the fair proportion of the property of the company employed by it in Ohio, and fixed the value of the property of such company situate and taxable therein; being guided, in determining the value of the property, by the value of the entire capital stock, and other evidence and information before the board."

There is no ground for complaint that the assessments were made without due process of law. The complainants had notice of the time and place where the board would meet, and were required to

make a sworn return of their property. The time and place were fixed by the law, and its sessions were not secret. In *State v. Jones*, heretofore cited, the supreme court of Ohio construed the act as entitling the companies "to be present and explain the statement rendered of its property and the value thereof." They did, in fact, appear, and offered evidence, and were heard by counsel. This right to appear and be heard is due process. *Kentucky Railroad Tax Cases*, 115 U. S. 321, 6 Sup. Ct. 57; *State Railroad Tax Cases*, 92 U. S. 575; *Railway Co. v. Backus*, 154 U. S. 421, 14 Sup. Ct. 1114.

The act is assailed upon the suggestion that it permits and requires the assessment and valuation of property outside the state. This contention is based largely upon the theory that the law imposes upon the assessors the arbitrary duty of estimating the value of the property owned by these companies as equal to the market value of its capital stock, and the further duty of apportioning to the state of Ohio that proportion of the total capital stock which the value of its personal property in Ohio bore to the total value of its personal property wherever situated. It must be confessed that the principal rule of assessment has been most obscurely drawn. Whether this was done that it might be read one way by the assessors and another by the courts is somewhat problematical. But the act in its most important feature has been construed by the supreme court of Ohio in *State v. Jones*, and that construction must be now read into the act, and accepted as conclusive as to its meaning by this court. That court, upon this point, said:

"The board, in determining the value of the company's property in this state for taxation, is not required to fix the value of such property upon the principle that the value of the entire property of the company shall be deemed the same as the value of its entire capital stock, thus making the respective values equivalents of each other. But, taking the market value of the entire capital stock as a datum, the board is to be only guided thereby in ascertaining the true value in money of the company's property in this state. The statute does not bind the board to find the value of the entire property of the company equal to that of the entire capital stock. While the value of the property may be less, there may be cases, and not uncommon, in which the value of the property will exceed the market value of the capital stock."

The value of its capital stock under the act, as thus construed, was but one of the factors to be looked to in estimating the total value of the property owned by the companies. The board might conclude, on all the evidence, that the property was of a greater or less value than its capital stock, and there is nothing in the act which arbitrarily requires the assessors to ignore "the other evidence" which the law contemplated they would look to, and find according to the fact. As construed by the Ohio court, the act required the assessors to ascertain the value of the property of all the companies to be assessed by the special board which was "within the state." In the opinion of that court, the provision of the law which required the board to regard the entire property of such companies, wherever situated, as one entire plant, and as "a dividend producing unit machine," was not obnoxious to the constitution of that state, nor to any provision of the constitution of the United States. It was also of opinion that the fundamental law of Ohio was not contravened

by treating, as elements in making up the gross value of such a unit plant, good will, business skill, contracts with railway or other carriers, and every other business consideration which contributed to the successful and profitable operation of the manifold parts of so complicated a machine. Neither was it objectionable that the value placed by the general public upon the capital stock of such companies, as indicated by sales of shares on the open market, should be looked to as a guide in fixing the total value of the property of such companies, wherever situated. That court was also of opinion that the money value of that part of this unit plant found within the state was within the taxing jurisdiction of Ohio.

Accepting, as we feel constrained to do, the opinion of the Ohio court as to the construction to be placed upon the provisions of the Ohio constitution concerning uniformity of taxation and admissible methods for assessing the property of corporations, and accepting, also, the construction of this Nichols law as settling the meaning of the legislature, we are unable to see wherein any provision of the constitution of the United States has been infringed. The law does not discriminate between domestic corporations and those of states other than Ohio. There was due process of law in the ascertainment of values. The bill does not charge any actual fraud upon the part of the assessors. Mere excessiveness of valuation, not the result of intentional or reckless willfulness, and not a consequence of a departure from the affirmative provisions of the law regulating such assessments, is not remediable by application to courts of equity. The tax imposed is not a license tax, nor a tax on the business or occupation, nor on the transportation of property through the state, nor from points within the state to points in other states, nor from points in other states to points within the state. It purports to provide for a tax upon property within the state of Ohio. Though this property is employed very largely in the business of interstate commerce, yet that does not exempt it from liability to taxation as all other property within the jurisdiction of Ohio. This proposition is too well settled to need argument. *Delaware Railroad Tax*, 18 Wall. 232; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530-549, 8 Sup. Ct. 961; *Leloup v. Port of Mobile*, 127 U. S. 640-649, 8 Sup. Ct. 1380; *Pullman's Palace-Car Co. v. Pennsylvania*, 141 U. S. 18-23, 11 Sup. Ct. 876.

Neither does the fact that the property of the express companies was valued as a unit profit-producing plant violate any federal restriction upon the taxing power of a state within which a part of that plant is found. The value of property depends in a large degree upon the use to which it is put. If a railroad may be valued as a unit, rather than as a given number of acres of land plus so many tons of rails and so many thousand ties and a certain number of depots, shops, etc., there is no sufficient reason why the property of an express company should not be treated as a unit plant. If the state of Ohio had a right to tax the property within the state, and to assess it at its true cash value, there is no federal restriction which will prevent such property from being "assessed at the value which it has, as used, and by reason of its use." *Railroad Co. v. Backus*, 154 U. S. 431, 14 Sup. Ct. 1114; *Western Union Tel. Co.*

v. Massachusetts, 125 U. S. 530, 8 Sup. Ct. 961; Pullman's Palace-Car Co. v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876.

That an express company owns no line of railway, and operates no railroad, does not prevent the value of its property from being affected by the relation of each part to every other part, and the use to which a part is put as a factor in a unit business. The Pullman Car Company neither owned nor operated any line of railroad. Its cars were moved by railway carriers under contracts, yet it was not regarded as violative of any federal restriction that its property should be regarded as a unit plant, with a unit value, and the value of its property in Pennsylvania assessed in the proportion that the mileage of the roads over which its cars ran in that state bore to the total mileage covered by its entire business. Pullman's Palace-Car Co. v. Pennsylvania, cited above.

Neither is it an objection that the Ohio law required the assessors to look to the value of the capital stock of the company as a factor in arriving at the value of its whole property considered as a unit plant. In State Railroad Tax Cases, 92 U. S. 575-605, Mr. Justice Miller said:

"When you have ascertained the current cash value of the whole funded debt, and the current cash value of the entire number of shares, you have, by the action of those who above all others can best estimate it, ascertained the true value of the road, all its property, its capital stock, and its franchises; for all these are represented by the value of its bonded debt, and the shares of its capital stock."

This language is quoted with approval in Railroad Co. v. Backus, 154 U. S., 429, 14 Sup. Ct. 1114.

It may be that in a particular instance this would operate with injustice, but that it is a proper matter to be considered is not to be controverted. As construed by the Ohio court, this act does not require the assessors to find that the value of the property of such a corporation is the precise equivalent of the value of its capital stock as ascertained by the rule stated above. The board was only required to treat the value of the capital stock as a guide in ascertaining the actual value of its property.

In view of the wealth, population, and area of Ohio, it is not a violent presumption that the value of the part of such a plant within that state was in the proportion that the actual value of its tangible property in Ohio bore to the total value of all its tangible property, wherever situated. The mileage basis of apportionment has been sustained where railroads, telegraph, and sleeping-car companies were the subject of assessment for taxation. Railroad Co. v. Backus, 154 U. S. 431, 14 Sup. Ct. 1114, and other cases heretofore cited. A mileage basis was not adopted by the assessors whose action is now complained of, because the express companies failed to return the datum asked for by the assessors. Precisely what rule the assessors did adopt in apportioning the total value does not clearly appear, though the inference is strong that the distribution was made largely on the basis of the relative value of tangible property in Ohio to the total value of all the tangible property owned by the complainants.

It may be that, under exceptional circumstances, a rule of apportionment based on mileage or upon the relative value of the local tangible property as compared to the total value, or based upon gross receipts within the state as compared to total gross receipts, would be inequitable and unjust. Speaking of objections to an apportionment on a mileage basis, Mr. Justice Brewer, speaking for the court, in *Railroad Co. v. Backus*, 154 U. S. 431, 14 Sup. Ct. 1114, said:

"It is true, there may be exceptional cases,—and the testimony offered on the trial of this case in the circuit court tends to show that this plaintiff's road is one of such exceptional cases,—as, for instance, where the terminal facilities in some large city are of enormous value, and so give to a mile or two in such city a value out of all proportion to any similar distance elsewhere along the line of the road, or, where in certain localities, the company is engaged in a particular kind of business requiring for sole use in such localities an extra amount of rolling stock. If testimony to this effect was presented by the company to the state board, it must be assumed, in the absence of anything to the contrary, that such board, in making the assessment of track and rolling stock within the state, took into account the peculiar and large value of such facilities, and such extra rolling stock. But whether in any particular case such matters are taken into consideration by the assessing board does not make against the validity of the law, because it does not require that the valuation of property within the state shall be absolutely determined upon a mileage basis."

The valuation of the returned personal property of the Adams Express Company for 1893 was \$53,500, and the assessed value as determined by the board is \$460,033.08. This great increase undoubtedly casts a shadow on the action of the board. Still, the bill, including the amendments incorporating the affidavits of Auditor Poe as a part thereof, does not charge any actual fraud on the part of the board, by intentionally and deliberately placing a valuation grossly in excess of the real value, for the purpose of compelling the complainant to bear a larger share of taxation than it rightfully should. As in the case last cited, it may be said "that the most that can be made out of the bill is a complaint that the assessment is too high, because the board took into consideration property outside of the state, and gave to the property within the state a value partly deduced from that without the state." But if it was lawful to value the whole plant looking to it as a unit, and looking to the market value of the capital stock as a factor in the ascertainment of that total value, and that such a method does not contravene the constitution or law of Ohio, then it would seem to follow, in the absence of specific charges of fraud, or of a departure from the method of appraisement indicated by the law, that a court of equity is without power to relieve against a mere excessive valuation. Clearly, a court of equity will not, in the absence of fraud or violation of law, enjoin an assessment merely upon allegations of excessiveness.

What we have said as to the case made by the Adams Express Company is equally applicable to the suits of each of the other express companies, there being no material difference in the averments of the several bills. Our conclusion must be, therefore, that neither the law nor the assessment thereunder is obnoxious to either the constitution of Ohio nor any federal restriction; and the decree of the circuit court dismissing the several bills must be affirmed.

WESTERN UNION TEL. CO. v. POE et al.

(Circuit Court of Appeals, Sixth Circuit. July 15, 1895.)

No. 323.

CONSTITUTIONAL LAW—TAXATION OF TELEGRAPH COMPANIES—SANFORD v. POE.
69 FED. 546, FOLLOWED.

Appeal from the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

Ramsey, Maxwell & Ramsey, for plaintiff.

J. K. Richards, Atty. Gen., and Thos. McDougall, for defendants.

Before LURTON, Circuit Judge, and HAMMOND and SEVERENS, District Judges.

LURTON, Circuit Judge. This is one of a series of bills filed by corporations of states other than Ohio to enjoin assessments for taxation under a law of Ohio, passed April 27, 1893, and known as the "Nichols Law," for the taxation of telegraph, telephone, and express companies. The facts averred in this suit are substantially like those stated and considered in the opinion of this court filed at this term in the case of *Sanford v. Poe*, 69 Fed. 546, except that the complainant is a telegraph company, while the suits disposed of by the opinion referred to were the suits of express companies.

Complainant avers that the entire value of its property in the state of Ohio, May 1, 1893, did not exceed \$647,000, and that it has been assessed for 1893 on a valuation of \$2,011,076.45, "wrongfully pretending that said sum is named as being the value of its property in the state of Ohio." The bill avers that the complainant is the owner of lines of Atlantic cable extending to Cuba and to England, and connecting in England with lines of other companies extending to all parts of Europe, and lines in Canada; and that the total number of miles of lines owned or operated by it is 189,576; and that the length of its mileage in Ohio is 8,272. It further states that:

"The cash value of its property cannot be ascertained, even approximately, by applying the proportion which its lines in Ohio bear to the whole number of miles owned or operated by it, upon a valuation of all the shares of its capital stock, because such valuation includes elements of value not existing within the state of Ohio, and not taxable within said state, and some of which are not taxable at all, and because the lines owned and operated by it are not of uniform value per mile, either as to gross or net income earned upon the various lines, or as to the cost of construction and maintenance. Your orator owns thousands of miles of ocean cable, which cost about \$4,000 per mile, while the ordinary cost of the lines in Ohio is about \$103.60 per mile. The cost of the company's lines in the more densely-settled portions of the country, as in Massachusetts, New York, Pennsylvania, and New Jersey, where also the company's trunk lines are larger, is very much greater than in Ohio. The income arising from the conduct of your orator's business is much greater in many of the states, per mile of line, than in the state of Ohio, and the average income per mile in the entire system is very much greater than that of the lines in Ohio. Your orator further shows that the market price of its stock affords no fair, reasonable, or just method of forming an opinion as to the value of its property, or of fixing a basis of value for the taxation thereof, inasmuch as the said market price is speculative and variable, and is dependent upon financial and other conditions

not at all connected with your orator, its business, or its property, while the actual value of its shares is made up of property of various kinds, in various states, and of valuable contracts with railroad companies and other companies and individuals; of franchises granted by the government of the United States by the act of July 24, 1866; of franchises granted by other states, and municipalities in them, and by foreign governments; of patent rights; of business experience, good will, and skill employed in the prosecution of its business; of investments in bonds and stocks of other corporations, aggregating \$7,633,230.12, and large investments in real estate in New York City and Chicago, and in other cities and towns outside of Ohio, aggregating more than five millions of dollars in value."

The bill then charges:

"That while, by the terms of said law, the appraisement made by said board is designated as an appraisement of the value of the property of express, telegraph, and telephone companies in the state of Ohio, it is not such in fact, but is, in truth, an attempt to levy a tax against such companies, including your orator, for the privilege of doing business in the state of Ohio; that the property of all individuals in Ohio, and of all companies in said state, other than express, telegraph, and telephone companies, is assessed in said state by ascertaining its true value, by uniform rule, as required by the constitution of said state, and that the property of the said companies should be assessed in the same manner, that is to say, by a verified return of such property in each county in which any part thereof is situated, such return setting forth the designation, amount, and value of said property; that the property of your orator in said state is of the simplest character, plainly open to observation and investigation as to its value, consisting only of poles, wires, instruments, and office furniture used in telegraphy, and there is no just or lawful reason for assessing its property in any mode or manner other than that employed generally under the laws of said state. And your orator further says that an attempt to fix a value upon its poles, wires, instruments, and office furniture by consideration of the property which it owns and the advantages which it enjoys and the business which it does in other states and countries is unjust, unfair, oppressive, and is not permissible under the constitution of Ohio and that of the United States."

By amendment, two affidavits of defendant Poe, concerning the procedure of the board in arriving at the valuation for assessment, were incorporated as amendments to the original bill. Included in this amendment is the minute of the board containing its finding of facts and conclusion as to the value of the plant of the complainant company in Ohio, from which it appears that on May 1, 1893, the capital stock of the Western Union Telegraph Company was \$94,000,820, the par value of its shares was \$100 each, and the market value \$87; that the value of the entire capital stock was on that day \$81,780,713.40. The assessors then deducted from this total valuation \$7,633,230.12, the value of stocks and bonds of other corporations owned by complainant, and also deducted \$5,013,326.64, the value of real estate owned by it outside of Ohio, leaving \$69,134,156.64 as the value of the lines owned or operated by it. The board further found that the whole length in miles of the lines of said company, both within and without the state, was 189,576, and the length of such lines in Ohio was 8,272 miles. The minute concludes as follows:

"That the proportion of the entire value of the capital stock of said company employed in business in Ohio, and represented by property taxable therein, was, on said first day of May, 1893, $\frac{8272}{189576}$ of \$69,134,156.64, which equals \$3,016,614.67. On consideration of the foregoing, the fact that property generally in Ohio is taxed at not more than two-thirds of its actual

value, the statement in the return of the company that to reproduce the lines in this state will cost the sum of \$1,649,279.10 (which the board regards as an insufficient estimate, and, at any rate, much below the existing value of said lines as an entirety), and other facts and evidence contained in the return of the company and otherwise brought to the attention of the board, on motion the board unanimously fix and determine the value of the property of the Western Union Telegraph Company in the state of Ohio to be assessed and taxed therein at the sum of \$2,011,076.45."

There is no averment that the defendants were guilty of any fraudulent purpose in making the valuation complained of as excessive.

The circuit judge, after overruling the demurrer filed by the defendants upon the ground that the Nichols law contravened the constitution of Ohio, and was therefore void, subsequently granted a rehearing, the supreme court of Ohio having in the meantime decided that the Nichols law was valid, and not obnoxious to any provision of the constitution of Ohio. See *State v. Jones*, 37 N. E. 945. Upon this rehearing the circuit court sustained the demurrers of defendants and dismissed the bill. The opinions of Judge Taft are reported in 64 Fed. 9, and 61 Fed. 449.

From this statement of the facts it is evident that the case of this complainant is completely controlled by the opinion of this court in the case, already referred to, of *Sanford v. Poe*, which was heard along with the present suit; and the case of *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530, 8 Sup. Ct. 961. It is accordingly ordered that the decree of the circuit court dismissing the bill of the present complainant be affirmed.

SOUTHERN PAC. CO. v. JOHNSON.

(Circuit Court of Appeals, Ninth Circuit. August 5, 1895.)

No. 150.

1. PRACTICE—TIME FOR PRESENTING BILL OF EXCEPTIONS—RULES OF COURT.

Rules of court prescribing the time within which bills of exceptions must be presented or settled are rules of procedure, which may be dispensed with, in the discretion of the trial judge, provided the exceptions themselves are seasonably taken, and the bill of exceptions is presented at the same term at which the judgment is rendered; and the pendency of a motion for a new trial is good ground for the exercise of such discretion in permitting a bill of exceptions to be presented after the time limited by rule.

2. NEGLIGENCE—SUFFICIENCY OF EVIDENCE.

The administratrix of one J., a locomotive engineer in the employ of the S. Ry. Co., sued that company for damages for the death of J.; alleging that it knowingly permitted defects to exist in the engine operated by J., by which he was thrown from the engine and mortally injured. It appeared upon the trial that J., at the time of his death, was running an engine with which he had been long familiar, and which was old and nearly worn out, and, in consequence, a "hard-running" engine, liable to jar and sway; that, while running at a speed of about 18 miles an hour, one of the injector valves stuck, and J. went out on the running board to close it; that such a difficulty with the valve was liable to occur on either a new or old engine, and that the course taken by J. to remedy it was the usual and proper one; that J. did close the valve, and started to return

to the cab, and, while returning, fell from the engine; that no special jar or jolt was noticed by either of three other men on the engine, sufficient to have thrown J. off if he was holding by the hand rail. *Held*, that the evidence was insufficient to establish negligence in the railway company.

8. SAME—RISKS OF EMPLOYMENT.

Held further, that the risk attendant upon going out upon the running board to remedy the sticking of the valve which was liable to occur was one of the risks of his employment assumed by J.

Error to the Circuit Court of the United States for the District of Nevada.

Action by Eliza Ann Johnson, administratrix of the estate of Horace Johnson, deceased, against the Southern Pacific Company, to recover for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. There was a verdict for plaintiff (defendant in error), and defendant (plaintiff in error) brought this writ of error. Rehearing. Reversed.

Wm. F. Herrin, E. S. Pillsbury, and G. W. Baker, for plaintiff in error.

Robert M. Clarke and C. A. Jones, for defendant in error.

Before McKENNA and GILBERT, Circuit Judges, and MORROW, District Judge.

MORROW, District Judge. This case is now before the appellate court upon a rehearing granted February 28, 1895. The action was instituted in the circuit court for the district of Nevada by Eliza Ann Johnson, administratrix of the estate of Horace Johnson, deceased, against the Southern Pacific Company, to recover damages for the death of plaintiff's intestate, alleged to have been caused by defendant's negligence. Plaintiff (defendant in error here) recovered a verdict of \$25,000, but consented to a reduction to \$15,000, in lieu of a new trial. The defendant (plaintiff in error here) sued out this writ of error, and arguments were had, and the cause submitted for decision on April 10, 1894. The opinion upon that hearing was rendered November 5, 1894. The determination which the court then reached was that the verdict should be set aside, and the case remanded for a new trial, on the ground that the trial court had committed an error in refusing to grant the motion of plaintiff in error to instruct the jury to find a verdict in its favor for the reason that the evidence showed conclusively that the deceased had been guilty of contributory negligence. 12 C. C. A. 479, 64 Fed. 951. While the insufficiency of the evidence tending to show negligence on the part of the company was considered, the decision was based upon the question of contributory negligence. After a full and careful reconsideration of the case as presented upon the rehearing, we are still of the opinion that our ultimate conclusion, to grant a new trial, was correct; but we place our reasons for so holding, not upon the question of contributory negligence on the part of the deceased, but upon the insufficiency of the evidence, as contained in the bill of exceptions, to justify the court in submitting the case to the jury at all.

Before entering into a consideration of this question, there is a preliminary objection to be disposed of. The defendant in error in-

sisted at the former hearing that there was no proper bill of exceptions before this court. This was considered, but not noticed in the opinion, the objection being deemed not well founded. Inasmuch as this point has again been earnestly pressed upon the attention of the court, both in the petition for a rehearing and on the argument, we will briefly state the reasons which impel us to consider this objection to the bill of exceptions untenable. It is claimed that the bill of exceptions, and the errors assigned therein, should be disregarded, and the judgment affirmed, for the reason that the bill of exceptions was not served, and was not presented to the judge, or allowed, within the time provided by the rules of court, and because the exceptions were waived, and the bill of exceptions abandoned, by failure to present the same within the time required by the rules of court. Rules 23 and 25 of the circuit court for the district of Nevada are relied on to sustain this contention. Rule 23 provides that:

"All exceptions to the charge of the court to the jury shall be specified in writing immediately after the conclusion of the charge and handed to the court before the jury leave the box. The bill of exceptions must be prepared in form and presented to the judge within ten days after verdict, and in default thereof the exceptions will be deemed waived."

Rule 25 provides that:

"Where exceptions are taken or there is a demurrer to evidence, the party shall not be required to prepare at the trial his bill of exceptions, or demurrer or statement of evidence, but shall merely reduce such exceptions to writing, or make a minute of the demurrer to the evidence, as the case may be, and deliver it to the judge. The bill of demurrer shall, within ten days after the determination of the trial, be drawn up, filed, and a copy be served on the attorney of the adverse party, who, within five days thereafter, may prepare, serve and file amendments thereto; and in default thereof the right to propose amendments shall be deemed waived, in which case within five days thereafter the proposed bill may be presented by the moving party to the judge for allowance. * * * In all cases where a party proposing a bill of exceptions fails to present his bill, or bill and the proposed amendments, to the judge for allowance or settlement within the time limited as aforesaid, his bill of exceptions shall be deemed abandoned, and his right thereto waived."

The verdict was returned and judgment entered on June 17, 1893, which was during the March term. The bill of exceptions was not presented for allowance or settlement, nor was the same allowed or settled and certified to, until September 18, 1893,—90 days subsequent to the verdict and entry of judgment. These proceedings were, however, still within the March term of the circuit court for the district of Nevada, the court having but two terms during the year,—one beginning on the third Monday of March, and the other on the first Monday of November. 19 Stat. 4. No orders of court, or stipulations between the parties, extending the time within which to prepare and present the bill of exceptions, appear of record in the transcript. On June 24, 1893,—seven days subsequent to the verdict and judgment,—notice of a motion for a new trial was given by plaintiff in error. This, however, was not disposed of until September 18, 1893, when, as an alternative to the granting of a new trial, the defendant in error consented to a reduction of the verdict from \$25,000 to \$15,000.

According to the rules of the circuit court, above referred to, no further time having been granted by the court, or consented to by the parties, the time within which to file a bill of exceptions expired on June 27, 1893. By the strict terms of these rules, the bill of exceptions would be deemed to have been abandoned, and the right thereto waived. But adjudications in the supreme court of the United States and in the circuit court of appeals hold that rules of court fixing the time within which bills of exceptions are to be presented, allowed, or settled, and certified to by the trial judge, are merely directory. These decisions are to the effect that such rules do not control absolutely the action of the judge; that he is at liberty to depart from their terms, to subserve the ends of justice. *U. S. v. Breitling* (1857) 20 How. 254; *Dredge v. Forsyth* (1862) 2 Black, 568; *Muller v. Ehlers* (1875) 91 U. S. 249; *Hunnicutt v. Peyton* (1880) 102 U. S. 350; *Chateaugay Ore & Iron Co., Petitioner* (1888) 128 U. S. 544, 9 Sup. Ct. 150; *Hume v. Bowie* (1893) 148 U. S. 245, 13 Sup. Ct. 582. Such is the law of this circuit, as declared in the case of *Southern Pac. Co. v. Hamilton*, 4 C. C. A. 441, 54 Fed. 468, 474. In other words, these rules are regarded as rules of procedure, which may be dispensed with, in the discretion of the judge, provided, always, that the exceptions themselves are seasonably taken and reserved. As was tersely stated by the supreme court in *Dredge v. Forsyth*, *supra*:

"It is always allowable, if the exceptions be seasonably taken and reserved, that it may be drawn out in form, and sealed by the judge, afterwards; and the time within which it may be so drawn out and presented to the court must depend on the rules and practice of the court, and the judicial discretion of the presiding justice."

But it would seem that the exercise of this discretion is limited, under ordinary circumstances, to the same term in which judgment is rendered. *Preble v. Bates*, 40 Fed. 745. It cannot be done at a subsequent term, except, perhaps, under very extraordinary circumstances. See cases cited *supra*; also, *Bank v. Eldred*, 143 U. S. 293, 12 Sup. Ct. 450; *U. S. v. Jones*, 149 U. S. 262, 13 Sup. Ct. 840; *Morse v. Anderson*, 150 U. S. 156, 14 Sup. Ct. 43; *Ward v. Cochran*, 150 U. S. 597, 602, 14 Sup. Ct. 230; *Railway Co. v. Russell*, 9 C. C. A. 108, 60 Fed. 501; *Miller v. Morgan*, 14 C. C. A. 312, 67 Fed. 82. No such objection arises here, however, since the bill of exceptions was settled and certified to within the same term that the verdict and judgment were entered. The trial judge being empowered, according to the weight of authority, with a discretion as to when a bill of exceptions should be settled and certified to (so long as it is within the same term that judgment was entered, and, it would seem, under very extraordinary circumstances, beyond the term at which judgment has been rendered), the question which we are called upon to determine in this case is whether this discretion has been abused. We entertain no doubt that this question should be answered in the negative. There is not the slightest intimation that this discretion has been exercised to the detriment of the substantial rights of the parties. But, aside from the general and inherent power possessed by courts to suspend their own rules, or to except from their provisions a particular case, to subserve the ends

of justice, we think that the pendency of the motion for a new trial is a sufficient reason in this case why the action of the trial court in settling and certifying to the bill of exceptions should be sustained. It appears that the bill was settled and certified to on the day the court disposed of the motion for a new trial, viz. on September 18, 1893. The function of a bill of exceptions is to make a record for the appellate court. Black, Law Dict.; Bouv. Law Dict.; Yates v. Smith, 40 Cal. 669. Had the motion for a new trial prevailed, it is obvious that the labor of engrossing, settling, and certifying to the bill of exceptions would have been entirely useless. It was deferred until the motion for a new trial had been disposed of. Whether the mere pendency of a motion for a new trial operates, ipso facto, as an extension of time to prepare and have settled a bill of exceptions, it is not necessary to decide, but it was certainly a circumstance proper to be considered by the trial judge in the exercise of his discretion. The case of Woods v. Lindvall, 1 C. C. A. 34, 48 Fed. 73, is in point, although there the motion for a new trial was determined, and the bill of exceptions allowed and filed, at a term subsequent to the entry of judgment. In that case the verdict was returned on February 11, 1891, and on the same day judgment was entered on the verdict, according to the usual practice of that district. On the following day, pursuant to section 987, Rev. St. U. S., plaintiffs in error asked and obtained a stay of execution for 42 days, to enable them to file a petition for a new trial. During the January term, and within the 42 days, such petition for a new trial was filed, but the January term adjourned sine die before the motion was heard or determined. At the succeeding June term, 1891, the petition for a new trial was argued and overruled; and at the same term, to wit, July 30, 1891, a bill of exceptions was signed, sealed, and filed. The defendant in error duly objected to the allowance of the bill because the trial term had expired. It further appeared that no order had been entered at the January term, 1891, expressly extending the time for filing the bill to the June term, 1891, nor was any consent given that it might be so filed. Upon this state of facts, defendant in error made a motion to strike the bill of exceptions from the record, on the ground that it was not filed in time to become a part of the record. This was overruled by the circuit court of appeals. Judge Thayer, in the course of his opinion, said:

"Since the decision in Rutherford v. Insurance Co., 1 Fed. 456, we believe the practice has been uniform in all the districts of this circuit, where the custom prevails of entering judgment immediately on the rendition of verdict, to allow a bill of exceptions during the term at which the motion for a new trial is overruled, even though it happens to be a term subsequent to the entry of judgment. This practice, according to our observation, has become so common that it may be termed a rule of procedure in this circuit. It is a convenient practice. It obviates the necessity of settling a bill of exceptions at the trial term which is useless labor if a motion for a new trial is continued to and is sustained at, the succeeding term. And in these days, when it is customary to take notes of trial proceedings in shorthand, the practice in question is not open to those objections formerly urged against it. We are of the opinion, therefore, that the practice which has hitherto obtained in many districts of the circuit should be upheld unless it is over-

borne by controlling authority, and we find no such authority. On the contrary, we think the rule requiring bills of exception to be filed at the term when judgment is rendered must be understood to mean the term when the judgment becomes final, and, by reason of its becoming final, the court loses control of the record. It has been held several times that, if a motion for a new trial is duly filed by leave at the trial term, the judgment does not become final until such motion is determined. *Rutherford v. Insurance Co.*, supra; *Brown v. Evans*, 8 Sawy. 502, 17 Fed. 912; *Railway Co. v. Murphy*, 111 U. S. 488, 4 Sup. Ct. 497; *Brockett v. Brockett*, 2 How. 238; *Memphis v. Brown*, 94 U. S. 716, 717; *Slaughterhouse Cases*, 10 Wall. 289."

It has been held, under a statute of the state of Missouri requiring all exceptions to be filed during the term at which they were taken, and all exceptions during the trial of a cause to be embraced in one bill, that the continuance of the motion for a new trial from the trial term to a succeeding term keeps the record open, prevents the judgment from becoming final, and enables the court to allow a bill of exceptions during the term at which the motion was finally determined. *Riddlesbarger v. McDaniel*, 38 Mo. 138; *Henze v. Railroad Co.*, 71 Mo. 636, 644. In *Bank v. Steinmitz*, 65 Cal. 219, 3 Pac. 808, it appeared that the writ of error and bond for the removal of the cause from the state supreme court to the federal supreme court were not filed within 60 days after the judgment, as required by section 1007 of the Revised Statutes of the United States, but were filed within 60 days after the order denying the motion for a new trial. It was held that the motion for a new trial operated as a postponement of the time for filing the writ of error and bond until the disposition of that motion. We are not prepared to say that in this circuit the motion for a new trial has the effect declared in these cases, but we are of opinion that, under the circumstances of this case, the trial judge was fully justified in the discretion exercised by him, and that the bill of exceptions is now properly before the court.

Having disposed of this preliminary objection to the record, we will now proceed to consider the important question of this case, as raised by the first assignment of error, viz.: Did the trial court err in refusing to take the cause from the jury, or, in other words, was the evidence sufficient to justify the verdict of the jury? This inquiry necessarily involves a close scrutiny of the evidence. That this may, in its turn, be more clearly understood, let us briefly refer to the issues of the case: The action was brought under section 3898, Gen. St. Nev., which provides:

"Whenever the death of a person shall be caused by wrongful acts, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued), have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured * * *."

The complaint alleges that:

"On the 14th day of August, 1892, said deceased, Horace M. Johnson, was a locomotive engineer employed by the defendant, Southern Pacific Railroad Company, on one of its engines, and was in the proper and necessary discharge of his duty as an engineer, in running the engine; and on said day, through the willful carelessness and negligence of the said defendant, Southern Pacific

Railroad Company, in failing and neglecting to keep its engines in repair, and without any carelessness, negligence, or fault of the said Horace M. Johnson, and by reason of defects in the said engine,—of which defects defendant had notice, and which it was its duty to repair, and which defects it knowingly permitted to exist,—the said Horace M. Johnson was thrown from the said engine, which he was at the time operating as engineer for the said defendant, and was mortally injured, of which mortal injury the said Horace M. Johnson afterwards, and on the 20th day of August, 1892, died," etc.

The answer denies that said Johnson met his death by or through any carelessness or negligence of the defendant; denies that the engine was out of repair, that defendant failed or neglected to keep the engine in repair, that it had notice that the engine was out of repair; and avers that Johnson met his death by and through his own carelessness and negligence in going out upon the running board of the engine.

The rule which should govern the action of the trial court in allowing or refusing the motion to direct the jury to give a verdict one way or the other is thus stated in *Commissioners v. Clark*, 94 U. S. 278, 284:

"Decided cases may be found where it is held that, if there is a scintilla of evidence in support of a case, the judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule; to wit, that, before the cause is left to the jury, there is or may be in every case a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed."

And in *Elliott v. Railroad Co.*, 150 U. S. 245, 14 Sup. Ct. 85, the following language is used:

"It is true that questions of negligence and contributory negligence are, ordinarily, questions of fact, to be passed upon by a jury; yet, when the undisputed evidence is so conclusive that the court would be compelled to set aside a verdict returned in opposition to it, it may withdraw the case from the consideration of the jury, and direct a verdict."

The same doctrine was decisively settled, and very clearly stated, in *Pleasants v. Fant*, 22 Wall. 116. Justice Miller, in the course of his opinion, said:

"It is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor,—that is the business of the jury,—but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

Other cases announcing the same rule are *Blount v. Railway Co.*, 9 C. C. A. 526, 61 Fed. 375; *Railroad Co. v. Houston*, 95 U. S. 697; *Herbert v. Butler*, 97 U. S. 319; *Bowditch v. Boston*, 101 U. S. 16; *Griggs v. Houston*, 104 U. S. 553; *Montclair v. Dana*, 107 U. S.

162, 2 Sup. Ct. 403; *Randall v. Railroad Co.*, 109 U. S. 478, 3 Sup. Ct. 322; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125; *Marshall v. Hubbard*, 117 U. S. 415, 6 Sup. Ct. 806; *Coyne v. Railway Co.*, 133 U. S. 370, 10 Sup. Ct. 382; *Gunther v. Insurance Co.*, 134 U. S. 110, 10 Sup. Ct. 448; *Railroad Co. v. Converse*, 139 U. S. 469, 11 Sup. Ct. 569; *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835; *Meehan v. Valentine*, 145 U. S. 611, 12 Sup. Ct. 972; *Railroad Co. v. McDonald*, 152 U. S. 262, 14 Sup. Ct. 619,—and, in this circuit, *Southern Pac. Co. v. Hamilton*, 4 C. C. A. 441, 54 Fed. 468; *Southern Pac. Co. v. Lafferty*, 6 C. C. A. 474, 57 Fed. 536; *Railway Co. v. Novak*, 9 C. C. A. 629, 61 Fed. 573.

Keeping this rule in mind, let us examine the evidence tending to support the principal issues in the case. The circumstances leading to and attending the accident to Johnson are as follows: Johnson received an order on August 14, 1892, to take engine 1,266 and a freight train to Winnemucca. He left Wadsworth at about 6:30 in the morning of that day. On going down Brown's hill, about 35 miles from Wadsworth, he started the right-hand injector to prime some water into the boiler, it being then pretty low. It was necessary to work the injector for the purpose of throwing water into the boiler from the tank, in order to keep the boiler from burning. The injector is worked from the cab. Upon shutting it off, to give the fireman a chance to get up more steam, the injector check valve stuck, and steam and hot water poured from the boiler into the cab. Thereupon Johnson picked up an eight-inch monkey wrench, and went out of the cab, onto the running board, to tap down the right-hand injector check valve. This check is situated out on the side of the boiler, where the injecting pipe connects with it. Access to it is gained by means of the running board, which extends from the cab to about 1½ feet further than the check valve, and is about 7 to 10 inches wide. There is a hand rail fastened alongside the boiler. The train, at the time of the accident, was going on a down grade, impelled by its own momentum, at about 18 miles an hour. The track where the accident occurred was straight, with no sags. Johnson, as stated, went out on the running board, and tapped down the right-hand injector check valve, whereupon the water and steam ceased coming into the cab. After tapping down the check valve, and while in the act of returning to the cab, Johnson either fell or was thrown from his position on the running board, and was first seen, after his disappearance, doubled up, either just striking the ground, or else, having struck the ground, he was on the rebound. He subsequently died from the injuries sustained by the fall. There was no evidence tending to show how the deceased fell from the engine, or what caused him to be thrown from it. No one saw him fall from his place on the running board. The testimony tended to show that Johnson was a competent and experienced engineer, and that he had operated engine No. 1,266 from one to three years next preceding the accident; that this engine was old and worn out; that, as such, it was a hard-riding engine,—that is, it did not run smoothly, being liable to a jarring or swinging mo-

tion, known in railroad parlance as "lost motion." Freeman, the fireman, testified that:

"Engine No. 1,266, on the 14th day of August, 1892, was a hard-running engine. I think it would be from looseness of the engine. Continual wear, I should think, would make it loose,—I mean, wear of the boxes. The boxes were loose, and the cylinders were loose, and there would be a continual pounding and jarring. There was more or less swinging motion in cab and locomotive, occasioned by this looseness. At the time of the accident, as the engine was going down Brown's hill, there was considerable jarring. It was a hard-running engine."

This testimony was fully corroborated by other witnesses. It also further appeared that six days after the accident to Johnson the engine broke down completely, and had to be pulled into the shops for repairs; that within two months after Johnson's death it was taken to Sacramento for general repairs; that its condition then was such that it had to be hauled as a load.

It was claimed by defendant in error that the deceased was thrown from the engine by the jarring of the engine, and the jury were asked to draw that inference from the fact that the engine was old and worn out, and susceptible to "lost motion"; but the testimony of the only witnesses who were on the engine at the time of the accident does not justify this inference. Driscoll, who was a brakeman on the train, and happened to be in the cab at the time of the accident, saw Johnson just a moment before the latter disappeared. He testified that he had been on the engine some 2 months previous to the accident, and had been in the cab some 15 minutes before the accident. His testimony as to the jarring was as follows:

"It was not so rough that the engineer could hardly keep his seat, but I never was on an engine that jarred as much as this one. It would not jar a man so much that he would be likely to slip off his seat. If he was in the cab, he could not. I did not say the jarring motion was sufficient to throw a man off the running board. Q. Why won't you say it? Is it because you do not know? Do you mean this: that the up and down motion, or the jarring motion, that constituted it a rough-riding engine, would be sufficient to throw a man off the running board if he had his hand on the hand rail? A. I do not think it would, if he had his hand on the hand rail. Q. Your experience is that engineers don't very often go out on the running board without keeping their hand on the hand rail? A. Yes, sir; as soon as they can get it on there. Q. Then you do not conclude that the jarring you have described, if the engineer had his hand on the hand rail, would be sufficient to throw him off, if he was exercising any care? A. If he had his hand on the hand rail, I do not think it would. I would not go out without having my hand on the rail."

L. S. Bell, also a brakeman, who happened to be on the engine at the time of the accident, testified to the swaying of the engine, as follows:

"I can tell pretty close to the place where Johnson fell off. At that place the road is straight. At the time, just before I knew that Johnson had fallen off, as near as I can remember, we were going down hill, without steam. There was no violent motion of the locomotive to the right and left, nor was there at any time when I was sitting in the position I have described. I saw Johnson go through the window. There was no peculiar motion or violent motion of the locomotive at the time I remember seeing him go out. The motion was not such as to render it unsafe for me to sit where I was sitting. I had my foot braced against the cab. I was sitting on a seat about

one and one-half to two feet long. There were no supports upon the left or right. My seat was just as if I was sitting on that desk. My feet were on the cab, and I was sitting on the tender."

The testimony of Freeman, the fireman, that "there was considerable jarring," has already been referred to; but it should be observed that that witness nowhere makes the statement that the jarring or swinging motion, whatever may have been its nature, was sufficiently violent to wrench Johnson's hand from the hand rail.

The use of the injectors is to convey water from the tank into the boiler. There is one on each side of the engine. The injector check valves are, as stated, out on the side of the boiler where the injecting pipe connects with them, which is near the end of the running board. These valves are worked from the cab by means of the injectors, and are known as "round-cup valves." The process of operation is as follows: When the injector is started in the cab, the velocity of the water rushing from the tank into the boiler raises this check valve. While the injector is kept working the check valve remains up,—kept thus by the force of the water. When the injector is shut off, and water ceases entering the boiler, the check should reseal itself. If it does not, then it would be stuck. An engineer would know whether a check is stuck by the escaping of steam into the cab through the overflow pipes. When this occurs the usual and customary practice among engineers, as testified to, is to go out on the running board, while the train is in motion, and tap down the check with a hammer, or, as was used in this case, a monkey wrench. This is the most convenient and ordinary method of remedying the sticking of the check valve, and arresting the flow of hot steam into the cab. It could also be done by stopping the train, and then going out on the running board and tapping down the check. Or the "frost cock" could be used. This last, however, seems to be seldom resorted to, for it would only result in preventing the hot steam from escaping into the cab. It would not cause the check to reseal itself. The causes which conduce to the sticking of check valves are either cinders, or scales from off the boiler, or some other foreign particle in the water getting into the check valve; or it may be that the check is too close-fitting in its cage; or, again, it may be defective and worn out. It is not an uncommon thing for checks to stick. It is as likely to occur to a new and smooth-working engine as to an old and worn-out one, in the condition of engine 1,266. The most frequent and likely cause is the presence of some cinder, or other small particle. This cannot be foreseen,—may happen at any time; and the only way in which one can detect whether the check will stick, or not, is by working the injector. So far as the right-hand check valve, in this case, was concerned, the evidence tended to show that it was somewhat worn, reduced in size, and that a washer had been placed on top of it to fill up the vacant space; that Johnson had reported on July 26, 1892, in the regular book kept in the roundhouse at Wadsworth for the purposes of reporting need of repairs to engines, that the right-hand injector check valve needed repairing. Freeman, the fireman, testified that the check was overhauled after it had been

reported by Johnson, which was 10 to 15 days before the accident, according to that witness' recollection. In subsequent reports made by Johnson,—viz. on July 30th, August 5th, 6th, 10th, and 13th, he makes no mention of the injector check valve,—but refers to the other defects, not connected with the injectors. It is claimed by the defendant in error that Johnson made a report on August 13, 1892,—the day preceding the accident,—as to the particular defect in the working of the injectors, and that this report was made in the regular report book kept by the company in the roundhouse for that purpose. The book purporting to contain reports from August 10th to August 18th was produced, and it was sought to show that a report between the one dated "August 13th, 1892," signed "Shipley," and the one dated "August 13th, 1892," signed "Marshall," had been torn out. There was a piece of paper where it was claimed a page had been extracted, about one-fourth of an inch in width, the lower edge of which was ragged. This piece of paper is of the same color and texture as the pages immediately preceding and following it, and is bound into the book. It was contended that a page had been torn out, so that its contents might not be disclosed at the trial. But, assuming that a page of the report book has been destroyed, there is an entire absence of evidence as to what it contained. The principle of the maxim, "*Omnia præsumuntur in odium spoliatoris*," as applicable to the destruction or suppression of a written instrument, is that such destruction or suppression raises a presumption that the document would, if produced, militate against the party destroying or suppressing it. This presumption, however, will not suffice to establish the contents of such document, without proper secondary evidence. It is only when this secondary evidence is weak and vague that the presumption takes effect. *Bott v. Wood*, 56 Miss. 140; *Insurance Co. v. Evans*, 9 Md. 1. But whether Johnson did, or did not, on the 13th of August, 1892, make a report as to defects in the right-hand check valve, becomes immaterial, in the view we take of the insufficiency of the evidence tending to show how Johnson met his fatal injury, or the proximate cause thereof.

This résumé of the evidence, though stated briefly and in general terms, will serve to show the nature of the case presented to the jury, upon which the negligence of the company is sought to be predicated. The allegation of the complaint is that the deceased was thrown from the engine by reason of defects in the engine, of which defects the company had notice, and which it was its duty to repair, and which it failed to do. We are met at the very threshold of this inquiry by the question, what were those defects? Was it the sticking of the check valve, or was it some other defect? And were such defects the proximate cause of the fall, and fatal injury to the deceased? The answer to these inquiries must come from the evidence alone, and, obviously, cannot be supplied by conjecture or surmise. How the deceased fell from the running board—what caused him to fall—was not shown. None of the witnesses saw him disappear. Johnson, when last seen by the witness Driscoll, was in the act of returning, or just

about to return, to the cab. He had accomplished the object which had induced him to go out. He had tapped down the check valve, for steam and hot water ceased coming into the cab. It is therefore clear that the act of tapping down the check valve—even conceding that it was defective, and that the company knew of this, and failed to remedy it—could not have had anything to do with Johnson's fall, since it appears affirmatively that he had already done that. But it is urged that, if the right-hand injector check valve had not stuck, Johnson would not have had to go out and incur the risk he encountered. It is true that the sticking of the check valve was the occasion of Johnson's going out on the running board. It might even be said that it was necessary to do so, in order to prevent the further escape of steam into the cab. But it must, nevertheless, have been the proximate cause of deceased's fall. "*Causa proxima, non remota, lex spectatur.*" Kent, Comm. 302; *Railway Co. v. Kellogg*, 94 U. S. 469. The bare fact that the check stuck, causing Johnson to go out on the running board, is not, of itself, sufficient to charge the company with negligence; especially so in view of the uncontradicted testimony that that will happen to any engine, whether it be new or old, and that the most frequent cause is the unavoidable and unforeseen presence of cinders or other small particles in the check valve. But assuming that the evidence satisfactorily establishes the fact that the check valve failed to seat itself because of a defect in its mechanism or working, due to the company's negligence, we are no nearer to a solution of the vexed question as to how this defect caused Johnson to be thrown off the engine. Indeed, so far as the facts of this case are concerned, going out on the running board to tap down a defective check valve is fraught with no more danger or peril than it is to readjust one which has stuck on account of a cinder or particle of dirt. But it is claimed that Johnson may have lost his hold of the hand rail by reason of a sudden lurching of the engine. That the engine, in its then worn-out condition, was susceptible to a jarring or swinging motion, termed "lost motion," was clearly established. "It was a hard-riding engine." That this somewhat increased the risk of going out on the running board, by making it more difficult to hold on, is conceded. But the difficulty about this phase of the case is that none of the witnesses testify to any "sudden lurch," or to any jarring sufficiently violent to wrench Johnson's hand from the hand rail. It does not appear that at this particular time there was any more jarring, or that it was greater in point of force, than was usual or peculiar to this engine, and which Johnson, as its engineer, and by reason of his long experience and intimate acquaintance with its condition and movements, must have known, and was presumably accustomed to. While there were curves in the road over which they were running, it was testified that where the accident happened the track was straight, with no sags; that the engine was running on a down grade, impelled by its own momentum, at the rate of about 18 miles an hour. That the act of going out on the running board was deemed usual and

proper, even on an engine in the condition in which No. 1,266 was, is evidenced by the fact that the fireman, Freeman, went out on the running board, soon after the accident, to tap down this same check valve. The two engineers who subsequently had charge of the engine did the same. Johnson's fate does not seem to have deterred them, nor, so far as the evidence discloses, did they experience any difficulty, or consider that they were doing anything unusual or perilous. The fact that the general condition of the engine was old and worn out; that she was a hard-riding locomotive; that her right-hand injector check valve was defective,—these facts do not, of themselves, make out a case against the company. There must be some evidence tending to show, or from which a reasonable inference can be drawn to justify submitting the case to the jury, that the injury proceeded proximately from some defect in the condition of the locomotive, whether it be the jarring, or some other cause. And it must further be shown, in this case, that the deceased was thrown from the engine by reason of such defect, which the company knew of, and failed to repair. There is an entire absence of evidence as to how Johnson fell from the engine, and the cause of his fall is involved in uncertainty and doubt. That he was thrown from the running board by reason of the jarring of the locomotive is not the only and exclusive inference that the evidence is susceptible of, as counsel for defendant in error contends. If it were the only reasonable inference that could be drawn, it might then well be said that the question should have been submitted to the jury, to abide by their judgment and verdict. But whether the deceased fell from the engine by reason of his own negligence, or was thrown off, is uncertain. Even an appeal to conjecture, if such could supply the place of legitimate evidence, does not aid us, for several hypotheses present themselves. Johnson, in turning around to return to the cab, may have released his hand from the hand rail, or he may have slipped, or possibly, as suggested by counsel for the company, he may have become dizzy. If the hand rail or the foot board had been defective and given away, thereby precipitating Johnson to the ground, or had the check valve, by its defective operation, rendered either the hand rail or the foot board less secure than usual, manifestly, a different case would be presented for our consideration; but the fact, under the evidence of this case, that the deceased was injured by a fall from the running board, is not sufficient to impute negligence to the company. The general rule being that negligence cannot be presumed from the fact of the injury, though it may be inferred from the facts proved, it, obviously, cannot be based on "guesses or conjecture." *Redmond v. Lumber Co.*, 96 Mich. 545, 55 N. W. 1004. As was said in *Short v. Railroad Co.*, 69 Miss. 848, 13 South. 826:

"The deceased was killed, and no one knows how. That is not enough to subject the railroad company to liability. Negligence must be shown."

In the case of *Chandler v. Railroad Co.*, 159 Mass. 589, 35 N. E. 89, this language was employed, respecting the correctness of the

ruling of the trial judge in directing a verdict to be entered for the defendant:

"How the intestate came to his death, is purely a matter of conjecture. There is no evidence that the ladder down which he went was defective. Whether he fell from the ladder by reason of negligence on his part, or whether, without looking to see whether the coal car was in its place, he attempted to jump upon it, is uncertain. There is an entire absence of evidence as to how the intestate happened to fall to the ground, and it is not enough to show that one conjecture is more probable than another."

But, aside from the insufficiency of the evidence tending to show how or what caused Johnson's fall and fatal injury, there is another phase of this case which is equally conclusive against the right of defendant in error to recover, and that is upon the doctrine of assumption of risk. Considering the view we take of the insufficiency of the evidence to justify submitting the case to the jury, it will not be necessary to discuss this last proposition at any length. The act of Johnson in going out on the running board, while the train was in motion, to tap down the check valve, was incidental to the business of an engineer. It was "usual," "customary," and "necessary" to be done, according to the witnesses. It entered into the nature of his employment, and became one of the duties thereof, and he assumed the ordinary risks connected therewith. The general rule is well stated in the last edition (fourth) of Shear. & R. Neg.:

"A servant is held to assume the ordinary risks of the business upon which he enters, so far as those risks, at the time of his entering upon the business, are known to him, or should be readily discernible by a person of his age and capacity, in the exercise of ordinary care. But he does not assume any risks not thus known or discernible, nor any which do not exist at the time when he enters into his master's service, and to which his attention is not called before he suffers injury therefrom. These risks, moreover, must be inherent in the nature of the business, and must not arise from defects in the master's discharge of his personal duties." Section 185, p. 315.

But it is contended that, under the facts of this case, this act of Johnson was no longer an ordinary risk; that it became an extraordinary risk, on account of the condition of the engine, which rendered going out on the running board more hazardous, owing to the jarring or swinging motion. There are two difficulties which militate against this contention. In the first place, there is no evidence tending to show, or from which a reasonable inference can be deduced, that the increased risk contributed proximately to Johnson's fall. In the second place, Johnson, having been the engineer of this particular locomotive from one to three years previous to the accident, and being competent and experienced, must have known of the jarring or "lost motion" attending the movements of the engine,—he knew that it was a hard-riding engine; and he must have appreciated whatever increased hazard there was connected with the act of going out on the running board and tapping down the check valve while the engine was in motion, traveling at the rate of 18 miles an hour. It was not, therefore, an unknown or unseen peril. He went out with his eyes wide open to the exigencies of the situation. Having incurred the risk voluntarily, with full knowledge of the situation, the company cannot be held responsible. Their rules imposed care and caution upon his actions, and did not require him to place himself

in a position of unnecessary danger or peril, assuming that there was such. The law applicable to this proposition, and known as the doctrine of "*Volenti non fit injuria*," is thus stated very clearly in 2 Thomp. Neg. p. 1008:

"If the servant, before he enters the service, knows, or if he afterwards discovers, or if, by the exercise of ordinary observation and reasonable skill and diligence in his department of service, he may discover, that the building, premises, machine, or fellow servant in connection with which or with whom he is to labor is unsafe or unfit in any particular, and if, notwithstanding such knowledge or means of knowledge, he voluntarily enters into or continues in the employment, without objection or complaint, he is deemed to assume the risk of the danger thus known or discoverable, and to waive any claim for damages against the master in case it shall result in injury to him."

In *Buzzell v. Manufacturing Co.*, 48 Me. 113, it was tersely said:

"If the danger is known, and the servant chooses to remain, he assumes, it would seem, the risk, and cannot recover."

In *Fitzgerald v. Paper Co.*, 155 Mass. 155, 29 N. E. 464, the following language is used:

"One who knows of the danger from the negligence of another, and understands and appreciates the risk therefrom, and voluntarily exposes himself to it, is precluded from recovering for an injury which results from the exposure. It has often been assumed that the conduct of the plaintiff in such a case shows conclusively that he is not in the exercise of due care. Sometimes it is said that the defendant no longer owes him any duty; sometimes, that the duty becomes one of imperfect obligation, and is not recognized in law. In one form or another, the doctrine is given effect, as showing that in a case to which it applies there is either no negligence towards the plaintiff on the part of the defendant, or want of due care on the part of the plaintiff. * * * Therefore, when it appears that a plaintiff has knowingly and voluntarily assumed the risk of an accident, the jury should be instructed that he cannot recover, and should not be permitted to consider the conduct of the defendant by itself, and find that it was negligent, and then consider the plaintiff's conduct by itself, and find that it was reasonably careful."

In *Mundle v. Manufacturing Co.*, 86 Me. 400, 403, 30 Atl. 16, it was said:

"But in addition to what we have already stated in reference to the power of the servant to waive, or even dispense with, the obligation which the employer is under to him, the decisions of our own court, as well as elsewhere, hold that a plaintiff may be precluded from recovering when he voluntarily assumes a risk which he knows and appreciates, whether existing at the time he enters the service, or coming into existence afterwards. It is in this class of cases that the principle expressed by the maxim, '*Volenti non fit injuria*,' has the effect to debar the plaintiff from a remedy which might otherwise be open to him. * * * It would not be just for one who has voluntarily assumed a known risk, or such as might be discovered by the exercise of ordinary care on his part, and for which another might be culpably responsible, to hold that other responsible in damages for the consequences of his own exposure to those risks which were known and understood by him."

The following authorities all announce the same doctrine,—some of them, under circumstances quite similar to those of the case at bar: *Judkins v. Railroad Co.*, 80 Me. 418, 14 Atl. 735; *Sullivan v. Manufacturing Co.*, 113 Mass. 396; *Leary v. Railroad Co.*, 139 Mass. 580, 2 N. E. 115; *Crown v. Orr*, 140 N. Y. 450, 35 N. E. 648; *Sweeney*

v. Railroad Co., 57 Cal. 15; Tuttle v. Railroad Co., 122 U. S. 189, 7 Sup. Ct. 1166.

The doctrine of an assumption of risk by the employé does not detract from, or lessen in the least, the duty of the employer towards the former to supply and maintain suitable and safe instrumentalities, and a reasonably safe place, for the performance by the employé of the work required of him, since it imports, as an inseparable prerequisite, complete knowledge and understanding on the part of the employé of the risk or danger, and an intelligent and full consent, express or implied, to abide by the consequences. In this case, whatever was the increased hazard in going out on the running board while the engine was in motion, the conclusion is inevitable that Johnson, who was a man of intelligence and experience, knew and appreciated it; and, that being so, he must be deemed to have acted accordingly, and to have assumed the incidental risk or peril.

In this view of the evidence in this case, it is not necessary to notice the other errors assigned in the bill of exceptions. We think, upon the evidence as presented in the record, the judge should have instructed the jury to find a verdict for the defendant. The judgment of the circuit court is therefore reversed, and the case remanded for a new trial.

McKENNA, Circuit Judge, concurs in the judgment.

CALDERON v. ATLAS STEAMSHIP CO., Limited.

(Circuit Court of Appeals, Second Circuit. July 30, 1895.)

SHIPPING—LOSS OF GOODS—CONTRACT LIMITING LIABILITY.

A bill of lading under which certain bales and crates of duck uniforms were shipped contained a clause providing that the carrier should not be liable for gold, silver, and other enumerated articles, "or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor with the value therein expressed, and a special agreement is made." *Held*, that this should be construed, not as excluding any liability for packages exceeding \$100 in value, but as excluding liability for the excess over \$100, and that the stipulation was a reasonable and valid limitation upon the carrier's liability. 64 Fed. 874, affirmed. Wallace, Circuit Judge, dissenting, was of opinion that the provision was intended to exclude all liability, and that, even accepting the court's construction, the clause was void as applied to a loss by negligence, as in direct contravention of the act of February 13, 1893, known as the "Harter Act." 27 Stat. 445.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Climace Calderon against the Atlas Steamship Company, Limited, to recover damages for nondelivery of cargo. The district court rendered a decree in favor of libelant for \$2,900, with interest and costs. 64 Fed. 874. Libelant appeals.

North, Ward & Wagstaff, for appellant.

Wheeler & Cortis, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. Libelant shipped 26 bales and 3 crates of duck uniforms for transportation by the steamship Ailsa from New York to Savanilla, thence by rail to Barranguilla, there to be delivered to the collector of customs, for which respondent issued its bill of lading. The goods were not landed at Savanilla, but were brought back to New York, and reshipped on the Alvo of the same line, which was lost at sea on the voyage, with all on board. The actual value of the goods lost was \$5,413.18. Inasmuch as the respondent has not appealed, the only question before this court is whether the district court erred in limiting the amount of libelant's recovery to \$100 per package, under the bill of lading.

The bill contained on its face the following provision:

"And, finally, in accepting this bill of lading, the shipper, owner, and consignee of the goods and the holder of the bill of lading agree to be bound by all of its stipulations, exceptions, and conditions, as printed on the back thereof, whether written or printed, as fully as if they were all signed by such shipper, owner, consignee, or holder."

On the back of the bill of lading, among numerous other clauses, was printed the following:

"(1) It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor with the value therein expressed, and a special agreement is made."

Stipulations in bills of lading limiting the amount of the carrier's liability on each package carried to some stated sum, unless the value of the package is declared, and a special agreement made, have been repeatedly held valid, and such reasonable regulations for the conduct of the carrier's business so as to prevent imposition upon him, and to establish proper charges adequate to the extent of the risks to be undertaken, may be communicated to the shipper by notice printed upon the carrier's receipt. *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151; *Railroad Co. v. Fraloff*, 100 U. S. 24; *Potter v. The Majestic*, 9 C. C. A. 161, 60 Fed. 624. It is contended that the clause above quoted is not such as these authorities sanction,—namely, a reasonable regulation to protect the carrier from excessive loss where the hazardous character of the goods or the fact that they are valuable is not disclosed to him,—but is rather a clause undertaking to relieve the carrier entirely from his common-law liability, and therefore not enforceable. The language used, "shall not be liable for gold, * * * or for goods of any description which are above the value of \$100 per package, unless," etc., if literally construed, would no doubt import that the carrier shall be liable for nothing in the package if its value is over \$100. But a more reasonable interpretation is that adopted by the district judge, namely, that the goods which are above \$100 in the package may be excluded from consideration, and only those which amount to \$100 be regarded. Being a clause in a written form of contract prepared by the carrier, and susceptible of two constructions, it is to be construed in favor of the other party, and, as thus construed, it applies only to such of the goods in each package as

are in excess of the stipulated value, and is therefore within the authorities above cited. The decree of the district court is affirmed, with costs of this court to the appellee.

WALLACE, Circuit Judge (dissenting). I dissent from the judgment of the court in this case. The 26 bales of goods in controversy were shipped by the libellant at New York for transportation to and delivery at Savanilla. The goods were not delivered by the steamship, but were forgotten and overlooked by those in charge of her while she was being unloaded at Savanilla. After she had left the port, the goods were discovered, and were taken back by the steamship to New York, and thence reshipped to their original destination on board another vessel, which foundered at sea, and the goods were lost. The corporation owning the steamship attempts to escape liability for the loss of the goods by a defense founded upon a condition in the bill of lading which reads as follows:

"In case any part of the goods cannot be found for delivery during the steamer's stay at the port of destination, they are to be forwarded by first opportunity, when found, at the company's expense; the steamer not to be held liable for any claim for delay or otherwise."

The bill of lading contained also another condition, which reads as follows:

"This agreement is made with reference to, and subject to, the provisions of the U. S. Carriers' Act, passed February 13, 1893."

By that act, commonly known as the "Harter Act" (27 Stat. 445), it is provided, among other things, that it shall not be lawful for the owner of any vessel transporting merchandise from or between ports of the United States and foreign ports to insert in any bill of lading any clause or agreement whereby the vessel shall be relieved "from liability for loss or damage arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery" of any merchandise committed to its charge, and that any words of such import inserted in the bill of lading "shall be null and void and of no effect." The court below correctly decided that the condition relied upon was in direct contravention of the statute which the parties by express agreement had incorporated into the bill of lading, and therefore ineffectual to absolve the steamship company from liability for the failure, through negligence, to make proper delivery of the goods. But the court also decided that the steamship company was entitled to a partial exemption from liability because of another condition in the bill of lading, which reads as follows:

"It is also mutually agreed that the carrier shall not be liable for gold, silver, bullion, specie, documents, jewelry, pictures, embroideries, works of art, silks, furs, china, porcelain, watches, clocks, or for goods of any description which are above the value of \$100 per package, unless bills of lading are signed therefor with the value therein expressed, and a special agreement is made."

In the opinion it was conceded that the condition, if read literally, so as to exempt the carrier wholly for goods in packages exceeding in value \$100, would be too unreasonable to be sustained;

but the court concluded that it should be construed as intended to exclude liability beyond \$100 for goods in any one package, and, as so construed, was a reasonable one, and therefore valid.

This court in the prevailing opinion has adopted the conclusions of the court below. The construction thus given to the condition seems to me to ignore its explicit terms, expressed in the plainest possible language. I think the condition was intended to exempt the carrier wholly, in case of loss or damage to any goods of the several kinds mentioned in it, including those the value of which would exceed \$100 per package. To uphold such a condition would permit a carrier, receiving goods which he may know are worth more than \$100 per package, to absolve himself from all responsibility in respect to them, and thus divest himself altogether of the obligations which are inseparable from his occupation.

But if the condition is capable of being read so as to exempt the carrier from liability beyond the amount of \$100 for each package, it does not include a liability for a negligent loss of the goods. In construing, in a bill of lading, the exceptions to the carrier's liability, the rule obtains, both in the English courts and our own, that where the words leave the intention in doubt they are to be construed against him, and their meaning is not to be extended to give him a protection for which he has not bargained in clear terms; and it is therefore to be presumed, unless the contrary is stated, that he is to continue liable for negligent acts and faults committed by himself or his servants. General words exempting him from liability under particular circumstances do not protect him from the consequences of his own negligence. If it had been the purpose of the condition, explicitly expressed, to lessen the liability of the steamship company from the consequences of a loss arising from its own negligence or that of its agents, the condition would have been prohibited, and therefore void, by the act of congress. In order to give it any effect, it must be read as though it were not intended to apply to such a loss. The condition is not one whereby the shipper and carrier agree in advance, by the terms of the contract, upon the value of the goods, and limit the liability of the carrier to a sum not to exceed the valuation; and the cases of *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, *Muser v. Holland*, 17 Blatchf. 412, 1 Fed. 382, *Graves v. Railroad Co.*, 137 Mass. 33, and several others which might be cited, where the contract was of that description, are not in point.

In *Hart v. Railroad Co.*, the court say:

"The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract."

And in concluding the opinion the court used the following language:

"The distinct ground of our decision in the case at bar is that where a contract of the kind, signed by the shipper, is fairly made, agreeing on the valuation of the property carried, with the rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation,

even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations."

There is no injustice in restricting a shipper's claim for damages to the value he places on his property for transportation. Where the contract and the rate of freight are based upon an assumed fictitious value of the goods carried, the parties are bound to that value in case of loss. *McCance v. Railroad Co.*, 34 Law J. Exch. 39. Where there is an agreed valuation stated in the contract, that is assumed as the basis of the carrier's compensation and responsibility. Such a valuation would necessarily, in the absence of fraud, conclude both the shipper and the carrier upon any inquiry as to the amount of damages arising from a loss, and the contract would therefore extend to any kind of a liability,—the liability of the carrier as an insurer as well as for a negligent loss. In the present case there was no statement of the value of the goods. The bill of lading was delivered after the steamship company had received the goods, and, as delivered, it was silent in respect to their value. Construing it as intended to exempt the steamship company from liability beyond the value of \$100 per package, the contract between the parties was merely that this sum should be deemed the limit of the company's liability. Such a contract is not the equivalent of one valuing the goods, and the exemption, therefore, does not reach a loss by the carrier's negligence. This was distinctly adjudged in *Magnin v. Dinsmore*, 56 N. Y. 168, and *Westcott v. Fargo*, 61 N. Y. 542, and in both of these cases it was held that a condition to exempt the carrier from liability for loss beyond a specified sum, in the absence of a statement of value by the shipper, would not exempt him from liability for loss by his own negligence. On the contrary, in *Belger v. Dinsmore*, 51 N. Y. 166, where the condition provided that the goods should be valued at a specified sum, in the absence of a statement in the contract of a different value, the same court held the carrier's liability to be limited to that sum, in the absence of the statement, although the loss was by his own negligence.

The authorities are elaborately considered and reviewed in *Railroad Co. v. Wynn*, 88 Tenn. 320, 14 S. W. 311, and the conclusion reached that a condition limiting the liability of a carrier, in case of loss, to a specified sum, in the absence of a statement of a different value, is not a valuation of the goods, and does not relieve the carrier from liability for the whole value in case of a negligent loss.

The steamship company could have exacted from the libellant a statement of the value of his goods, if it had seen fit to do so, or it could have required him to agree that they should be regarded as of a certain value in the absence of a statement upon his part of a different value; but it did neither, and only stipulated with him that it should not be liable beyond a specified sum in case

of loss. The law presumes that this agreement does not refer to a loss by the carrier's negligence.

For these reasons I think there should be a reversal of the decree below, and a decree for the libellant for the whole value of his goods.

NORTHERN PAC. R. CO. v. SMITH.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1895.)

No. 556.

RES JUDICATA—ACTION TO RECOVER REAL PROPERTY—SUBSEQUENTLY ACQUIRED TITLE.

In an action to recover real property, brought under the Code of North Dakota, which has abolished the fictions of the old action of ejectment, the judgment is a bar to a subsequent action only when the titles and defenses are the same, and is therefore not a bar where the defense is founded on a title acquired subsequent to the judgment, and which was not and could not have been set up in the earlier action.

In Error to the Circuit Court of the United States for the District of North Dakota.

C. W. Bunn and F. W. M. Cutcheon, for plaintiff in error.

H. F. Stevens, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This was an action brought by the defendant in error, Patrick R. Smith, against the Northern Pacific Railroad Company, the plaintiff in error, for the possession of certain lots in the city of Bismarck, in the state of North Dakota, and for damages for withholding the same. It was tried by the court upon an agreed statement of facts, and judgment was rendered for the defendant in error. This was the second trial of the case. On the first trial a judgment was rendered for the plaintiff in error, which was reversed in this court at the May term in 1893. In the opinion then rendered, which is reported in *Smith v. Railroad Co.*, 7 C. C. A. 397, 58 Fed. 513, all the issues are stated, and the views of this court upon all the alleged errors of law now assigned except one are expressed. We adhere to the conclusion then reached, and refer to that opinion for the grounds of our decision.

The alleged error which was not considered in that opinion is that the court below refused to admit in evidence the pleadings and judgment in an action between the parties to this action, through which the railroad company recovered possession of a part of the property in controversy in 1878. In its complaint in that action the railroad company alleged that in May, 1873, "it became seised, for the use and purpose of a right of way," of that portion of the property in question which is described in the complaint in that action, and that the defendant in error, Smith, was unlawfully in possession of it as tenant of other parties who entered as trespassers and were defendants in that action. The defendant in error filed a general demurrer to that complaint. The company moved for judgment on the demurrer

as frivolous, and it was granted on January 31, 1878. This was the record that was rejected by the court below as immaterial. Testimony tending to prove that the property described in that record was a part of the lots in controversy in this action was also offered, and rejected by the court on the same ground. The ground on which it is contended that these rulings are erroneous is that this record and testimony proved that the title to the property described in the complaint in that action was *res adjudicata* between the parties to this action, and that the judgment rendered in 1878 constituted a bar to the recovery of the property described in it by the defendant in error in this action. The argument is that it was alleged in the complaint in that action that the railroad company was "seised in fee, for the use and purpose of a right of way," of the real estate described in it; that the judgment was an adjudication that it was so seised, and that that decision barred the defendant in error from contesting that question in this action. This view of the case, however, overlooks two decisive facts disclosed by this record: (1) That the defendant in error did not acquire the title on which he founds this action until more than a year after that judgment was rendered; and (2) that the question whether or not the railroad company was seised in fee or otherwise of the property in question was not put in issue, and was not tried in the former action. The only question tried was that raised by the demurrer,—whether or not the railroad company was entitled to possession of the property if it was seised in fee for the purpose of a right of way, and the defendant was wrongfully in possession as the tenant of trespassers. The general rule is that, whenever the same question has been in issue, has been tried, and judgment has been rendered, that judgment is conclusive in a subsequent action between the same parties and their privies. This rule governs actions for the recovery of the possession of real estate in the state of North Dakota, for the fictions of the old action of ejectment at common law were abolished in that state and in the territory which it succeeded before either of these actions was brought, and the real parties in interest were required by the Code of that territory and state to be the parties to these actions. Code Civ. Proc. Dak. T. §§ 33, 34, 74, 635, 651 (Rev. Code Dak. T. 1877; Comp. Laws Dak. T. §§ 4830, 4832, 4870, 5449–5465). But under this rule the former judgment is not conclusive of questions that could not have been and were not tried and determined between these parties in the earlier action. In actions for the recovery of real property under this Code the former judgment is a bar when the titles and defenses are the same in both actions, but it is not a bar to a subsequent action or defense founded on a title that was not and could not have been interposed in the earlier action. Hence an action or defense founded upon a title acquired by either of the parties subsequent to the judgment is in no way affected by it, because it could not have been tried or determined by the former judgment. A stranger to the earlier action could maintain against any of the parties to it any title or right which he held when the judgment was rendered, or which he acquired subsequent to its date. Any of the parties to the action, therefore, may, after the judgment, acquire any right or title

to the property he can obtain, and may maintain it against the parties to the former action with the same force and effect as a stranger. A judgment in an action for the recovery of real property is not a bar to a subsequent action brought or defense interposed by either of the parties to it when that action or defense is founded on an after-acquired title. *Barrows v. Kindred*, 4 Wall. 399; *Hardy v. Johnson*, 1 Wall. 371; *Foster v. Evans*, 51 Mo. 39; *Mahoney v. Van Winkle*, 33 Cal. 448, 457; *Emerson v. Sansome*, 41 Cal. 552; *Black*, Judgm. § 656; *Freem. Judgm.* §§ 301, 302. The title of the defendant in error in this action was acquired subsequent to the former judgment. The question in this case was whether or not this after-acquired title was superior to the alleged title of the plaintiff in error. That question could not have been, and was not, tried in the former action, and therefore the pleadings and judgment in that action were immaterial, and were rightly rejected. The judgment below must be affirmed, and it is so ordered.

TAYLOR-CRAIG CORP. v. HAGE.

(Circuit Court of Appeals, Eighth Circuit. August 12, 1895.)

No. 544.

1. REVIEW ON ERROR—REFUSAL TO DIRECT VERDICT—DEFECTIVE RECORD.

A refusal to direct a verdict for defendant at the conclusion of the evidence cannot be reviewed where the bill of exceptions only purports to give the substance of the testimony in narrative form, concluding with the words "Testimony closed"; for this does not show affirmatively that all the evidence is set forth, and in the absence of such a showing the court must presume that there was evidence to support the verdict.

2. MASTER AND SERVANT—DANGEROUS MACHINERY—ASSUMPTION OF RISKS.

An employé engaged in whitewashing the ceiling of a factory was injured by catching his sleeve in the set screws projecting from the coupling of a rapidly revolving shaft. In charging the jury, the court said that it was "claimed" that plaintiff could not see the set screws, when working near the shaft, and that under these circumstances he assumed only the risks of working near a revolving shaft and coupling which were smooth. Plaintiff had testified that a few days before the accident he saw the shaft in course of erection, and observed that it was being put up in sections, which would necessitate the use of couplings; that, when he went to work near the shaft he noticed the coupling, and saw that it was in rapid motion; and that he tried to keep away from it, and was afraid he might get hurt if he touched it. *Held* that, in view of this testimony, the jury might well have inferred that he knew the shaft and coupling were not entirely smooth, for which reason the court's charge was misleading and erroneous.

In Error to the Circuit Court of the United States for the District of Minnesota.

T. T. Fauntleroy (Otto Kueffner and J. N. Searles, on the brief), for plaintiff in error.

John W. Arctander filed brief for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a suit for personal injuries which were sustained by Nels Hage, the defendant in error, while

in the employ of the Taylor-Craig Corporation, the plaintiff in error, in the capacity of a journeyman painter and whitewasher. The circumstances under which the injuries were sustained were as follows: The Taylor-Craig Corporation, which will be hereafter termed the "defendant company," was engaged in the general business of erecting, repairing, and fitting up buildings for occupancy. Prior to the injuries complained of, it had entered into a contract with another corporation, the Minnesota Shoe Company, to repair a building, which was to be used as a shoe factory, that had theretofore been partially destroyed by fire. The work of repairing said building had progressed so far at the time of the accident that the defendant company was engaged in whitewashing the ceilings of several of the rooms, in some of which the machinery necessary to be used in the business of manufacturing shoes had already been put in place and in operation by the shoe company. On the occasion of the accident the plaintiff, Nels Hage, was engaged, with some other men, in whitewashing the ceiling of the fourth story of the building. Two revolving shafts had been put in place in that room by the shoe company, which ran from east to west the full length of the room, and were suspended on hangers about 18 or 20 inches below the ceiling. These shafts were put up in sections, the several sections composing each shaft being united at intervals by couplings and set screws. The plaintiff was standing on a scaffolding, the top of which was about six feet from the ceiling, and was engaged in whitewashing the ceiling above one of the shafts, and in close proximity to one of the couplings, when his shirt sleeve came in contact with the coupling, and was caught by one of the set screws. The shaft being at the time in rapid motion, the plaintiff was carried over the shaft, and was thrown violently to the floor, thereby sustaining serious injuries. In his complaint, which was filed in the circuit court of the United States for the district of Minnesota, the plaintiff alleged, in substance, that the defendant company was guilty of a neglect of duty, in failing to furnish him with a reasonably safe place in which to do the work that he was required to do. In support of this charge the plaintiff averred that the defendant company knew, or ought to have known, that the set screws passed through the coupling, and protruded to some extent; that the fact that they did so protrude was not known to the plaintiff, and could not be discovered by him when the shaft was in rapid motion; and that the defendant company carelessly and negligently failed to warn the plaintiff of the existence of said protruding set screws in said coupling when he was set to work on the scaffolding. There was a trial before a jury, which resulted in a verdict and a judgment in favor of the plaintiff. To reverse such judgment the defendant company has prosecuted a writ of error to this court.

At the conclusion of the testimony the defendant company requested the court to instruct the jury to return a verdict in its favor, for the reason that there was no evidence tending to establish the charge of negligence. The refusal of this instruction constitutes one of the chief errors that have been assigned. We are unable, however, to notice the alleged error in refusing the request for a

peremptory instruction, because of the condition in which we find the record. The bill of exceptions only purports to give the substance of the testimony of several witnesses, in a narrative form, and at the conclusion of the evidence which is contained in the bill of exceptions is found the following statement: "Testimony closed." The record therefore not only fails to show affirmatively that it contains all the evidence produced at the trial, but it shows the contrary, as we think, in that it is manifest that, in making up the bill of exceptions, counsel only attempted to give a general summary of the evidence, without reporting the testimony in full or in detail. The rule is well established that whenever a litigant proposes to ask an appellate court to review the testimony, and to determine whether there was any evidence to warrant a recovery or to support a particular defense, he should cause a statement to be inserted in the bill of exceptions showing affirmatively that it contains all the testimony that was heard or produced at the trial. In the absence of such a showing an appellate court must presume, in aid of the verdict, that there was testimony to support it, and that it would so appear if all the evidence had been incorporated into the record. A statement found in a bill of exceptions, after a report of the evidence of various witnesses in a narrative form, that the "testimony closed," falls far short of showing affirmatively that all the evidence has been reported. A statement of that kind merely marks the conclusion of the hearing or the trial. It does not affirm, even by inference, that the bill contains all the evidence; and it is entirely consistent with the assumption that some evidence, either oral or documentary, has been omitted. Elliott, App. Proc. § 823, and cases there cited.

It is further assigned for error that the trial court erred in instructing the jury as follows:

"The evidence in this case shows that, when plaintiff was put to work at the place where he was injured, he saw that there was a shaft and coupling on the same, revolving near by the place in the ceiling where he was to work. It is claimed on the part of the plaintiff that he could not see, or ascertain by the use of his senses, that there were set screws protruding on the coupling, as has been shown to be the fact. Under those circumstances, plaintiff himself assumed all risks and dangers connected with working near a revolving shaft and coupling which was smooth, and not provided with any protruding bolts or screws, but he did not assume the risks connected with working near a coupling provided with protruding bolts or screws, as has been shown to be the fact in this case; and if his injuries were caused by these protruding bolts or screws, and would not have been caused by a smooth coupling, then he cannot have been said to have assumed the risks connected with working near these protruding bolts and screws."

This portion of the charge, when considered in connection with the plaintiff's testimony, appears to us to have been erroneous and misleading. In the course of his examination as a witness, the plaintiff testified, in substance, that two or three days prior to the accident he saw the employes of the shoe company putting up the shaft by which he was subsequently injured, and observed at the time that it was being put up in sections, which would necessitate the use of couplings; that on the morning of the accident, when he was directed to go upon the scaffolding for the purpose of white-

washing the ceiling above the shaft, he noticed the coupling, and saw that the shaft was in rapid motion; that as he began to work he tried to keep away from it, because he was afraid of it, and was apprehensive that he might get hurt if he touched it. In other words, the plaintiff's own testimony warranted an inference that he knew that the shaft was not perfectly smooth, and that there might be some slight projections in the vicinity of the couplings, which would catch his clothing if it came in contact with the shaft. Under these circumstances it was erroneous to instruct the jury, as the court did instruct it, in substance, that because the plaintiff claimed "that he could not see that there were set screws protruding on the coupling" when it was in motion, therefore he "did not assume the risk connected with working near a coupling provided with protruding bolts or set screws." If the plaintiff was conscious that he might get hurt if his clothing came in contact with the coupling, and if he tried to keep away from the coupling for that reason, then it would seem to be a reasonable deduction from his testimony that he was aware of the alleged latent dangers connected with the revolving shaft when he began to work in proximity thereto. The general rule of law stated in the foregoing instruction, that an employé does not assume the risk of being hurt by unknown and latent dangers incident to the place where he is set to work, is not denied; but the important issue in the present case appears to have been whether the alleged latent dangers were not in fact well known to the plaintiff, and assumed by him. As we have sufficiently shown, there was evidence from which a jury might well have inferred that he knew that the shaft was not entirely smooth, that he might get hurt if his clothing came in contact with it, and that he tried to avoid it for that very reason, but in a thoughtless moment suffered his arm to approach too near to the shaft, and by so doing sustained an injury from the very risk that he had apprehended and assumed. For error in the instruction the judgment is reversed, and the cause is remanded for a new trial.

UNITED STATES v. WILSON et al.

(District Court, D. Oregon. July 31, 1895.)

No. 3,594.

1. JURY—PREJUDICE—EVIDENCE.

For the purpose of impeaching the verdict of a jury in a criminal case, the defendant, upon a motion for a new trial, offered the affidavit of one S. to the effect that one of the jurors, before being taken upon the jury, had said to S. that he would like to get on the jury, and to "cinch" the defendant. This statement was contradicted by the juror, and no explanation was offered of the failure of S.—who was deeply interested in the defendant's behalf, and was present at the trial—to disclose the circumstance until after the trial. *Held*, that the affidavit was insufficient to impeach the verdict.

2. NEW TRIAL—DOCUMENTS IMPROPERLY IN POSSESSION OF THE JURY.

Upon the trial of several defendants for conspiracy, some 50 letters were admitted in evidence provisionally, subject to further proof. Though no further proof was offered, the letters were taken to the jury room, and remained in the possession of the jury two hours; until they were sent for

by the judge and removed. During this time the jury were reading and discussing the letters. Only three of the letters contained statements claimed to be prejudicial to the defendants, and these, under the instructions given by the court relative to other letters in evidence, could not have been regarded by the jury as evidence against the defendants on the only litigated issue. *Held*, that the jury's possession of the letters was no ground for a new trial.

8. SAME—STATEMENTS AS TO PENALTY FOR CRIME.

In reply to an inquiry by the jury, the court, with the consent of the defendants' attorney, informed them of the penalty for the crime with which the defendants were charged. The attorney for the United States then stated that it was within the power of the court to impose a nominal penalty, to which the court added that the jury were not, therefore, to infer that if the defendants were found guilty the court would impose such a penalty. *Held*, that these proceedings afforded no ground for a new trial.

This was an indictment against John Wilson, James Lotan, and Seid Back for a violation of Rev. St. § 5440. After a verdict of guilty, the defendants moved for a new trial.

Daniel R. Murphy, U. S. Atty., John M. Gearin, Special Counsel, and Charles J. Schnabel, Asst. U. S. Atty., for the United States.

C. W. Fulton, Raleigh Stott, W. W. Thayer, Rufus Mallory, and George C. Stout, for defendants.

BELLINGER, District Judge. The defendants James Lotan and Seid Back move for a new trial on the following grounds: That the evidence is not sufficient to justify the verdict; that the verdict is against law; misconduct of the jury; errors of law occurring at the trial.

The defendants submit the affidavit of Garibaldi Stahr, who swears to statements made to him, while the jury was being impaneled by S. A. Hart, to the effect that he (Hart) would like to get into the jury box; that he would like to cinch that Chinaman,—meaning the defendant Seid Back. Hart was, shortly after the alleged statements were made, taken upon the jury, after having sworn in his examination touching his qualifications to serve on the jury, that he had not talked with any one about the case, and had no prejudice against the Chinese defendant, or his race. These statements attributed to Hart by Stahr are contradicted by the affidavit of the juror himself. Stahr says that the statement of Hart was in answer to his own statement that he would "like to get in that jury box," and this was assumed by defendants' attorneys, in the argument of the motion, to mean that Stahr was a friend of Seid Back, and desired to get on the jury so as to acquit him of the crime for which he was being tried. If such an affidavit could, under any circumstances, be allowed to impeach a juror, still this affiant is not, in my judgment, entitled to belief. There is no attempt to explain why Stahr should not have made the disclosure contained in his affidavit until after a verdict was returned against the defendant. Hart was sworn on the jury on May 21st. Stahr did not inform any one of Hart's alleged statements to him until the date of his affidavit, May 28th, although he was deeply interested in behalf of Seid Back, and was in attendance at the court room in the

hope that he might have an opportunity to serve him. The attorneys for this motion confess themselves unable to explain Stahr's silence during the trial. It is incredible that having this important fact to communicate, and being deeply interested in the welfare of Seid Back, he should have kept silent for a period of one week, and until after the verdict was rendered.

The fact principally relied upon in support of the motion grows out of the possession by the jury for a time of what are known as the "Dunbar Letters." There are between 50 and 60 letters written by Blum and Dunbar to Maj. John Wilson, at Victoria, and relating, so it is claimed, to the conspiracy charged in the indictment. The admission of these letters in evidence was objected to by the defendants on the ground that they were not proven so as to entitle them to be read in evidence. The court was of this opinion, and, in the state of the proof as to this, admitted the letters "provisionally,"—subject to further proof, or to such further examination as to the proof already made as should relieve the existing doubt as to their admissibility. No further proof was offered, nor was anything further said, concerning these letters, until the attorney for the government, in the closing argument to the jury, undertook to discuss them. On objection being made, the court refused to permit him to discuss the letters, because they had not been referred to by the attorneys for the defendants in their argument to the jury, and because of the state of the proof concerning them. Some two hours after the jury had retired to deliberate on their verdict, the judge of the court, remembering these letters, asked one of the attorneys for the government if they had been taken to the jury room; and, upon receiving an affirmative answer, he at once sent a bailiff to the jury room, with instructions to bring the letters away, which was done. The affidavits of some of the jurors accompany this motion. As to these letters, they show that, "during most of the" two hours during which they were in possession of the letters, "different jurors were reading and discussing" their contents. Only three of the letters are claimed to be prejudicial to the defendants. These three letters refer to the amount of money necessary to be charged and collected at Victoria to secure passage to Portland, and the landing here, of Chinese laborers. In one of them the writer says:

"Now be very careful what you do. First, we want to pay the banks and I cannot work here on less than \$60 50 for L and 10 for certificates and fare on str. down."

The second of these three letters contains the following:

"Now be very careful. I require \$50 each to get them through. 10 fare to the boat so you can pay the other 40 to the bank. That only means 100 to clean them up. Suppose you get 10 each trip, we can do all in three months. You must remember I have to put up the money here before they get off so you will have to collect and remit before the steamer arrives here."

The third letter repeats the statement in the above quotation as to the necessity the writer is under to "put up here [in Portland] before they get ashore."

Three of the jurors make affidavits in defendants' behalf, in impeachment of their own verdict. Two of these affidavits state the

opinions of the affiants that certain other matters particularly stated were prejudicial to the defendants. The disposition of these jurors, as shown by these affidavits, makes it reasonably certain that if either of these three letters was read or discussed, to their knowledge, by any one or more of the jury, or if they believed any of the jurors had read these particular letters, they would have stated the fact in the affidavits made by them. There is no inference that, out of some 50 or 55 letters, these 3 were read. To authorize an inference that the jury were influenced by matters not proper for their consideration, and prejudicial to the defendants, the fact that such matters came to their knowledge should be shown. There can be no inference upon an inference,—no inference that the jury were influenced from an inference that they saw the 3 particular letters out of the interdicted batch of 55. But, if the jury did see these letters, they could not have considered them as tending to connect these defendants with the crime charged, under the very explicit instructions of the court as to other letters properly in the case,—known as the "Mulkey Letters." As to these letters, the court instructed the jury as follows:

"You may consider the letters known in this case as the 'Mulkey Letters.' These letters do not depend for their proof of authenticity wholly upon the testimony of Blum. There is the testimony of witnesses, not accomplices, tending to prove that these letters are in Mulkey's handwriting, but as to this there is a conflict in the testimony. If these letters were written by Mulkey, they tend to establish the conspiracy, and to connect Mulkey with it; but any references you may find in these letters and in the Dunbar letters to other defendants, not connected with such letters, if you should find such references, are not competent evidence tending to connect the persons so referred to with such conspiracy. The connection of such other persons must be otherwise shown."

This subject was further adverted to by the court at the conclusion of the charge, when the following proceedings were had:

"Mr. Fulton (for the defense): We do not want any other exceptions than those that were taken at that time, and marked, I think. With this addition, I think probably your honor did not intend to state it as you did, or possibly I misunderstood you. You stated that acts or declarations of a co-conspirator was not sufficient of itself,—I don't know whether you used the word 'itself,' or not,—was not sufficient to connect other parties with the conspiracy. The Court: I did not wish to qualify my statement to the jury by the word 'itself.' I say that the acts and statements of one conspirator do not tend in any degree to prove the connection of another person charged with the conspiracy; that such connection must be established by independent evidence, not by the acts in pursuance of the conspiracy of the conspirators themselves from whom the acts proceed; and I illustrated that by saying that, for instance, the references in the Mulkey letters to other defendants are not to be taken as proving the connection of the other defendants with the conspiracy, but are merely to be taken—those letters are—as proving the existence of a conspiracy, and Mulkey's connection with it, and Blum's. Mr. Fulton: That was what I desired."

Under these instructions, the jury could only consider these letters as tending to prove the existence of a conspiracy between Blum, Dunbar, and Wilson; and, if the plea of not guilty had the effect to put this in issue, it was, at most, but a technical denial of the existence of a conspiracy as charged between these three persons. There was no attempt to deny the existence of a conspiracy on the

trial. The attorney who opened the case for the defense admitted the existence of a conspiracy that at least included Jackling and Blum, and he stated that they might have been assisted by Dunbar. Another of the attorneys for the defense, in his concluding argument to the jury, said:

"Now, I am willing to concede that Jackling and Blum and Sig Baer were in the conspiracy. I haven't any doubt but what they were, and I don't know but what there were more. There were others in the conspiracy with them. But that does not prove, gentlemen of the jury, that these parties were in that conspiracy; not at all."

This shows that there was no issue of fact on the trial as to the existence of what was constantly referred to during the trial as "the" conspiracy. The issue was as to the connection of the defendants on trial with that conspiracy; and, as to this issue, the rights of the defendants were not affected, under the instructions of the court, by the Dunbar letters.

The jury having returned for further instructions, and having, after such instructions were given, asked the court what the punishment was, provided for the crime charged, the court inquired of defendants' attorney Mr. Fulton if there was any objection to an answer to the question asked. Mr. Fulton said there was no objection. The court then stated to the jury the substance of the provision of the statute on that subject. Thereupon the attorney for the United States stated that it was within the power of the court to imprison the defendants for one day, and impose a fine of one dollar. In response to this statement by the attorney for the United States the court said, addressing the jury:

"You are not to infer from the statement made by the attorney for the United States that if the defendants are found guilty the court will only impose a nominal punishment upon them."

The object of this remark by the court was to prevent the jury from acting upon the suggestion or belief that a verdict of guilty would only result in a nominal or light punishment. It cannot be presumed, in the face of this statement by the court, that the jury would be influenced by the remark of the attorney for the United States to return a verdict against the defendants, under the belief that the court would impose only a slight punishment. The statement of the court to the jury had a contrary tendency,—a tendency to warn them that the punishment would not be as suggested by the attorney for the United States, since it warned them against any inference of that character. The motion for a new trial is denied.

UNITED STATES v. THOMAS.

(District Court, S. D. California. July 8, 1895.)

No. 742.

CRIMINAL LAW—INDICTMENT—REV. ST. § 5470.

An indictment which charges that the defendant did aid in buying, receiving, and selling a draft, "knowing that said draft had been stolen and embezzled," is insufficient, under Rev. St. § 5470, which imposes a

penalty for aiding in buying or receiving articles of value stolen or embezzled from the mail, since it fails to allege any offense; the acts of stealing and embezzling being distinct, and inconsistent with each other.

This was an indictment against W. F. Thomas for violation of Rev. St. § 5470. The defendant demurred to the indictment.

George J. Denis, U. S. Atty., for the United States.
W. H. Shinn and Sam. Hamilton, for defendant.

WELLBORN, District Judge. Section 5470 of the Revised Statutes, which defendant is charged with violating, provides:

"Sec. 5470. Any person who shall buy, receive, or conceal, or aid in buying, receiving or concealing any note, bond, draft, * * * or any other article of value * * * knowing any such article or thing to have been stolen or embezzled from the mail, or out of any post office, branch post office, or other authorized depository for mail matter, or from any person having the custody thereof, shall be punished by a fine of not more than two thousand dollars and by imprisonment at hard labor for not more than five years."

The indictment charges that the defendant "did, knowingly, willfully, unlawfully, and feloniously, aid in buying, and receiving, and selling, a certain article of value, to wit, a draft, * * * knowing that said draft had been stolen and embezzled." Besides the general ground of demurrer that the indictment does not state facts sufficient to constitute an offense against the laws of the United States, it is specially objected that it is uncertain, for the reason that it cannot be determined therefrom whether the draft was stolen or embezzled. The case of *U. S. v. Fero*, 18 Fed. 901, cited on behalf of the government, is not directly in point, and, so far as it does apply, seems to sustain, rather than answer, the objection. That case holds that the general rule that a count in an indictment which charges two distinct offenses is bad does not apply to a case where the several acts charged, though enumerated in the statute as constituting distinct offenses, are consistent with each other, and appear to form parts of the same transaction. A careful study of the case shows that under the principle which it enunciates, if the offenses charged are either inherently repugnant, or so distinct that they could not be construed as different stages in one transaction, the pleading would be bad. In that case the statute under which the defendant was prosecuted enacted that "every person who shall receive any money or other valuable thing, under a threat of informing, or as a consideration for not informing, against any violation of any internal revenue law, shall, on conviction thereof, be punished," etc. The information charged that the defendant received money "under a threat of informing, and as a consideration for not informing," etc. The court, in holding the information not duplicitous, used the following language:

"There can be no doubt that the transaction may be such as to make a case of receiving money both under a threat of informing, and as a consideration for not informing, and, if the acts of the party are so combined as to constitute a single transaction, but one offense is committed. Clearly, the information in this case must be construed as alleging such a transaction, and therefore as alleging a single offense. The allegation of the pleading, in substance, is that on the 27th day of October, Lewis N. Fero did receive from Matthias Bourgeois five dollars, under a threat of informing, and as a

consideration for not informing, against him. The time is fixed. A day is named. A single transaction is necessarily to be implied from the allegation. The meaning of the averment is that the threat was made; that the money was paid; that the consideration for the payment was that the defendant would not inform; and so it follows, as the necessary meaning and effect of the averment, that the money was paid both under a threat of informing, and as a consideration for not informing, and that there was but one transaction, involving the commission of but one offense."

To the same effect is the ruling of the court in the case of *U. S. v. Nunnemacher*, 7 Biss. 131, Fed. Cas. No. 15,903,—one of the cases approvingly referred to in the case of *U. S. v. Fero*, supra. In the former of said cases, at page 134, the court quotes from a Missouri case as follows:

"When a statute, in one clause, forbids several things, or creates several offenses in the alternative, which are not repugnant in their nature or penalty, the clause is treated, in pleading, as though it created but one offense, and they may be united conjunctively in one count."

Thus it appears that the essential condition, upon which several things disjunctively forbidden in one clause of the statute may be conjunctively united in the same count, is that they are of such a nature that they may be considered as parts of the same transaction. This condition does not exist in the present case. The terms "theft" and "embezzlement" cannot characterize the same act, because they are repugnant to, and irreconcilable with, each other. The cases above cited, if not directly in point, are at least closely analogous to, and, I think, determinative of, the present case. It seems to me that an accurate statement of the objection to the indictment here is not that it is uncertain, or that it states in one count two offenses, but that it fails to state any offense whatever; that the crime sought to be charged is that the defendant aided in buying and selling a draft, knowing the same to have been stolen or embezzled, whereas the charge in the indictment is that the defendant knew that the draft was stolen and embezzled; and that this last allegation being the statement of a manifest impossibility, and therefore nugatory, the indictment fails to state an essential element of the offense sought to be charged. I am of opinion that the objection is well taken. The demurrer is sustained.

LEATHERBEE et al. v. BROWN.

(Circuit Court, D. Massachusetts. September 18, 1895.)

No. 617.

PATENTS—INFRINGEMENT SUITS—PLEA IN EQUITY.

A plea to a bill for infringement alleged that defendant never made, used, or sold any article embodying the patented invention, and that the alleged infringement was committed, if at all, solely by a foreign corporation of which he was treasurer. *Held*, that the plea was not bad as tendering two issues, but should be construed as raising the single question whether a bill would lie against defendant personally for an infringement committed, if at all, by a foreign corporation of which he was an officer.

This was a bill in equity by James D. Leatherbee and others against M. W. Brown for alleged infringement of a patent. Com-

plainants moved to strike from the files a plea filed by the defendant.

James E. Maynadier, for complainants.

Edward S. Beach, for defendant.

COLT, Circuit Judge. This is a bill in equity, charging the defendant with infringement of complainants' patent, and praying for an injunction and an account of profits and damages. The defendant has filed a plea setting up that he never made, used, or sold, or caused to be made, used, or sold, any telephone receiver embodying the invention of the patent in suit, and that the alleged infringement complained of was committed, if committed at all, solely by the Thompson-Brown Electric Company, a corporation organized and existing under the laws of the state of New York, of which he is treasurer. The present hearing was had on complainants' motion to strike the plea from the files on the ground that it tenders two issues—First, that the defendant has not infringed; and, second, that the foreign corporation of which the defendant is treasurer has infringed, if any infringement has been committed.

The counsel for complainants contends that if he sets the plea down for argument it is an admission of noninfringement, because he admits the truth of the facts alleged in the plea, and, if he joins issue on the plea, the proofs must necessarily be the same as if the defendant had filed his answer, denying infringement. In his brief he states his position as follows:

"It is submitted that the plea in the case at bar must be stricken from the files, for the reason that the complainant cannot set it down for argument without admitting that defendant has never made, used, or sold, or caused to be made, used, or sold, any article embodying the invention of the patent in suit, and also admitting that the alleged infringement, if any, was committed by a foreign corporation, and that defendant was not a joint tortfeasor with that corporation. But these are facts which cannot be admitted, and which complainant should not be compelled to try twice—First, by joining issue on the plea, and proving the falsity of the alleged facts in that issue; and thereafter proving their falsity on final hearing on bill, answer, replication, and proofs."

The construction of the plea by complainants' counsel seems to me to be wrong. Considered as a whole, the plea was intended to raise, and, in my opinion, does raise, a single question,—whether a bill in equity for the infringement of a patent can be brought against the defendant personally for an infringement committed, if committed at all, by a foreign corporation of which he is an officer. The complainants' counsel admits that if the plea had only alleged that the acts complained of were committed by the defendant solely as an officer of the Thompson-Brown Electric Company, and not otherwise, he would offer no objection; and the defendant's counsel admits that this is the only question raised by the plea. Upon the facts brought out at the hearing on motion for preliminary injunction, it is clear that this is the real question which both parties wish to have raised and determined.

It is true, as contended by the counsel for complainants, that the

naked question of infringement cannot be raised by plea. *Sharp v. Reissner*, 9 Fed. 445; *Korn v. Wiebusch*, 33 Fed. 50. It is also equally true that where the infringement complained of has not been committed by the defendant, but by another person, this issue may be tendered by plea. *Boston Woven Hose Co. v. Star Rubber Co.*, 40 Fed. 167; *Linotype Co. v. Ridder*, 65 Fed. 853.

Upon a proper construction of the plea, considered as a whole, and which agrees with what defendant's counsel says it means, and with what complainants' counsel declares would be a proper plea, I must deny the motion to strike the plea from the files. Motion denied.

HEATON PENINSULAR BUTTON-FASTENER CO. v. SCHLOCHT-MEYER.

(Circuit Court, S. D. Ohio, W. D. July 22, 1895.)

No. 4,775.

1. PLEADING IN PATENT CASES—PROFERT OF PATENT—DEMURRER TO BILL.

A bill containing this language, "All of which will more fully appear by the said letters patent, or by a copy of the same duly certified from the records of the patent office, and in this court to be produced as your honors may direct," makes formal profert of the patent, so that it may be considered on demurrer to the bill.

2. SAME—INFRINGEMENT SUITS—JUDICIAL NOTICE OF PRIOR ART.

In determining the validity of a patent on demurrer to the bill, courts will take judicial notice of matters of common knowledge relating to the state of the art; but the judge must be careful to distinguish between his own special knowledge and what is strictly within the field of common knowledge, and the matter must be so plain as to leave no room for doubt.

3. SAME—DESCRIPTION OF PRIOR ART—ESTOPPEL.

The description in the specification of the existing state of the art bears upon the construction of the patent, and is a limitation of the grant. It forms the representations upon which the grant is obtained, and the patentee is estopped to say that such representations were incorrect.

4. SAME—BUTTON-FASTENING STAPLES.

The Vinton and the Prentice patents, Nos. 324,053 and 451,070, respectively, both for improvements in button-fastening staples, *held* void, on demurrer, for want of invention.

This was a bill by the Heaton Peninsular Button-Fastener Company against Schlochtmeier, for infringement of two patents for improvements in button-fastening staples.

Jas. H. Lange, Odin B. Roberts, Gardner Perry, and S. L. Swartz, for complainant.

Taggart, Knappen & Denison, for respondent.

SAGE, District Judge. The bill is for an injunction and account against defendant as an infringer of two patents, owned by complainant, for button-fastening staples,—the first being No. 324,053, to John H. Vinton, August 11, 1885, and the second No. 451,070, to George W. Prentice, January 26, 1891.

The defendant demurs upon the grounds: First, that it is ap-

parent upon the face of the letters patent referred to, that the two inventions and improvements described and claimed therein cannot be used conjointly in the same structure; second, that the Vinton patent is invalid for the reason that the improvements described and claimed did not, in view of the state of the art within common knowledge, and of which the court will take judicial notice, constitute patentable invention; and, third, that the Prentice patent is invalid, for the same reason. The first ground of demurrer was abandoned upon the argument, and upon the averments of the bill was untenable. That a demurrer to a bill for infringement will be sustained in any case where it is apparent to the court that the alleged improvement does not involve patentable invention, although the bill alleges novelty and utility, is well-established. The demurrer admits only those facts which are well pleaded, and an allegation of fact in one part of the bill, which by inspection of the entire bill appears to be untrue, cannot be said to be well pleaded.

In *Wollensak v. Reiher*, 115 U. S. 96, 5 Sup. Ct. 1137, the supreme court held, upon inspection of the original and the reissued patent, and upon demurrer to the bill, that the original specification was not insufficient or defective, and that the sole object of the reissue was to enlarge the claim, and sustained the demurrer, notwithstanding the averment of the bill that the original patent was inoperative or invalid by reason of an insufficient or defective specification, which insufficiency or defect had arisen through inadvertence, accident, or mistake.

In *Richards v. Elevator Co.*, decided by the supreme court of the United States, May 20, 1895, and reported in 71 O. G. 1456, 15 Sup. Ct. 831, Mr. Justice Brown, delivering the opinion of the court, said that:

"While patent cases are usually disposed of upon bill, answer, and proof, there is no objection, if the patent be manifestly invalid upon its face, to the point being raised on demurrer, and the case being determined upon the issue so formed."

The patent in that case was for a grain-transferring apparatus, and the claims were for combinations which the court held to be for a pure aggregation of old elements. It was not claimed that there was any novelty in any one of the elements of the combination. The court said that they were all perfectly well known, and, if not known in the combination described, were known in combinations so analogous that the court was at liberty to judge of itself whether there was any invention in using them in the exact combination claimed. In the language of the opinion, the justices of the court "did not feel compelled to shut their eyes" to certain well-known facts in reference to the use of grain elevators in transferring grain from railway cars to vessels,—that this method involved the use of a railway track, entering a fixed or stationary building, an elevator apparatus, an elevator hopper scale for weighing the grain, and a discharge spout for discharging the grain into the vessel. Applying to the patent these facts, and other facts referred to in the opinion, which were not averred in the bill but were generally known, the court held that the combination claimed was a pure ag-

gregation, and affirmed the decree of the court below, dismissing the bill.

The patents sued upon in this case are for improvements in button-fastening staples, to be used in attaching buttons to shoes. The Vinton patent describes a staple made of wire. The claims are as follows:

(1) "As an article of manufacture, a button-fastening staple composed of wire, the legs of which are provided with V-shaped points broader than the diameter of the wire from which the staple is made, the cutting edges of both of said points being substantially at right angles to the length of the staple head, substantially as described."

(2) "A staple fastener for leather work, it having V-shaped points spread wider than the diameter of the wire, and set at one side of the center of the wire forming the legs above the point, to thus compel the staple to clinch uniformly in the desired direction, substantially as described."

The Prentice patent described a wire staple of similar general construction. The claim is as follows:

"A one-piece metallic button fastener, substantially uniform in size throughout, consisting, essentially, in an arc-shaped crown or top and two curvilinear side portions diverging from said crown or top, the whole forming a body portion, the curvilinear contour of the inner wall of which follows substantially the curvilinear contour of the outer wall thereof, or is parallel therewith, and an attaching portion consisting of two prongs or legs substantially parallel with each other and depending from the extremities of the body portion, the junction of the legs with the body portion forming corners or bearing shoulders to define said body portion, and to limit the penetration of the legs of the fastener into the material to which it is to be attached, substantially as described."

The bill makes profert of the letters patent in this language:

"All of which will more fully appear by the said letters patent, or by a copy of the same duly certified from the records of the patent office, and in this court to be produced as your honors may direct."

This is a formal profert, and is sufficient to make the letters part of the bill, so that they may be considered on demurrer. *Dickerson v. Greene*, 53 Fed. 247; *Bogart v. Hinds*, 25 Fed. 484. Courts, in determining the validity of a patent, will take judicial notice of matters of common knowledge relating to the state of the art. This proposition is supported by the decision of the court in *Richards v. Elevator Co.*, cited above, where the court referred to facts not set forth in the record, but recognized because they were perfectly well known.

The rule suggested by Judge Blodgett in *Manufacturing Co. v. Adkins*, 36 Fed. 554, imposes a proper limitation, to wit, that the court must keep strictly within the field of common knowledge, and the judge must be careful to distinguish between his own special knowledge and what he considers to be the knowledge of others in the field or sphere where the device is used. "But when the judge before whom rights are claimed by virtue of a patent can say from his own observation and experience that the patented device is in principle and mode of operation only an old and well-known device in common use, he may act upon such knowledge. The case must, however, be so plain as to leave no room for doubt; otherwise, injustice may be done, and the right granted by the patent defeated, without a hearing upon the proof."

In *Root v. Sontag*, 47 Fed. 309, the patent was held invalid on demurrer, and the court said that, upon investigation of the question whether the patent was void upon its face by reason of want of novelty or patentable invention, the court might "take judicial notice of a thing within the common knowledge and use of the people throughout the country."

In *Brown v. Piper*, 91 U. S. 37, the supreme court took judicial notice of the ice-cream freezer in common use throughout the country, and, as illustrating the common knowledge on the subject of the art involved, referred to *Ure's Dictionary of Arts*, *Watt's Dictionary of Chemistry*, and the *American Encyclopædia*. That court, also, in *Terhune v. Phillips*, 99 U. S. 593, took judicial notice of the common use and knowledge of corner sockets for show cases; in *Slawson v. Railroad Co.*, 107 U. S. 654, 2 Sup. Ct. 663, of reflectors for directing the rays of a lamp to any desired spot; in *King v. Gallun*, 109 U. S. 102, 3 Sup. Ct. 85, of the customary trade packages of plug tobacco; and in *Phillips v. City of Detroit*, 111 U. S. 606, 4 Sup. Ct. 580, of the method of constructing pavements by preparing a foundation, placing the blocks thereon, and filling the space between with sand.

In *New York Belting & Packing Co. v. New Jersey Car Spring & Rubber Co.*, 30 Fed. 785, Judge Wallace held a patent for a design for rubber mats invalid upon demurrer to the bill, taking judicial notice of the fact that the design was old as applied to other fabrics, and holding that its application to rubber mats did not involve invention. On appeal the supreme court (137 U. S. 445, 11 Sup. Ct. 193), Justice Bradley pronouncing the opinion, sustained the decree so far as the first claim was concerned, "for the reason stated in the opinion," which he quoted, including the portion where the judge below took judicial notice of the fact that the design was old as applied to other fabrics; but Justice Bradley thought that, as to the other more limited claims, proof should have been heard.

In *Buckingham v. Iron Co.*, 51 Fed. 236, Judge Blodgett held a patent void on demurrer to the bill because the court, from common knowledge, took notice that the structure was old.

In *Wall v. Leck*, 61 Fed. 291, a demurrer to the bill was sustained, the court concluding, from an inspection of the specification, that the patent did not cover any patentable process. This decision was affirmed by the court of appeals (13 C. C. A. 630, 66 Fed. 552) in February, 1895, and it appears that the court resorted to a certified copy of the patent, outside the bill, to ascertain its contents.

In *Industries Co. v. Grace*, 52 Fed. 124, Judge Putnam recognized that by making profert of the letters patent the specifications were made a part of the bill, and said that a bill in equity did not necessarily make all the statements of fact contained in a contract or letters patent or other instrument proper parts of its pleadings, either by referring to them, or by annexing them as an exhibit, or by making profert, or by reciting the tenor at length. Claims of the patent become a fundamental portion of the allegations of the bill so far as they are relied upon by the complainant. The judge added:

"So everything in the specifications which must be resorted to by the court in construing the claims might be considered as part of the complainant's pleadings. But all portions which merely set out the state of the art, like recitals of facts in contracts or other instruments, are more or less conclusive on the party who sets them up, yet in the eyes of the law explainable, and not absolutely presumed to have been so alleged as to become the subject of demurrer. * * * It is true that, so far as the specification contains any representations which, if erroneous, may be presumed to have misled the patent office to the detriment of the public, the patentee may be estopped."

On the other hand, Judge Putnam said that a patent should not be forfeited because of inapt and somewhat inaccurate descriptions of the state of the art, or where, as in the case before him, the state of the art had been set out somewhat confusedly and with qualifications. All this must be taken in connection with prior cases, which were not criticised nor referred to by Judge Putnam, and from which evidently he did not intend to dissent, and in which the specifications were referred to for facts which had direct bearing upon the scope of the patent and the construction of its claims. The patent is, as is well said by counsel for defendant in their brief, the title deed through which the complainant must derive all his rights. It is the grant of a monopoly, and, with rare exceptions, every statement of the prior state of the art therein contained bears upon the construction, and is a limitation of the grant. The description in the specification of the existing art, and of the applicant's improvements, form the representations upon which he obtains the grant. Having done so, he is estopped to say that his representations were incorrect. If the recitals of the state of the art do not tend to limit, explain, or nullify the grant, they are of no possible pertinence, even if the same facts were fully proved aliunde. If, on the other hand, they do have such tendency, the patentee is bound thereby, and the patent must be construed in the light of the facts so recited.

In the light of the decisions above cited, let us look to the patents in this case. The staple shown and described in the Vinton patent is made of wire, and is of a U-shaped form. It is expressly stated in the specification that the general outline or form is the same as in the early Ely patent, to which express reference is made, and which is therefore a part of the Vinton specification. Inspection of the Ely patent establishes the absolute identity of the Ely and Vinton staples, so far as general form and shape are concerned. Vinton's improvement consisted in making a V-shaped point, the apex of which is located at one side of the center line of the leg of the staple, and which is pressed, swaged, or flattened, and thus made broader than the diameter of the wire from which the staple is produced. That is the only possible novelty in the Vinton patent. The setting of the points at one side of the center line of the leg of the staple, and the making of the staple with slightly incurved legs, so that it will clinch in the desired direction, are fully shown in the Ely patent, and admitted to be old by the Vinton specification. Making the cutting edge of the staple points at right angles to the length of the staple head was a matter involving nothing more than ordinary mechanical skill.

Now, it is a matter of common knowledge that if a round wire is pointed, by being pressed or swaged or flattened upon two sides, the diameter of the point will be and must be greater than the diameter of the wire. The making of such broadened points upon nails and staples was a matter of common knowledge years before the date of Vinton's patent. The old cut nail was made in this form for the very purpose mentioned in the patent,—that the broad, flattened point might cut a slit in the wood through which the shank would enter, and thereby prevent splitting the wood. So it was with common nails and staples. With reference to the patentability of such an improvement the case of *Double-Pointed Tack Co. v. Two Rivers Manuf'g Co.*, 109 U. S. 117, 3 Sup. Ct. 105, is cited, and is pertinent.

The Prentice patent is for a button fastener differing from the Vinton and Ely fasteners only in trifling particulars. Prentice took almost the exact form of the Vinton staple with the beveled ends, and made a slightly different angle between the body of the legs, so as to make the crown portion with a double reverse curve instead of a single curve. Prentice provided his staple with a sort of supplementary crown, leaving shoulders against which the legs might be clinched. The old paper staple, in common use long before Prentice's patent, had a flat top against which the legs clinched, the top and the legs lying parallel after the clinching operation was finished. If such a staple was required to hold the eye of a button, or any similar object, a portion of the crown must be raised so as not to bind against the paper or cloth or leather; and, the necessity being apparent, mechanical ingenuity was all that was involved in the requisite change of form.

The complainant's patents are invalid upon their face for want of invention. The demurrer will be sustained, and the bill dismissed, at the complainant's costs.

MATHESON v. CAMPBELL.

(Circuit Court, S. D. New York. July 27, 1895.)

1. PATENTS—ASSIGNMENT IN FOREIGN COUNTRY—HOW PROVED.

An assignment made in a foreign country, and purporting to have been executed before the consul general of the United States, is sufficiently proved by his signature and the United States consulate general seal.

2. SAME—ANTICIPATION OF PRODUCT PATENT—CONCEALED CHEMICAL FORMULA.

The fact that an alleged anticipating chemical compound was commercially sold and used in this country prior to the date of the application does not invalidate the patent, when such compound was made in a foreign country by a secret process, not discoverable by inspection or analysis. *Boyd v. Cherry*, 50 Fed. 279, followed.

3. SAME—SUFFICIENCY OF SPECIFICATIONS.

A patent for producing a dye from coal-tar products should describe the process with such clearness and certainty that an ordinary manufacturer of aniline colors, having such ordinary knowledge as existed in this country at the date of the patent, would be enabled by its instructions to carry out the process successfully.

4. SAME—MISUSE OF CHEMICAL TERMS.

The use of "nitrate" of sodium for "nitrite" of sodium, in the specifications of a patent relating to the manufacture of a coloring compound from

coal-tar products, *held* not such a misuse of terms as would invalidate the patent; it appearing that no one skilled in the art would be misled thereby, and that the use of "nitrate" for "nitrite" was common in the earlier patents relating to the particular art.

5. SAME—VALIDITY OF PATENT—EFFECT OF LIMITATION.

The rule that a patent must be construed in conformity with the self-imposed limitations contained in its claims may be invoked in support of the validity of the patent as well as in denial of infringement.

6. SAME—INTERPRETATION OF PATENTS.

The fact that a patent is for a meritorious invention of a primary character is entitled to consideration, in determining whether mistakes in the specifications which would not in fact mislead persons skilled in the art should be permitted to invalidate the patent.

7. SAME—DEFINITIONS OF CHEMICAL TERMS.

The words "technically pure," as used in reference to substances employed in chemical processes, mean pure in the ordinary acceptance of the terms of the art. "Chemically pure" means absolutely pure.

8. SAME—DEFECTS AND OMISSIONS IN SPECIFICATIONS—PRODUCT PATENT.

The specifications of a patent for a color compound produced from coal-tar products contain the following: "We take one of the compounds corresponding to the general formula, $R(SO_3H)_x-N-N-C_{10}H_8NH_2$ (a) obtained by the reaction of diazo-sulphonic acids alpha-naphthylamine, and converted into the diazo-azo compound with the necessary quantity of nitrous acid. This diazo-azo compound is then allowed to react upon naphthol or naphthol-sulphonic acids in an alkaline solution. As an example, we shall describe the process of carrying out the manufacture of the dark blue azo coloring matter, which we call 'naphthol black.' We dissolve thirty-five kilograms naphthylamine disulphonate of sodium in three hundred liters of water acidulated with thirty kilograms of muriatic acid, twenty-one degrees Baume, and diazotize by addition of seven kilograms of nitrate of sodium in aqueous solution at a low temperature. Thereupon eighteen kilograms of chlorhydrate of alpha-naphthylamine dissolved in five hundred liters of water are poured into the above mixture while constantly stirring. The diazo-azo compound thus formed is allowed to act upon a solution of thirty-six kilograms of beta-naphthol-alpha-disulphonate of sodium (salt R) kept alkaline by addition of twenty kilograms ammonia of twenty per cent. The immediately formed coloring matter separates completely by addition of common salt. It is then filtered, and is delivered to the trade as a black paste, or in solid form." This description, so far as it relates to the special process, omits to describe one necessary step, namely, a second diazotization, whereby the diazo-azo compound mentioned is produced. *Held*, that the omission was immaterial, because—First, the general formula set forth provides for the conversion of the amido-azo compound into the diazo-azo compound; second, because the reference in the latter part of the specification to a diazo-azo compound would be sufficient to inform any practical coal-tar color manufacturer that a second diazotization was necessary; and, third, because any one skilled in the art would understand at once that the second diazotization could be accomplished by merely repeating the first as previously directed and explained.

9. SAME.

The general formula set forth in the specifications covered about 100 different substances, only a few of which will produce the naphthol black when treated by the special process described; and complainants claimed that the patent covered all of these bodies which should be found, on experiment, to produce the desired coloring matter, as being equivalents of the naphthylamine disulphonate of sodium called for in the special process. *Held*, that this broad claim was inadmissible, for the inventors could not be allowed to thus appropriate all the available substances in advance of experiment; that the general formula and statement might, however, be fairly considered as a disclosure of the general character and scope of the discovery, inserted merely to assist to a better comprehension of the special process afterwards set forth; that the patent was limited

to the particular substance mentioned in the description of the special process; and that, as thus limited, it was valid, notwithstanding the unwarranted attempt to cover all the other available bodies by means of the general formula and statement.

10. SAME—PURITY OF CHEMICALS.

On a question as to the sufficiency of the description contained in the specifications of a patent for producing a dye from a coal-tar product, defendant's expert chemist testified that, in producing the naphthylamine-disulpho acid required by the patent, he procured the correct raw materials, and followed the directions of the specifications, but that after obtaining the acid he did not test it to ascertain its purity. He was unable, from the acid thus produced, to obtain the desired results. Three experts for complainant stated that they readily produced the desired dye by following the patent, but that they tested their acids, after producing them, to see that they were technically pure. The patent prescribed no such tests, but it appeared that a practical chemist or manufacturer of coal-tar dyes at the date of the patent would, as a matter of common practice, have tested the purity of the materials used. *Held*, that the failure of defendant's expert must be attributed to impurities in his acids, and that the tests used by complainant's experts were to be regarded, not as experiments outside the patent, which were necessary to render it operative, but rather as mere simple and ordinary tests, which any practical and conscientious chemist would make in the ordinary course of manufacture, and, hence, that the omission of the patent to prescribe them did not invalidate it.

11. SAME—ASSIGNMENT OF PATENT—PAST INFRINGEMENTS.

In a suit for infringement of a patent for a dyeing compound, the only evidence of infringement was the sale by defendant of a can of alleged infringing dye prior to the time when complainant procured his patent by assignment. The assignment did not purport to transfer any right of action for prior infringements. *Held*, that on this evidence the suit could not be maintained.

12. SAME—COLOR COMPOUNDS—COAL-TAR PRODUCTS.

The Hoffmann & Weinberg patent, No. 345,901, for a naphthol-black color compound produced from coal-tar products, construed, and *held* valid and infringed.

This was a suit in equity by William J. Matheson against John Campbell for infringement of a patent for a color compound produced from coal-tar products.

Henry P. Wells, for complainant.

Cowen, Dickerson & Brown, for defendant.

TOWNSEND, District Judge. Final hearing on bill for injunction and accounting. Complainant alleges infringement of patent No. 345,901, for naphthol-black color compound, granted July 20, 1886, to Meinhard Hoffmann and Arthur Weinberg, and assigned to complainant July 10, 1888.

A preliminary question suggested by defendant is whether an assignment which purports to have been executed before the consul general of the United States of Frankfort-on-the-Main, Germany, is sufficiently proved by the signature of said consul general and the United States consulate general seal. I think this proof is sufficient, under the statutes of the United States and of the state of New York. *Rev. St. U. S. § 1750; Pharmaceutical Ass'n v. Tilden*, 14 Fed. 740; *Houghton v. Jones*, 1 Wall. 702.

The record herein discloses a series of complicated questions of chemical compositions, processes, and analyses, involved in the application of the general law of patents to the claimed chemical product. The elaborate and exhaustive brief of counsel for defendant forcibly presents an array of defenses supported by the testimony of an able expert, and by the results of skillful cross-examination. The determination of the issues raised has been found the more difficult by reason of the mass of expert testimony concerning chemical characteristics and laboratory processes, which the court cannot verify by inspection or experiment, and by the uncertainty as to how far these matters would be understood by one skilled in the art. A brief preliminary statement of the character of the subject-matter of the controversy, apart from its most technical chemical features, will be helpful in studying the development of the case. It has further seemed more desirable, even at the expense of some repetition; to present and dispose of only a single question at a time.

The patent is for a new coal-tar coloring product, called "naphthol black." It is described as a black color, is called a black dye, and is used for dyeing dark shades, commonly called "black." As a matter of fact, there is no such thing as an absolute or actual black dye. The artificial coal-tar colors employed in dyeing black, either alone, or in admixture with other colors, generally dye dark blue shades, which have the appearance of black, and which, when sufficiently concentrated, are commercially known as "black colors." In view of these facts, the patentees claim: "As a new product, the herein-described dyestuff or coloring matter, of a black color and capable of dyeing shades of dark blue, as set forth." The word "black" will be used herein in its popular meaning, as applied generally to colors. In this sense, the patent in suit was the first printed publication which described a process by which a black dye could be obtained from coal tar, and claimed the resulting product. Prior to its discovery, logwood had been generally used, in admixture with yellow, to dye a black color. It has a great advantage over logwood, in that it produces a beautiful black on the fiber to be dyed, without the use of mordants. It has been extensively adopted in the industries in place of logwood, and its sales have continuously increased. Its utility is not disputed. The patent was the first disclosure of a new, important, and highly meritorious discovery.

Before proceeding to a consideration of the specification, the general character of the chemical processes involved will be briefly stated: Certain aniline colors derived from coal tar are known as "azo compounds"; the word "azo," derived from "azote," or "nitrogen," being used to show that these compounds contained nitrogen in the form of nitrous or nitric acid. Among the chemical processes used in the creation or development of coal-tar colors is that of azotization. To azotize such a color is to treat it with nitrogen. To diazotize is to unite two nitrogen atoms to a hydrocarbon radical, and to form a diazo compound. A repetition of the process, or rediazotization, forms a diazo compound. The general

formula, " $R(SO_3 H)_x-N-N-C_{10}H_8NH_2(a)$," includes the sulpho-acids of any radical,—a group comprising a great number and variety of colors.

The foregoing general statement is not derived from the record or briefs, but is inserted merely as an aid in understanding the terms used and processes described.

The patent in suit contains several errors. The product claimed therein cannot be produced by following strictly the process as described. "Nitrate" is used in the place of "nitrite." The specific description of a second diazotization is omitted. One of the reducing tests is ambiguously stated. It is only by following a process in which the first two errors are corrected that a black dye can be produced. The specification of the patent in suit is as follows:

"We take one of the compounds corresponding to the general formula, $R(SO_3 H)_x-N-N-C_{10}H_8NH_2(a)$, obtained by the reaction of diazo-sulphonic acids upon alpha-naphthylamine, and convert it into the diazo-azo compound with the necessary quantity of nitrous acid. This diazo-azo compound is then allowed to react upon naphthol or naphthol sulphonic acids in an alkaline solution. As an example, we shall describe the process of carrying out the manufacture of the dark-blue azo coloring matter, which we call 'naphthol black.' We dissolve thirty-five kilograms naphthylamine disulphonate of sodium in three hundred liters of water acidulated with thirty kilograms of muriatic acid, twenty-one degrees Baume, and diazotize by addition of seven kilograms of nitrate of sodium in aqueous solution at a low temperature. Thereupon eighteen kilograms of chlorhydrate of alpha-naphthylamine dissolved in five hundred liters of water are poured into the above mixture while constantly stirring. The diazo-azo compound thus formed is allowed to act upon a solution of thirty-six kilograms of beta-naphthol-alpha-disulphonate of sodium (salt R) kept alkaline by addition of twenty kilograms ammonia of twenty per cent. The immediately formed coloring matter separates completely by addition of common salt. It is then filtered, and is delivered to the trade as a black paste, or in solid form. Naphthol black produces on the fiber in an acidulated bath dark-blue shades. It is very soluble in water, insoluble in spirit, and dissolves in strong sulphuric acid with green color. Reducing agents destroy the color-forming alpha-naphthylamine besides other products."

The specification first states the class of coloring matters to which the invention relates, discloses the general character of the discovery, and describes generally the nature of the chemical operations upon a class of products or colors included under a broad general formula. Then follows a specific description of the process employed in treating one of these products, naphthyl, in order to obtain the patented color. There is considerable controversy over these two descriptions, and it will be important to keep them distinct. They will therefore be hereafter referred to as the "general description" and "special process," respectively.

The patent relates to a method for manufacturing coloring matters belonging to the azo group. The formula of said general description covers from 100 to 500 products. Dr. Schweitzer, the chief expert for complainant, declares that the effect of the directions for treating any one of the compounds, corresponding to the general formula, $R(SO_3 H)_x-N-N-C_{10}H_8NH_2(a)$, was to say, if you treat any sulpho acid of any radical according to the directions in this specification, you will get a color producing black. He then adds:

"Of course, with the change of the radical there is a change of the chemical composition of the product; but in the arts the patent, in effect, declares that one is the equivalent of the other, and may be used as a substitute for the other, and that they are therefore technically the same."

While, technically, they would not have the same chemical composition, by reason of substitutions made in the general formula, causing differences in the position of the atoms in the different molecules, it was claimed that no chemical analysis would show any difference in the products obtained from following the process of the patent, and that all of them would have the same effect in the arts. Acting upon this theory, Dr. Leibmann, the expert for defendant, made a series of experiments with these coloring matters or bodies claimed as equivalents, following the description or general formula of the patent in suit. He testified that the colors so produced were not technical substitutes in the art, and that by following said description he could produce a variety of colors, but no color which, by itself, would dye black. He says that by following exactly the method of the special process he could obtain only orange, brown, and purple; by following the method of the general description, almost any conceivable color, except black, could be produced. Dr. Liebmann also testified to a series of experiments following the special process of the patent, with both the necessary corrections as insisted upon by complainant. In these experiments he made use of the G. acid, the R. acid, and the Ter Mer Dahl acid, either of which, acting upon soda, would produce the naphthylamine disulphonate of sodium called for in the special process of the patent. The results in each case were practically the same as those already stated. The patentees undertook, by their general formula, to cover every body or color in the azo group which, when treated by their process would give the product of the patent. In this attempt they used such broad terms as included a large number of bodies, of which very few, when treated according to the directions of the patent, would produce the patented color. Counsel for complainant claims that no one skilled in the art would have been misled into supposing that all of the hundreds of bodies included under the general formula would produce the patented product. He further says:

"The inventors were entitled to protect themselves against such as might try to steal their broad discovery by the general statement that many of the bodies included in the general formula might, when subjected to their process, produce naphthol black, and that the products so produced from those that did work were the equivalents of the product resulting from the specific materials set forth in the example. Without this, or something of the kind, the real invention could have been appropriated with impunity, and this pioneer patent for a most valuable discovery would have been almost valueless to the inventors."

I do not understand the law to be so that an inventor can thus speculate on the equivalents of his claimed invention, and thereby oblige the public to resort to experiments in order to determine the scope of the claims of his patent. It is admitted that the general formula covers over 100 different bodies. The patentees declare that they are equivalents. This, in regard to the operation of chemic-

als, means "equally good." *Tyler v. Boston*, 7 Wall. 327. The patentees say, according to complainant's expert, "If you take any sulpho acid of any radical, and treat as we direct you, you will get a color producing black." In fact, very many of these bodies are not equivalents, and will not produce a black color. Whether this statement is true or false, as applied to a particular color, can be ascertained only by experiment. Complainant's expert says, "As far as those bodies are concerned, a chemist would be obliged to experiment in order to find out the fact inquired about." If the experiment succeeds, the patentees claim the body as an equivalent. If it fails, they disclaim it. The law requires that the description in a patent for a chemical discovery should be especially clear and distinct. The rule and the reason are stated by Mr. Justice Grier in *Tyler v. Boston*, supra, as follows:

"A machine which consists of a combination of devices is the subject of invention, and its effects may be calculated a priori, while a discovery of a new substance by means of chemical combinations of known materials is empirical, and discovered by experiment."

Counsel for defendant has furnished the court with a copy of the opinion of the lord chancellor in *Simpson v. Holliday*, 13 Wkly. Rep. 577, in which a question similar to that presented herein was decided adversely to the complainant. There a patentee described two separate chemical processes for the production of a certain dye. One process was ineffective. It was claimed, however, that as this ineffective process was so described that a person of ordinary knowledge and observation would reject it, and adopt the other, no one would be misled. But the lord chancellor declared the patent void, and dismissed the bill, saying that while it is true that errors which could not possibly mislead, such as those appearing on the face of a specification, would not vitiate a patent—

"The proposition is not a correct statement of the law, if applied to errors which are discoverable only by experiment and further inquiry. Neither is the proposition true of an erroneous statement in a specification, amounting to a false suggestion, even though the error would be at once observed by a workman possessed of ordinary knowledge of the subject."

Judge Shepley, in *Jenkins v. Walker*, Holmes, 123, Fed. Cas. No. 7,275, says:

"When the specification of a new composition of matter gives only the names of the substances which are to be mixed together, without stating any relative proportion, undoubtedly it would be the duty of the court to declare the patent void, and the same rule would prevail when it was apparent that the proportions were stated ambiguously or vaguely; for in such cases it would be evident on the face of the specification that no one could use the invention without first ascertaining by experiment the exact proportion of the different ingredients required to produce the result intended to be obtained. The specification must be in such full, clear, and exact terms as to enable any one skilled in the art to which it appertains to compound and use the invention; that is to say, to compound and use it without any experiments of his own." *Moody v. Fiske*, 2 Mason, 119, Fed. Cas. No. 9,745.

It seems to me that this attempt of the patentees to cover this group of bodies, and thereby to appropriate products not embraced within their discovery, should not be countenanced. Discovery cannot be claimed in advance of experiment. There is no considera-

tion whereon to found the contract for the enjoyment of the monopoly implied by the grant of the patent.

It is further claimed that, if the patent is to be construed to cover the alleged equivalents embraced within the general formula, it is anticipated. The facts bearing on that point, omitting technicalities, are as follows: Of the colors included among the equivalents embraced in the general formula and description, two, namely, diazobenzole-mono-sulpho-acid and diazo-naphthalene-mono-sulpho-acid were commercially sold and used for dyeing black in this country prior to the date of the application for the patent in suit. The former color is a fast violet. When mixed with yellow, it dyes black. The latter is a blue violet, or azo black, and is now known to be naphthol black. The chief answer to this claim of anticipation, with reference to the general formula, is that these colors were made by a secret process in Germany, not discoverable by inspection or analysis, and that the invention was not present in this country, nor published or described, at the date of the patent in suit. The defendant cites the case of *Cohn v. Corset Co.*, 93 U. S. 377, in support of the proposition that a patent for a product may be anticipated by showing or describing the product, without describing the mode of manufacture. There, the complainant had patented a certain form of corset. He did not exhibit or claim the process of making. The anticipating specification, in connection with the known state of the art, was sufficient to enable one skilled in the art to make the patented corset, and for that reason the patent was declared invalid. I fail to see the application of that decision to this case. The consideration received from the disclosure of the discovery to the public is the foundation of the right to the monopoly of the patent. As against an original discoverer, the law recognizes no distinction between the lost art, the abandoned experiment, and the secret process. Whether the conception slumbers buried in the ashes of the past, lies inchoate in the brain of the would-be inventor, or is locked in the breast of its creator, it cannot afterwards be dug up, developed, or set free, to question the title of the complete creation first brought forth into the world of knowledge, and thus, as the first born, the rightful heir to the patent estate. As against an original inventor, anticipation is not shown by prior use of the invention under conditions which fail to disclose its composition or operation. Such knowledge of the invention should be accessible to the public. In *Boyd v. Cherry*, 50 Fed. 279, 283, Judge McCrary says:

"If the alleged prior use of the process was under such circumstances that the public obtained no knowledge of the mode of its operation, or of the results to be obtained by it, there is no prior use, within the meaning of the patent law. If kept secret by the first inventor until the second has discovered it and given it to the public, the latter will be protected, for it is to him that the public is indebted; it is from him that the public has received value." 3 Rob. Pat. 152.

Irrespective of the legal questions raised by the fact that the composition of these colors was unknown, it appears that these colors are not anticipations, if the scope of the patent is limited to the

special process. While both are embraced within the general formula, neither belongs to the class or body named in said special process, namely, naphthylamine-disulpho acid. It is proved that fast violet is the soda salt of aniline paramono-sulpho acid, while azo black is the sodium salt of beta-naphthyl-sulpho acid. In short, these colors, alleged as anticipations, are mono-sulpho acid products. The color of the patent is a disulpho acid product. Further chemical facts are shown in support of this denial of anticipation, but they are merely cumulative, and need not be stated here. They show, generally, that the starting material named in the special process of the patent is radically different from that of either of said colors. In view of the conclusions reached, the consideration of these matters was unnecessary; but it has seemed desirable, in the peculiar circumstances of this case, to pass upon the various points raised, in order that they may be more readily presented upon appeal.

A further defense, which is directed against the whole patent, is its inaccuracy and insufficiency, by reason of which, it is said, it is practically inoperative. It is claimed that these errors are so misleading as to render the patent void. One branch of this subject has already been considered in connection with the experiments of defendant's expert following the general description, and as to which he testified he obtained as a result, purple, drab, brown, and other colors. Defendant's expert made further experiments, following the corrected instructions of the special process, without obtaining the product of the patent. It is admitted that said product can only be obtained by making certain changes in said special process, namely, by changing the word "nitrate" to "nitrite," in line 28 of the specification, and by adding a direction for a second diazotization of the compound before it acts upon the solution of beta-naphthol-alpha-disulphonate of sodium. "Nitrate" of sodium in the patent appeared as "nitrite" of sodium in the original application, but was afterwards altered by the attorneys for the applicants. The mistake does not appear to be material, for the experts for complainant testify that no one skilled in the art would be misled by the mistake. The chief reasons given are that it was well known at the date of the patent that it was necessary to use nitrite of sodium to carry out the diazotization in the manufacture of coal-tar colors, and that the use of the word "nitrate" for "nitrite" was common in the earlier United States azo patents. It is manifest from the whole evidence that this error is immaterial.

The next error is in the omission to describe, or provide for, the second diazotization, whereby the amido-azo compound is converted into a diazo-azo compound. The special process of the patent, up to a certain point (line 33), describes a diazo compound. It is next referred to as a diazo-azo compound. The file wrapper shows that the original application contained directions for a second diazotization, after waiting 12 hours, by the addition of muriatic acid and nitrite of sodium. It does not appear how this or the preceding error occurred. The complainant argues that they were due to the ignorance of the patent solicitors in this country. The defendant con-

tends that, as the patentees manifestly originally understood and correctly stated the process, these errors were intentionally inserted into the specification, in order to mislead. In the absence of any proof other than what appears from the record, it has seemed just to test their materiality by the inquiry whether they were of such a character as to mislead one skilled in the art, and thereby deprive the public of the benefit of the alleged invention. As already stated, it does not appear that the use of the word "nitrate" instead of "nitrite" was in fact misleading. The testimony of complainant's experts has satisfied me that the second error also is immaterial, because they show—First, that the general formula provides for the conversion of the amido-azo compound into the diazo-azo compound; second, that the reference to the compound, in line 34 of the specification, as a diazo-azo compound, would be sufficient to inform any practical coal-tar color manufacturer that a second diazotization was necessary; and, finally, that any one skilled in the art would have understood at once that the necessary second diazotization could be accomplished by merely repeating the first diazotization as directed and explained in the specification. This view is confirmed by the fact that while the learned expert for the defendant attributed a series of the failures in his experiments to the errors caused by following the process of the patent, he did not state that they were such as would mislead a person skilled in the art, and no witness was called to deny the statements of complainant's experts on this point.

A further error occurs in the tests stated in the specification, but, as this chiefly concerns the question of infringement, it will be considered in that connection.

Counsel for defendant claims that the whole patent is invalidated by reason of said general formula and description. I have not been able to adopt this view, for the following reasons:

Said general statement may be fairly considered as a disclosure to the public of the general character and scope of the discovery, inserted merely as a help to a better comprehension of the special process of the patent. As is stated by complainant's expert, a chemist would more readily understand the process and reactions from such a graphical formula than from a general description. A comparison of said statement with the special process, and an examination of the claim, show that the general formula only describes the class of bodies to which naphthyl belongs, and covers only the first step in the reaction. It does not profess to give a resulting color or product. This was the first printed publication of such a coal-tar process and product. While it may be questioned whether the general formula and description, as a matter of law, could be construed, as claimed by complainant's counsel, so as to cover all the bodies included therein, yet, even if this construction be assumed, it does not appear that it was based upon experiment, and it does not purport to be a complete description of the necessary process. When, however, the patentees undertake to describe the complete process, and to claim the resulting product, they confine the application of the process to a single body, and the tests and claim to a single product. It does not appear that a person skilled in the art, upon reading the patent,

would have been misled into supposing that all the compounds covered by the general formula would produce the patented color, or, upon an examination of the whole patent, would have understood that it purported to describe all the bodies included under the general formula. The patentees say that "the present invention relates to a new method for manufacturing blue to violet coloring matters belonging to the azo group." They then say, "We take one of the compounds corresponding to the general formula," etc., and treat and convert it. Then follows the special process for obtaining one of the various "coloring matters belonging to the azo group," namely, naphthol black, with appropriate tests, and a claim limited to the single product of the special process upon the special body "naphthyl."

Furthermore, no principle has been more firmly established and consistently applied, in the federal courts of last resort, than that the patent must be construed in conformity with the self-imposed limitations contained in the claims. *Groth v. Supply Co.*, 9 C. C. A. 507, 61 Fed. 284; *McClain v. Ortmyer*, 141 U. S. 419, 12 Sup. Ct. 76; *Manufacturing Co. v. Weeks*, 9 C. C. A. 555, 61 Fed. 405. The application of this principle of construction may be invoked in support of the validity of the patent as well as in denial of infringement. In the case at bar the claim is confined by "the herein-described dyestuff * * * as set forth." The only dyestuff described is the filtered coloring matter, delivered to the trade as a black paste, or in solid form, of the special process. The general statement contains no reference to a product. Manifestly, the claim could not be construed to cover any body other than the naphthyl of the special process, either upon the question of infringement or validity. I am aware that these views do not accord with the broad claims of the complainant's counsel, but the above construction seems to me the only one justified by an interpretation of the whole instrument. The attempt of complainant's counsel and experts to torture this incomplete, unclaimed, general disclosure of the discovery into an unwarranted appropriation of hundreds of bodies, in advance of experiment, has furnished to defendant some of the strongest evidence in support of the arguments against the validity of the patent.

I conclude, therefore, that the multifariousness of the general formula does not invalidate the whole patent, but that said patent may be valid, at least where so limited as to embrace only the product of the special process, definitely stated, and applied to naphthylamine-disulphonate of sodium, as specifically claimed.

Even if the scope of the patent be thus limited, the general formula and description, under the familiar rule of construction, may be resorted to in order to interpret and explain the whole patent. The special process describes in detail the method of making "naphthol black" from the chemical product or salt, naphthylamine-disulphonate of sodium. At the date of the patent in suit the term "naphthylamine-disulphonate of sodium" was known as covering some four or five naphthylamine-disulpho acids. Upon three or these acids, namely, beta-naphthylamine acid R., beta-naphthylamine acid G., and Freund's acid, experiments were made

by the experts on each side. The experts for complainants succeeded in producing the color of the patent in every case. The single expert for defendant entirely failed in one case; in others, the results were inconclusive. All the experts are eminent scientists. All swear they faithfully followed the directions of the patent. Upon this proof the counsel for defendant makes the following claim, namely, that such patents should be so plain, under the statute, as that an ordinary manufacturer of aniline colors, having such ordinary knowledge as existed in this country at the date of the patent, should be enabled by the instructions of that patent to carry out successfully its process. This point is well taken. The following considerations will be confined to such evidence as relates to experiments following the corrected method of the special process:

Dr. Liebmann, the expert for defendant, admits that after he had failed in his experiments, following the directions of the patent, he succeeded in producing from the G. acid the color of the patent by the use of a secret process, not described in the patent, but invented by him. He admits that, at the date of the patent in suit, technically pure G. acid was manufactured, and used in the preparation of dyestuffs. With the Freund's acid he came nearest, except as above, to obtaining the product of the patent. The color was a bluish violet. Dr. Liebmann claims that it did not correspond with the properties described in the patent, and was not produced either by following the instructions of the patent alone, or with the added instructions of the art. He admits, however, that he should probably not have objected to the result if the patent had specified this acid. Dr. Liebmann testifies that the R. acid is the one which a chemist would have naturally selected from those already named as included within the terms of the special process. He states that with this acid he was unable to produce the result of the patent by the use of all care and precautions. The considerations already suggested apply to this evidence. I shall assume the law to be so that if the specification of a patent for a chemical product purports to definitely describe the process of obtaining the product from certain bodies, and a person skilled in the art cannot obtain the result by the use of the method described, upon each one of the bodies included in said description, the patent is invalid. For this reason, among others, the claim that Dr. Liebmann practically produced, or could have produced, the color of the patent from the G. and Freund acids, seems to be immaterial, provided the specification is insufficient as to the R. acid. Dr. Liebmann, for his experiments, used impure naphthylamine-disulpho acids; that is, neither chemically nor technically pure. The experts for complainant used technically pure naphthylamine-disulpho acids. "Technically pure" means pure in the ordinary acceptance of the terms of the art. "Chemically pure" means absolutely pure. The question is, what should or would the ordinary coal-tar chemist have done, in these circumstances? As this inquiry involves a close and difficult question, it will be necessary to examine the evidence at length.

Dr. Liebmann testifies that he procured the correct raw materials, and from them the acids were prepared, partly by himself, and partly by an assistant in his laboratory, according to the literature on the subject. It would only confuse the questions involved to state the chemical processes by which these acids were prepared. It appears that Dr. Liebmann followed the instructions contained in certain standard chemical publications. Having thus prepared them, he did not further identify them; that is, he did not test them to see whether they were pure, or mixed with other substances. He stated that he "examined the raw material, and followed the instructions given, and there was no necessity of further investigation of the identity of this body." It is stipulated that the testimony of complainant's expert, Dr. Schweitzer, is to be considered as having been given also by Dr. Charles F. Chandler and Dr. Henry Morton. Dr. Schweitzer testifies that Dr. Liebmann failed in his experiments, following the special corrected process, because he prepared and used impure naphthylamine-disulpho acids, the impurities in which vitiated his result. Dr. Schweitzer says:

"I myself prepared the naphthylamine-disulpho acids mentioned by Dr. Liebmann, after the directions given by the authorities cited by him, only using the general chemical knowledge of the date of the patent in suit to obtain technically pure acids. And with these acids, in every case, I succeeded without difficulty in obtaining the product of the patent in suit by following the process therein described. It is obvious from Dr. Liebmann's testimony that he took no precautions to obtain his acids in a technically pure form; and since he failed, while I succeeded without difficulty, it seems clear that his failure was due to the modification of the reaction by the impurities contained in his acids."

He states that he has found, by the application of such tests for reaction as would naturally have suggested themselves to any one skilled in the art, that the time allowed by Dr. Liebmann (eight hours) was not sufficient to convert naphthol-disulpho acid R. to naphthylamine-disulpho acid R. Again, as to the preparation of the G. acid, Dr. Schweitzer says:

"Although Dr. Liebmann knew that the calcium salt of this acid was very easily soluble in water, he did not use this convenient property for the separation of this acid from foreign bodies, so as to obtain a practically pure acid for his experiments."

Dr. Schweitzer concludes:

"In the case of the G. acid, as in the case of the acid R., Dr. Liebmann did not use the acid, but a mixture of the acid and other organic substances,—a mixture neither adapted to the process of the patent in suit, nor within its terms."

In the preparation of the Freund acid, Dr. Liebmann followed the directions given in a standard work, but did not follow the specifications of the German patent to Freund for said acid, reprinted in said work. The evidence as to the use of the G. and Freund acids is only material, for reasons already stated, as showing the general character of the experiments testified to by Dr. Liebmann. The Ter-Mer-Dahl acid experiments are not material, as it does not appear that this acid was known at the date of the patent in suit. No question is raised as to the character or use of the other chemicals named in the

special process. Raw materials such as are used in the process of this patent, and in other similar processes in chemical factories, are practically never chemically pure, but for almost all reactions technically pure bodies are used. Dr. Schweitzer, confirmed by Drs. Chandler and Morton, says the acids prepared by him, and separated from the raw product in its entirety, were technically pure bodies. He says:

"The general knowledge taught everybody skilled in the art that there were impurities present in the raw products obtained during the preparation of the naphthylamine-disulpho acid. That these impurities are deleterious to the naphthol-black reaction I only conclude from the result of Dr. Liebmann's and my own experiments. Naturally, the literature at the date of the naphthol-black patent could not give us any information what influence these impurities would have on this new reaction, which was published for the first time. But the patent calls for naphthylamine-disulphonate of sodium, and states that such bodies will give naphthol black. It contains no statement how mixtures will work when subjected to that reaction."

There are no statements in the literature of the art that the processes there given produce impure acids, or that it was necessary to remove any impurities; but Drs. Schweitzer, Chandler, and Morton say that every conscientious chemist would have added such simple operations as would insure a pure product, and that everybody skilled in the art at the time of this patent carried out such operations, when called upon to prepare said acids.

Some stress is laid upon Dr. Schweitzer's statement that he only concluded that the impurities in the raw materials were deleterious to the naphthol-black reaction, from the result of his and Dr. Liebmann's experiments. This is explained, however, by the fact that, having succeeded in the same experiments in which Dr. Liebmann failed, he assumed that the difference in result came from the fact that Dr. Liebmann's materials contained a mixture of acid with foreign organic bodies, which vitiated his reactions. It will be remembered that with the R. acid Dr. Liebmann did not obtain anything like the result of the patent. Assuming that the question of the sufficiency of the specifications is narrowed down to a consideration of the reactions with the R. acid, two points are presented by counsel for defendant:

The first point is supported by the evidence that Dr. Schweitzer used a certain process, described by one Landshoff, in closed vessels, and obtained the product of the patent in suit, but did not use the other Landshoff process, with open vessels. The Landshoff closed-vessel process states that the conversion is carried out by heating under pressure during 24 hours. The Landshoff open-vessel process directs heating for 12 hours. The cross-examination covers a long and elaborate examination of the literature relating to the preparation of the R. acid. It appears therefrom that the patent for the second Landshoff process, not used by Dr. Schweitzer, stated that the acid thereby produced was without bi-products, —meaning, thereby, free from secondary or foreign products or substances. Dr. Schweitzer declined to give an opinion as to whether the product of the second Landshoff process, treated according to the method of the patent, would produce the naphthol

black of the patent, as he had never practiced said process. He did say, however, as follows:

"In my opinion, derived from my experiments when working with pressure, I should say that twelve hours would not be sufficient to convert the whole quantity of naphthol-disulpho acid present into naphthylamine-disulpho acid. The condition of such product of reaction would not answer to the requirements of the patent, which calls for naphthylamine-disulpho acid, and, when taken as a whole, it would, in my opinion, not give the product of the patent in suit."

The second point is that as Dr. Liebmann, following the literature, failed to obtain the patented product, and Dr. Schweitzer only obtained it after repeated experiments and tests for purity, not referred to in the literature, the information contained in the patent is not legally sufficient. To the general considerations on this point the following may be added:

It is forcibly urged by counsel for defendant that the law would only require that a person skilled in the art should take the product stated by Landshoff to be free from bi-products for his experiments, without further tests, and that such processes of purification as are necessary to be carried on during the preparation of the color must be stated in the specification of the patent. These claims are opposed by the following considerations: As to the second Landshoff process, there is no admission or proof that its product would not produce the patented color, other than Dr. Schweitzer's opinion and reasons above stated. This opinion, not founded on experiment, practically questions only the correctness of the Landshoff statement that the open-vessel 12-hour product would be free from bi-products. It does not appear whether Landshoff was or was not mistaken as to the freedom of his product from bi-products. Dr. Liebmann used the open-vessel process. The defendant failed to show by him, or by any other expert, that the product of the Landshoff closed-vessel process would be inoperative. In the absence of such proof, the insufficiency of the patent in suit will not be assumed on that ground.

Drs. Schweitzer, Chandler, and Morton—three eminent experts—agree in repeated declarations that the general knowledge at the date of the patent taught everybody skilled in the art that there were impurities present in the raw product obtained. They say (using Dr. Schweitzer's language) that the general chemical knowledge would teach such person—

"That the product of any of the described processes for the preparation of naphthylamine-disulpho acid would result in mixed products, since it was known that such was generally the case in complex reactions, such as that of the sulphuration of bodies of that kind. Since the patent was the first publication of the naphthol-black reaction he would not know what injurious effect the foreign organic bodies of the mixture might have, and therefore, the patent calling for naphthylamine-disulpho acid, and not for naphthylamine-disulpho acid mixed with something else, would, as a matter of course, apply all of the knowledge of the time to prepare as pure sulpho acids as possible. This I did, and in doing so I succeeded, without difficulty, in obtaining the product of the patent after the process therein set forth. Since I employed only the very simplest operations of chemistry, known long before the patent in suit, it is evident that the knowledge of the time was sufficient to produce naphthylamine-disulpho acid fit for the naphthol-black reaction."

They further say that the so-called investigations and experiments were simple operations, which everybody skilled in the art carried out at the date of the patent in suit, when called upon to prepare naphthylamine-disulpho acid.

These witnesses further agree in the statement that it was the common practice in coal-tar factories, at the date of the patent in suit, to test the raw materials to be used in the manufacture of colors, in order to ascertain their character and degree of purity. This latter evidence was objected to on the ground that the witnesses were not shown to be experts on this point. I think it is relevant, to the extent that acquaintance with such matters may be implied from the professional position and general expert knowledge of Drs. Morton and Chandler, and from the experience of Dr. Schweitzer as a consulting chemist in this country, making coal-tar colors a specialty, and as having formerly had charge of coal-tar color factories in Europe.

Upon the question whether such tests to determine the amount of impurities present in raw materials are usually employed by persons skilled in the art, the following further considerations are material: Dr. Schweitzer, in criticising Dr. Liebmann's failure to test or identify his raw materials, says that the common and ordinary test, at the date of the patent, for reactions in the preparation of the acid, was by simple titration with nitrate of sodium, and the use of iodine starch paper as indicator. The defendant has not only not denied this statement, but Dr. Liebmann seems to admit the general use of such test in these operations. Counsel for complainant asked him this question:

"In your cross-examination you have sometimes referred to materials used by you as of so many grammes weight, will you explain what you mean by this phrase, chemically?"

Dr. Liebmann replied:

"The meaning of the expression is plain to any chemist. It expresses the quantity used, as found by titration with nitrate of soda; that is to say, the number of grammes of pure material used, excluding the impurities."

In this connection, the testimony of Howard S. Neiman, a chemical expert, becomes important. Mr. Neiman is the superintendent of the Albany Coal-Tar, Dye & Chemical Company, a corporation of which complainant is secretary and treasurer. Its selling offices are the same as those of complainant. I have therefore considered this evidence, in view of these circumstances. It is not necessary, however, to discuss his testimony as to the samples used, or certain criticisms of his cross-examination, for reasons which will hereafter appear. Mr. Neiman testifies that he carried out the special process of the patent in suit without difficulty, and obtained in every case the result of the patent. His further testimony is as follows:

"At the date of the patent in suit, would or would it not have been in accordance with the ordinary practice of coal-tar color manufacturers, endeavoring for the first time to carry out the process of a new patent, to test their raw materials before proceeding to manufacture, in order to determine that they were the raw materials called for by the patent, and that they were of the requisite degree of purity to answer the requirements of the patent?"

"Most certainly it would have been in accordance with the practice of the

day. A person who was endeavoring to follow the process of the patent in suit on a commercial scale would, as a matter of course, satisfy himself positively that the raw materials he was using were identical with the raw materials called for by the patent, and that these raw materials contained no other substances which might endanger the successful operation of the process of the patent. For instance, the patent in suit calls for naphthylamine disulphonate of sodium. At the date of the patent, a manufacturer endeavoring to follow the process described in the patent in suit would have fully and positively identified the substances he was using, in order to prove that it was naphthylamine disulphonate of sodium, and that it contained no other matters which might in any way prejudice the result."

The testimony of these four experts as to what would have been understood by a person skilled in the art, and as to the sufficiency of the specifications, is not denied by a single coal-tar manufacturer or expert.

Counsel for defendant cites the Nickel-Plating Cases in support of the proposition that "if the conditions of a reaction require a chemical body in an unusual condition, either of formation or purity, the patent must point out the necessity for this condition." But nowhere in the record is there any evidence that it was necessary that the naphthylamine-disulpho acid should be in an unusual condition of purity. It need not be chemically pure, but only technically pure; that is, of such purity as is ordinarily found or required in the arts for the purposes for which it is used.

Counsel for defendant claims that complainant's expert had to make experiments in order to determine whether his materials were technically pure, and that, therefore, the patent is void. Assuming, as matter of law, that this patent must so clearly describe the steps in the process as to enable those skilled in the art to manufacture the product without any new experiment, invention, or discovery, the parties are at issue upon the legal effect of the evidence of the practical tests made by the expert for complainant in the course of his investigations. In my opinion, they do not affect the sufficiency of the specifications, because they were not carried on in pursuance of the process stated in the specification, or in the course of the preparation of the product, but were mere simple, ordinary tests to determine whether the starting material was in fact the naphthylamine-disulpho acid of the specification. Furthermore, while, for the purposes of cross-examination, it might have been desirable that the experts should manufacture their own starting materials, it does not even appear that the ordinary coal-tar manufacturer could not have obtained such chemicals in the market, and of the requisite purity. The conclusive answer to defendant's claim is the uncontradicted evidence, not only that these preliminary operations were merely carried on in order to guard against the presence of deleterious impurities, but that they were such as every conscientious chemist, every coal-tar manufacturer, would have added, in undertaking to obtain a patented product by following the process stated. In this connection, I do not refer to the experiments to test the various equivalents. It has already been assumed that the patent would be void if one of the equivalents included under the term "naphthylamine-disulpho acids" failed to furnish the patented product. This discussion proceeds upon the consideration of the results in the case of the R. acid,

chiefly relied on by defendant. It is true that the evidence as to what would have been understood by persons skilled in the art was not introduced until after Dr. Liebmann, defendant's only expert witness, had returned to Germany. But it is not necessary to resort to a learned foreign chemist to meet this evidence. If the patent was not sufficiently definite to enable one skilled in the art to obtain the product, it should have been easy to prove that fact by the evidence of ordinary coal-tar chemists and manufacturers. As the evidence now stands, the claim of insufficiency chiefly rests upon deductions drawn from the failure of the experiments of Dr. Liebmann, unsupported by any evidence that persons skilled in the art could not have obtained the product by following the process of the patent. If the patent was insufficient as to such persons, it was vital to the defendant's case to show it. The court, in a complicated case of this character, ought not to accept mere suggestions as to what the patent might mean to a person skilled in the art, as against the positive testimony of skilled experts, when no evidence has been introduced to contradict it. I conclude that the specifications of the patent in suit are sufficient to enable a person skilled in the art to obtain the product of the patent, using the ordinary knowledge of the class of persons to whom the patent is addressed.

Complainant, by way of proof of infringement, has offered in evidence a can containing coloring matter, and filed the following stipulation:

"It is stipulated and agreed by the solicitors for the parties to this cause that the said can, then containing coloring matter, a portion of which is now therein, was sold by the defendant herein within the United States subsequent to July 20, 1886, and prior to the commencement of this suit."

It will be remembered that although the patent was granted July 20, 1886, it was not assigned to complainant until July 10, 1888. The assignment does not purport to transfer to complainant any right of action for prior infringement. In these circumstances, the complainant must furnish affirmative proof of infringing acts committed subsequent to said assignment. Counsel for defendant claims that this stipulation does not prove a sale of the alleged infringing color since the complainant acquired title to said patent. This point is well taken, and is fatal to the maintenance of the present suit. *Moore v. Marsh*, 7 Wall. 522; *Jones v. Berger*, 58 Fed. 1006. The facts stated in the stipulation prepared and relied on by complainant may be perfectly true, and yet not show that he has any grievance. In view, however, of the opposing claims of counsel as to what was actually understood between them, I think the parties should have the right to introduce further proof as to the date of the alleged sales.

The other points made in support of noninfringement are highly technical.

It is said that defendant's color does not correspond with the tests of the patent. These tests are as follows:

"Naphthol black produces on the fiber, in an acidulated bath, dark-blue shades. It is very soluble in water, insoluble in spirit, and dissolves in strong sulphuric acid with green color. Reducing agents destroy the color-forming alpha-naphthylamine besides other products."

Dr. Liebmann says that defendant's color is slightly soluble in ethyl alcohol. Complainant's experts say that it is not soluble in ethyl alcohol. It is not disputed that the reactions both of complainant's and defendant's colors were identical, when tested with either ethyl or methyl alcohol, both being dissolved by the latter. It is suggested that Dr. Liebmann's ethyl alcohol may have been the alcohol of the druggist, containing just enough water to account for the slight solubility of defendant's color. It is not seriously claimed that the word "spirit" referred to methyl alcohol. Dr. Liebmann experimented with ethyl alcohol only. The word "spirit" generally refers to ethyl alcohol. It seems to be sufficiently shown that both complainant's and defendant's colors are "insoluble in spirit."

It is next said that defendant's powder is not "of a black color," as specified in the claim. But this has already been sufficiently explained by the admitted fact that there is no such thing as a black color. It is evident that the word "black" is here used in its ordinary acceptation. This is shown both by the subsequent statement in the claim, "and capable of dyeing shades of dark-blue," and by the language of the specification.

Much stress is laid on the ambiguous statement, "Reducing agents destroy the color-forming alpha-naphthylamine besides other products." I do not know what this sentence means. Dr. Liebmann was not asked, and did not state, its meaning. He assumed, however, and Dr. Schweitzer admits, that without said hyphen it may mean "reducing agents destroy color, forming alpha-naphthylamine," etc. It is not denied that with the hyphen it means if the color be treated by reducing agents the color would be destroyed. The hyphen after "color" is a printer's blunder, and yet, without it, the sentence is almost senseless. It is capable of the further construction that, where reducing agents are applied to the color, they destroy the alpha-naphthylamine and other bodies. In fact, the color is destroyed by reducing agents, but no alpha-naphthylamine is formed. This blunder does not seem vital in this case. Both complainant's and defendant's colors show the same reactions, or are destroyed in the same way when treated with reducing agents. Furthermore, Drs. Schweitzer, Chandler, and Morton testify that at the time of the application for the patent in suit the tests therein given were sufficient to identify the product, irrespective of the process by which it was obtained. This statement is not denied. They further give in detail the results of a series of 34 reduction and reaction tests made by them, by direct comparison of the patented product and defendant's color, made simultaneously with both colors, from which they conclude that the two colors are technically and chemically identical, and that defendant's color is unquestionably the product of the patent in suit. I do not find any material evidence to disprove this claim. That defendant's color does not exhibit the same reactions as that of complainant is only inferrible from the results of the experiments made by Dr. Liebmann, hereinbefore referred to. It does not appear that he experimented with the color made by complainant, or that such experiments, if made, would not have shown the

same results in both cases. Dr. Liebmann says that defendant's color, made by him, is not complainant's color, as made by him, because the results obtained differed from certain tests given in the patent. But this, for the reasons already stated, only means tests made, not upon the color of the patent, but upon the colors of his failures, or differences in tests upon the different construction of the word "spirit" and the term "color-forming alpha-naphthylamine besides other products." He does not say that the naphthol black made and sold by complainant differs from the naphthol black made and sold by defendant. Drs. Schweitzer, Chandler, and Morton say that Dr. Liebmann admits that defendant's color is the product of the patent in suit. The reasons stated involve chemical formulæ which it is not necessary to consider. As the testimony is not controverted, it may be assumed to be true.

Much stress is laid by complainant upon the claim that this patent is entitled to a liberal construction, as a pioneer patent. This claim has not been discussed, because it does not seem to be material to the substantial question in the case. This question is whether the patent sufficiently describes the process and product to enable a person skilled in the art to obtain and identify the product. It has been already stated that the patent first disclosed to the public a process whereby so-called black dye was produced from coal-tar colors; that this process possessed patentable novelty; that the product was of great utility, has gone into general use, and has replaced logwood in some industries; and that its sales have continually increased. These facts may be properly considered in connection with the general principle that a meritorious invention is to be supported, rather than defeated. They are pertinent in the consideration of the mistakes which have crept into the specification, and which should not be permitted to invalidate such a patent, provided they are such as would have been understood and corrected by any one skilled in the art. In this connection only has the pioneer character of the invention been considered and applied.

Let the bill be dismissed, unless the complainant shall, within 60 days from the filing of this opinion, introduce further proof of the date of the sale of the infringing color. The defendant may introduce evidence and be heard on said proof. If infringement be shown thereby, a decree may be entered for an injunction and an accounting.

IMPERIAL CHEMICAL MANUF'G CO. v. STEIN et al.

(Circuit Court, S. D. New York. August 7, 1895.)

1. INFRINGEMENT OF PATENTS—ACQUIESCENCE AND LACHES.

A complainant who purchased his patent a short time before filing the bill will not be refused an injunction, on the ground of acquiescence or laches, where the only evidence thereof is that sales of the infringing article were made for several years by defendants' assignor, and that no objection was made by complainant's assignor.

2. SAME—HAIR-DYEING PROCESS AND COMPOUND.

The De Barbaran patent, No. 305,057, for a process and compound for dyeing hair, *held* valid and infringed.

This was a suit in equity by the Imperial Chemical Manufacturing Company against Joachim Stein and others for injunction and accounting for alleged infringement of a patent relating to the dyeing of hair.

Briesen & Knauth, for complainant.

Hays & Greenbaum, for defendants.

TOWNSEND, District Judge. Bill for injunction and accounting, alleging infringement of patent No. 305,057, granted September 16, 1884, to C. Albert Conti de Barbaran, and assigned to complainant. The two claims of the patent cover respectively a process for dyeing hair, and the compound or dye bath used therefor. Said claims are as follows:

"(1) Coloring human hair or the hair or fur of animals by treating the said hair or fur first with an ammoniacal solution of nickel, and then with pyrogalllic acid, substantially as hereinbefore described and set forth.

"(2) The dye bath, consisting of an ammoniacal solution of nickel and pyrogalllic acid, substantially as described."

The defenses are denial of infringement, acquiescence, lack of patentable novelty.

The patent states, as an essential element of the patented process, that the liquids used therein shall be successively applied in a given manner. The defendants have sold a hair dye put up in three separate bottles, one containing sulphate or nitrate of nickel, one a solution of pyrogalllic acid in water, and one a solution of nitrate of silver. The circular accompanying said bottles shows that defendants apply said dye in the manner specified in the patent, and sell it to others to be so applied. Such sales constitute contributory infringement. *Chemical Works v. Hecker*, 2 Ban. & A. 351, Fed. Cas. No. 12,133; *Boyd v. Cherry*, 50 Fed. 279.

The evidence as to acquiescence is as follows: For several years, prior to 1891, defendants' assignor advertised and sold said infringing dye in the same form and under the same name as that now used by defendants, and no claim of infringement was ever made until after the defendants had bought out said business. Counsel for defendants claims that these facts show abandonment of the patent and acquiescence in its public use. There would be much force in this argument if it appeared that complainant was a party or privy to such laches. But the evidence shows that it did not acquire title to the patent until May 1, 1891, and that this bill was filed June 24, 1891. It is not now necessary to determine either under what circumstances the assignee of such a right may be chargeable with the consequences of the laches of his assignor, nor the effect of the alleged acquiescence of complainant's assignor upon the question of damages. It is well settled that abandonment or long delay to sue, with full knowledge of infringement, may constitute such laches as to be equivalent to bad faith, and may operate in analogy to an estoppel, so far as equitable relief is sought. *Prince's Metallic Paint*

Co. v. Prince Manuf'g Co., 6 C. C. A. 647, 57 Fed. 938, 944; Menendez v. Holt, 128 U. S. 514, 524, 9 Sup. Ct. 143. But there is no evidence in this case of nonuser, surrender to the public, or knowledge of infringement, except such as may be inferred from the fact of said sales without any protest on the part of complainant's assignor. In these circumstances, the principle of laches should not be so applied as to deprive complainant of the right to an injunction. A trespasser cannot acquire a legal right to the continuance in his wrongful acts without affirmative proof of some such act or omission to act, on the part of him whose property rights are invaded, as would make it inequitable to assert such rights. The inequity of permitting the enforcement of such claim is founded on knowledge of an opportunity to enforce rights on the one hand, and on changes in the conditions or relations of the adverse party on the other. Galliher v. Cadwell, 145 U. S. 368, 12 Sup. Ct. 873. "Mere delay in seeking relief, where there is no estoppel, will not in general prevent an injunction, though it may preclude the plaintiff from the right to an accounting for past profits." Edison Electric Light Co. v. Equitable Life Assur. Soc., 55 Fed. 480; New York Grape Sugar Co. v. Buffalo Grape Sugar Co., 18 Fed. 638, 646; Walk. Pat. § 596; Pom. Eq. Jur. § 817; Kittle v. Hall, 29 Fed. 508.

The disclaimer of the patent and the admissions of complainant's witnesses show that the claims must be strictly limited to the successively combined use of an ammoniated solution of some salt of nickel, and a mordant of pyrogalllic acid, or its equivalent. Counsel for defendants claim that, as thus limited, the patent is void for lack of patentable novelty, and, in support of said claim, relies especially upon the affidavit of Paul De Spoote and the testimony of Francis F. Marshal, husband of defendants' assignor. Marshal's testimony fails to prove that the circulars containing directions for the use of the dye similar to those of the patented process were published prior to the application for the patent in suit. It is true he says the method of using an earlier and different dye was the same as that used with the infringing dye, and that the patented preparation and process were very well known to dyers, but he produces no proof of the first statement, and admits he has no personal knowledge as to the second. Paul De Spoote, a voluntary witness who has been notified that he was infringing the patent, does not show that either he or the persons and publications referred to by him ever used or disclosed the patented process. His statements upon this point, like that of several other witnesses, merely show that salts of nickel had been used as a hair dye. The distinction between the prior art and the essence of the invention of the patent is shown by the fact that, while ammoniated solutions of nickel salts have been mixed with various other substances in the manufacture of hair dyes, the patentee was the first to disclose "the use of two separate solutions, each of which contained ingredients essential to the carrying out of the process described, and each of which is used separately, instead of having been previously mixed." I do not find in the record any trustworthy evidence of prior public use of sufficient weight to defeat what appears to be, in a small way, a meritorious and use-

ful invention. The conclusions reached are confirmed by the result of certain experiments testified to by complainant's expert, Dr. Wyatt, in the light of the evidence of defendant's witnesses Kraus and Stein. These witnesses swore that they had used practically the mixture of nickel and pyrogallic acid of the patent as a dye, and described its preparation and use. Upon rebuttal, Dr. Wyatt took certain samples of hair, and treated one portion with such mixture, and another portion by the successive processes of the patent in suit. He afterwards washed these samples. The result was that in the former case the color was washed out, while in the latter it remained. In the one case the hair was merely painted. In the other, it was dyed. I conclude from this evidence either that these witnesses to anticipation are mistaken as to their former alleged uses, or that the results therefrom were impracticable and unsatisfactory as compared with those obtained by following the process described in the patent in suit.

Let a decree be entered for an injunction, but not for costs or for an accounting.

STRATER v. KEYES et al.

(Circuit Court, D. Massachusetts. July 12, 1895.)

No. 468.

PATENTS—DRAINER FOR DRAFT APPARATUS.

The Strater reissue, No. 11,371, for a drainer for draft apparatus, and original patent No. 481,981, to the same inventor, for a drainer plate, *held void for want of patentable invention.*

This was a bill by Herman Strater against George C. Keyes and others for infringement of two patents relating to drains for draft apparatus.

Geo. L. Roberts, for complainant.

J. Steuart Rusk, for respondents.

CARPENTER, District Judge. This is a bill to restrain an alleged infringement of reissue patent No. 11,371, issued October 3, 1893, to Herman Strater, for drainer for draft apparatus, and patent No. 481,981, issued September 6, 1892, to Herman Strater, for drainer plate. The claims of the reissue patent alleged to be infringed are as follows:

(3) In a drainer, a group of open and closed vessels, conveying pipes in part within the closed vessels, and the draft faucets therefor, combined with a removable cover for the closed vessels, a transversely corrugated plate secured on the rear part of said cover, and detachable drainer plates raised above the front portion of said cover, with a waste pipe common to the drainer plate and the closed receptacle, substantially as described and set forth. (4) In a draft apparatus, a drainer box provided with an ice chamber or receptacle adapted to receive coils of pipe, through which the liquid to be drawn passes, said receptacle having a removable cover, the rear part of the upper surface of which is corrugated, and the front portion of which is apertured to serve as a drainer, combined with a conduit to convey away the waste liquid from the drainer.

The claim of patent No. 481,981 alleged to be infringed is as follows:

(3) In combination with a drainer box and its noncontiguous slats, a drainer composed of a series of corrugated plates, as an integral sheet, and a series of transverse pendent fastening strips adapted to pass between the slats and be bent there against, substantially as described.

I shall state only in the most general way the ground on which I base my decision, which ground is that the devices shown in the patents disclose no patentable invention, when taken by themselves, being only arrangements of well-known devices to accomplish easily perceived results, and being entirely within the reach of ordinary constructing mechanical skill, without the exercise of any inventive faculty; and especially that they disclose no patentable invention, in view of devices then existing and in use, particularly the apparatus which was in use in the Rossmore Hotel, which is clearly shown in the record, and, so far as appears to me, performs every function of the patented apparatus. The bill will therefore be dismissed, with costs of the respondents.

OSGOOD DREDGE CO. v. METROPOLITAN DREDGING CO.

(Circuit Court, D. Massachusetts. July 12, 1895.)

No. 267.

1. PATENTABLE INVENTION—COMBINATIONS.

While there may be a patentable combination in which different parts perform different and separate functions, this is only the case where a new result is attained, or an old result is produced in a new way, in consequence of the combination.

2. SAME—DREDGERS AND EXCAVATORS.

The Osgood patent, No. 257,888, for a dredger and excavator adaptable for use either as a scoop or a "clam-shell bucket," held void as to claims 1 and 2, as being for a mere aggregation, and not a true combination.

This was a bill by the Osgood Dredge Company against the Metropolitan Dredging Company for infringement of a patent.

Paul H. Bate, for complainant.

Rodney Lund, for respondent.

CARPENTER, District Judge. This is a bill to enjoin an alleged infringement of the first and third claims of letters patent No. 257,888, issued May 16, 1882, to Ralph R. Osgood, for dredger and excavator, which claims are as follows:

(1) In a dredging machine or excavator, the combination, with the swinging boom or crane carrying the shovel-handle guide, of the pole guides for the clam-shell dipper poles mounted upon said boom or crane, and adapted to operate substantially in the manner and for the purposes set forth. (2) The herein-described convertible excavator, the same being composed essentially of the boom or crane carrying the movable dipper, handle guide, and fittings, and the clam-shell pole guides mounted upon said boom or crane, the whole being adapted for use substantially in the manner and for the purposes set forth.

The infringement is not seriously contested, and seems plain. The invention is thus shortly described by the complainant:

Prior to the invention of Osgood, dredgers or dredging machines were of two general classes only,—those which were capable of using a scoop bucket only, and those which were capable of using a clam-shell bucket only; the two forms of buckets being designed for the digging of hard and soft material, respectively. Osgood's invention consisted in taking either one of these old forms of single machines, and adapting it to use either a scoop or a clam-shell bucket; thus making a convertible dredger of it, or one having a dual capacity.

This result was accomplished in the following manner: The boom or crane in the two forms of machine formerly in use differed essentially only in that each contained means by which only one of the two forms of bucket could be attached thereto; and the patentee conceived and carried out the idea of attaching to one and the same boom both supporting and guiding devices, so that one machine could thus perform, successively and alternately, the functions which had been theretofore separately performed by two machines. This, I am forced to conclude, is simply an aggregation, and not a combination, and does not involve invention. It is true, indeed, as urged by the complainant, that there may be a true combination in which different parts perform different and separate functions. I shall not discuss the cases which establish this rule, further than to say that they all require a new result, or an old result in a new way, as a consequence of the combination. In this invention no new result is accomplished, no new method of operation is perceived, and the parts do not co-operate by contributing to a common end. The function and operation of the machine when either bucket is attached is exactly the same as it would be if the means for attaching the other bucket were not present. In short, here is no new mechanism, no new method of operation, and no new result. The bill must be dismissed, with costs of the respondent.

SAMPSON v. DONALDSON et al.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 620.

PATENTS—INVENTION—VALVE-RESEATING TOOL.

The Wright patent, No. 400,989, for improvements in valve-reseating tools, in which the only change from previous devices was in substituting for a disk-shaped file, with a continuous cutting surface, a file having a broken or interrupted surface, which enables it to clear itself of the filings, so as to prevent clogging or "chattering," is void for want of invention.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This was a suit in equity by Clara E. Sampson against William Donaldson, Lawrence S. Donaldson, and William S. White, copartners as William Donaldson & Co., for alleged infringement of a patent relating to valve-reseating tools. The circuit court dismissed the bill (62 Fed. 275), and complainant appeals.

P. H. Gunckel, for appellant.

A. C. Paul (C. G. Hawley, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree dismissing a bill brought for the infringement of the first claim of letters patent No. 400,989, issued April 9, 1889, to Pliny J. Wright, assignor of one-half to Clara E. Sampson, for improvements in a valve-reseating tool. The claim that the bill alleges was infringed by the appellees is:

"(1) In a valve-reseating device, the combination, with a revoluble shaft, of a file connected to the lower end of said shaft at right angles to its axis, of a size to cover at any one time only a part of the surface to be dressed, whereby the file is rendered self-clearing, substantially as described."

In the specification the inventor says:

"My invention relates to valve seat dressing tools, and is in the nature of an improvement on the construction shown in the patent granted to myself and Samuel Rust, of date May 29, 1883, under No. 278,478. In my former patent I used a disk-shaped cutter on the end of a revoluble tool shaft, and a guide below the tool, adapted to fit the opening in the valve seat for the purpose of centering the cutter. In practice, however, I found that this construction was imperfect. I found that the guide in the valve-seat opening could not be relied on to hold the tool shaft at right angles to the valve seat, and therefore a true surface could not be produced. I found that the disk cutter would not clear itself of the filings. I also found it impracticable to get sufficient pressure on the tool without throwing it off its center. My present invention was designed to overcome these defects, and it consists of the construction hereinafter described, and particularly pointed out in the claims. * * * The cutter, F, is of a special construction. It is in shape like the frustum of an oblong pyramid. The lower surface, f', has a file finish with diagonal grooving, and its inclined surfaces, f'', are also files with diagonal grooves. This constitutes a flat and a conical file in one piece, both of which are self-clearing. The flat file face adapts the cutter to dress the horizontal valve seats, and the conical file face to the conical valve seats. In virtue of its oblong shape, and the diagonal grooving of the file surfaces, it is self-clearing. It does not clog with the filings. * * * It will be understood that, instead of making the cutter with both the flat and the inclined file surfaces, separate cutters may be used for the two classes of seats, cutters with oblong flat file surfaces for dressing flat valve seats, and oblong cutters with inclined file surfaces for the ball valve seats. The material point is that the file surfaces on the cutter be not continuous. There must be clearing spaces between them. The cutter may take any form having a broken periphery, as, for example, a star or a cross, but a continuous surface will not clear itself."

Devices for reseating valves of the general character of that described in this patent were old when the application for this patent was made. They are shown by the following letters patent: No. 170,363, dated November 23, 1875, to Charles F. Hall; No. 278,478, dated May 29, 1883, to Pliny J. Wright and Samuel Rust; No. 352,591, dated November 16, 1886, to Harvey R. Tower; No. 371,321, dated October 11, 1887, to George W. Hollingsworth; and No. 379,351, dated March 13, 1888, to Charles P. Weiss. These letters patent, and the specification of the patent in suit, which states that Wright had formerly used a disk-shaped cutter on the end of a revoluble tool shaft to reseat valves, conclusively show that there was nothing new in "the combination, with a revoluble shaft, of a

file connected to the lower end of said shaft at right angles to its axis," described in the first claim of this patent. The only novelty there could be in the combination described in that claim consisted in the shape of the file. The claim declares that the file shall be "of a size to cover at any one time only a part of the surface to be dressed, whereby the file is rendered self-clearing, substantially as described." The specification says: "The material point is that the file surfaces on the cutter be not continuous. There must be clearing spaces between them. The cutter may take any form having a broken periphery, as, for example, a star or a cross, but a continuous surface will not clear itself." Was there any patentable novelty in 1888, when the application for this patent was filed, in substituting a rotating file, with a broken periphery, for one, the surface of which was continuous, for the purpose of reseating valves? The sole function of the file, in a machine for reseating valves, is to dress down horizontal or conical valve seats and to render them true, so that the valves will exactly fit them. These valve seats are annular in form, and the work of dressing them down, which the file or cutter performs, is not dissimilar to that performed by any rotating file or cutter used to cut and remove solid substances. It was no discovery of Wright that a continuous file surface or a continuous cutting surface on a tool used for this purpose would clog it, cause it to chatter, and would delay and derange its work. Nor was the remedy for this evil—the use of a broken periphery or of a broken cutting surface—his discovery or invention. In the specification to letters patent No. 66,354, issued July 2, 1867, to H. N. Keables, for an improvement in gear cutters, we find the following description of this evil, and the device to remedy it:

"As cutters have heretofore been made, the cutting teeth, A, have followed each other in regular order, and at equal distances apart; and those who are acquainted with, or skilled in, the art of gear cutting, know that oftentimes the chips so clog up and crowd in between the cutting teeth and the sides of the cogs on the blank being cut as to injure the work, and often to such an extent as to derange the whole operation. In a large class of work it is very important to have the sides of the cogs cut with great precision and evenness, and it is a great source of annoyance and expense to have the work injured by the clogging or 'chattering' of the cutters. To remedy the foregoing and other objections to the old style of cutters is the object of my present invention, and which consists in leaving a clearing space, a, at regular and equal distances apart, and which distance I have found to produce the best results if arranged so as to occur after two teeth, as shown in Fig. 1. It might occur after three or more teeth, but I prefer two teeth. The result is that the cutter always runs smooth and easy, doing its work even and true, and never clogging up. The same principle could be applied with good effect to 'side' or 'slabbing' cutters, as they are called. With my cutter there is no chattering, and the work is unequaled, besides it requires less power to drive the cutter than it does to drive one of the same size made according to the old plan. The mode of using the cutter is the same as that in common use, the cutter being placed upon a revolving arbor, spindle, or similar device."

In the specification to letters patent No. 93,119, issued July 27, 1869, to A. J. Prescott, for an improved reamer, the inventor says:

"The nature of my invention consists in the construction of a reamer which is provided with grooved sides, and is so formed that it will not chatter while

at work. * * * Upon the bottom of the ball there are two beveled edges, one of which is notched, while the other is smooth. The notched edge, c, does the cutting, while the smooth one, d, serves to steady the reamer, and keeps it from chattering while at work, and also smooths the work, and keeps the dirt off of the seat. Two of the sides, e, are concave, so as to allow the chips, dirt, etc., to escape without being carried around with the ball as it turns."

In view of these clear descriptions of the device of a broken file surface or periphery to remedy the clogging that results from the use of a rotary cutter that has a continuous cutting surface, it is difficult to perceive how the exercise of the inventive faculty was required to break the periphery of the disk-shaped file or cutter in common use in valve-reseating tools, and to make this file in the form of a star, a cross, the frustum of an oblong pyramid, or in any other form in which the file surface would not be continuous, and in which the file would not clog or chatter, but would clear itself when in action. This was all that Wright did. It is all that he claims to have done. Given a disk-shaped file with a continuous cutting surface that clogs and chatters in action, and the plain statements and illustrations of the specifications and drawings of the patents to Keables and Prescott, which declare that the remedy for that evil is in a broken cutting surface, and the problem Wright claims to have solved becomes so simple that one who is not a mechanic could hardly fail to perceive that the evil would be remedied by cutting off the sides of the disk. This was all that Wright did. In our opinion, the conception and production of such a device, in view of the state of the art at the time of its production, to which we have referred, did not rise above the ordinary work of a mechanic skilled in the art. Because of its want of novelty, the first claim of the patent in suit cannot be sustained. *Stirrat v. Manufacturing Co.*, 10 C. C. A. 216, 220, 61 Fed. 980; *Atlantic Works v. Brady*, 107 U. S. 192, 199, 2 Sup. Ct. 225; *Vinton v. Hamilton*, 104 U. S. 485, 491; *Slawson v. Railroad Co.*, 107 U. S. 649, 653, 2 Sup. Ct. 663; *King v. Gallun*, 109 U. S. 99, 3 Sup. Ct. 85; *Double-Pointed Tack Co. v. Two Rivers Manuf'g Co.*, 109 U. S. 117, 3 Sup. Ct. 105; *Estey v. Burdett*, 109 U. S. 633, 3 Sup. Ct. 531; *Bussey v. Manufacturing Co.*, 110 U. S. 131, 4 Sup. Ct. 38; *Phillips v. City of Detroit*, 111 U. S. 604, 4 Sup. Ct. 580; *Morris v. McMillin*, 112 U. S. 244, 5 Sup. Ct. 218; *Hollister v. Manufacturing Co.*, 113 U. S. 59, 5 Sup. Ct. 717; *Ellbert v. Gaslight Co.*, 50 Fed. 205, 211. The decree below must accordingly be affirmed, and it is so ordered.

ROBERTS et al. v. PITTSBURGH WIRE CO. et al.

(Circuit Court, W. D. Pennsylvania. March 11, 1895.)

No. 22.

1. PATENTS—WIRE-ROD MILLS.

The Roberts patent, No. 392,365, for a mill for rolling wire rods, held void as to claims 1, 2, and 3 for want of novelty and invention; but held valid and infringed as to claim 4, which is for a combination of the rolls with an inclined mill floor and guides arranged therein for carrying the

loop of the wire by the combined force of gravity and the propelling power of the rolls; and *held*, further, that claim 6, for the combination of a plate fender with the rolls, must be restricted to the specific form of construction shown, and, being so restricted, was not infringed by defendants.

2. SAME—ISSUANCE OF PATENT—FALSE OATH—BURDEN OF PROOF.

Where it is sought to invalidate a patent on the ground of the falsity of the inventor's oath, the burden is upon the party attacking it to show the actual previous existence of the invention sought to be patented, and that the applicant knew of it at the time.

This was a bill by Henry Roberts, George T. Oliver, and Andrew J. Day against the Pittsburgh Wire Company and Thomas W. Fitch, its president, for the alleged infringement of a patent relating to wire-rod mills.

Bakewell & Bakewell and John R. Bennett, for plaintiffs.

Willis F. McCook and W. H. Van Steenbergh, for defendants.


BUFFINGTON, District Judge. This is a bill for the infringement of claims 1, 3, 4, and 6 of letters patent No. 392,365, granted November 6, 1888, to Henry J. Roberts, for a rod mill. The parties to this suit are Henry Roberts, George T. Oliver, and Andrew J. Day, assignees of said Roberts, complainants, and the Pittsburgh Wire Company and Thomas W. Fitch, president, respondents. The defenses are fraud, noninfringement, and anticipation and lack of patentable novelty. A proper understanding of the case renders necessary a brief resumé of the art of rod making.

In the class of rolls to which the patent relates, a billet, brought to rolling heat, is first passed back and forth through roughing rolls until it is lengthened to a bar, when it passes to a second set, and is still further lengthened. After this it enters a final series of rolls, placed end to end across the mill floor, and through which it is passed in a continuous course. On passing through the first rolls of this latter series, the rod is reflexed and passed through a second set, where it is again reflexed and passed through a third, and so on until the finishing set is reached. After passing through this, it is reeled, and undergoes the chemical action which fits it for wire-drawing operations. To obtain the best mechanical results in rolling, the roll grooves are of alternate oval and square section, so that the rod undergoes corresponding shape changes at alternate passes. From this fact, one side of the mill is known as the "oval," the other as the "square," side. During its passage the rod is fed from the delivery passes more rapidly than it can be taken up by the receiving ones, and therefore forms long U-shaped loops on the floors on both sides of the rolls. On the square side, the square section gives the rod such rigidity that it can be automatically guided from one set of rolls to the next by curved horizontal guide troughs, which are known as "repeaters." On the oval side, however, the rod is so flexible that it cannot be thus automatically guided; hence it is usual to employ "stickers in," or "tongsmen," who seize the end of the oval as it emerges from the roll, swing around and reflex and insert it for the next pass. This forms the loops referred to, which sometimes extend 100 feet out upon the floor, as

the rod has lengthened to upwards of 1,400 feet. The rolls are run at increased speed to take up the overfeed and prevent chilling, as it is necessary to complete the operation by a continuous process.

Prior to the patent in suit, the ordinary practice in this country was for "hooker boys" to take care of these loops. On the oval side their work was one of great risk, and their pay correspondingly high. As soon as the sticker in reflexed the rod, the boy seized the loop with his hook, and ran rapidly backwards with it, to prevent kinking. The rapidity of travel of such a flexible loop, its red-hot condition, and its tendency to erratic flying, made the work of these boys very dangerous, indeed. If they fell, or their feet became entangled in a loop, they were liable to be severely burned or have their legs cut off by the friction of the rapidly traveling rods. Such accidents were of frequent occurrence, and sometimes resulted fatally. The labor was essentially skilled, and, as men were not quick enough in movement, only boys could be employed. Frequent kinkings of rods resulted in making large quantities of scrap, with consequent waste. The device embodied in the patent in suit made a radical change in the process, by a method at once simple and effective. It consists of two elements. Instead of the level mill floor, an inclined one, which slopes downwardly from the rolls to the limit of loop length, is used, and with it, at right angles to the rolls, guiding troughs or channels are provided. These latter receive the primary branch of the loop formed by reflexing the rod; and the propulsive force of the delivery roll, combined with the gravity of the rod on the inclined floor, causes this primary branch to run rapidly down the floor, while the guide keeps it in a substantially straight line. It is clear a pushing force applied to a flexible oval-shaped rod will be effective only so long as the rod is kept in a straight line, and if it bends at any point, or, in the language of the mill, "breaks its back," the pushing force only serves to extend it laterally, with the probable effect of its kinking or snarling on itself. Whoever invented the device, it must be conceded its results were extremely effective in many ways. It eliminated the dangerous features of the hooker boys' work, and decreased their number. Where from five to seven skilled boys were formerly employed on the oval side alone, two workmen may now be used, and, instead of catching the loop near the rolls, as formerly, they stand or sit well down the floor, and watch to straighten out any kink, and to remove the scrap formed by kinking, or by the failure of the sticker in to catch the rod as it emerges from the rolls. The result is less danger to the men, less expense to the manufacturer in wages, and less liability for damages resulting from accidents. At the same time it has enormously increased the output. Mr. Fitch, the president of the respondent company, says that by its use in a former plant he managed the output was increased $33\frac{1}{2}$ per cent. In the Carnegie mill, a correspondingly large or larger increase was shown, while the respondents show that since this device has been used in their plant they have turned out as much as 4,200 tons per month, as against 1,800, the highest product under the old system. The percentage of scrap in their plant was reduced from 2.5 per cent. to 1.42. They have given

the data by which they figure a saving of some \$43,000 a year in their plant from this device, while Mr. Fitch estimated that the device in connection with the Braddock mill, which he was then managing, was worth from \$15,000 to \$20,000 a year. These data, however, are qualified by the fact that improved methods of rolling, increase of power, capacity of reels, and other factors enter into these estimates; but this far we may safely go: that this device enabled manufacturers to successfully handle the increased output resulting from these other improvements. Now, four, five, and even six rods go through the rolling process simultaneously where formerly there were only one or two. Several loops travel down the same channel at once, overlapping each other, but without any consequent tangling or interference. The device went into rapid and very general use in many rod mills in the United States.

An additional feature of the device was the guard or fender plate, which consisted of an  shaped appliance placed on the oval side near the rolls and in the pathway of the secondary branch of the loop. Its object was to prevent the rear end of the rod from flying up and about, as it entered the rolls, and striking the stickler in.

Infringement of the first, third, fourth, and sixth claims of the patent granted upon this device is alleged. These claims are as follows:

(1) "In a wire-rod mill, the combination, with the main mill floor, having an inclined surface which extends in a plane transversely to the rolls, substantially as described, of a series of rolls arranged on different lines of feed, whereby the propelling force of the rolls and the gravity of the loop are utilized to cause the loop to travel freely over the floor, substantially as and for the purposes specified."

(3) "In a rod mill, the combination, with two sets of rolls arranged on different lines of feed and the mill floor, of an open sunken guide trough or channel arranged on the delivery side of the primary rolls, and leading therefrom, for the purpose of guiding the primary branch of the loop, substantially as and for the purpose specified."

(4) "In a wire-rod mill, the combination, with the main mill floor, having an inclined surface extending in a plane transversely to the rolls, substantially as described, of a series of rolls arranged on different lines of feed, whereby the propelling force of the rolls and the gravity of the loop are utilized to cause the loop to travel freely over the floor, and a guide extending along the said inclined main floor transversely to the delivery side of the primary rolls, and adapted to guide the primary branch of the loop, substantially as and for the purposes specified."

(6) "In a rod mill, the combination, with the rolls, of a plate fender in the line of the feed, substantially as shown and described."

These claims, for the purpose of our present consideration, may be said to be—First, the broad claim of an inclined floor of a certain functional capacity, in combination, as embodied in the first claim; second, a like claim of a sunken channel of a certain functional capacity, in combination, as embodied in the third; third, the combination of an inclined floor and a guide of a certain functional capacity, in combination, as embodied in the fourth; and, lastly, the claim for the plate fender, in combination, as embodied in the sixth. To these claims the respondents have pleaded, as noted above, certain defenses peculiar to separate claims, and a general defense involving the validity of the entire patent. We will consider these questions seriatim.

Mr. Roberts says his invention was made in 1887, and was first used in complainants' mill in November of that year. Is he entitled to the broad generic claim, in combination, of an inclined floor of certain functional capacity as embodied in his first claim? While we are of opinion, as will hereafter be noted, that his device is one of great merit, and the fourth claim, for an inclined floor in combination with a guide, must be sustained, yet, in view of the prior state of the art, we are just as clearly of opinion that he is not entitled to the first claim allowed him by the patent authorities. The inclined plane which he therein claims has, outside the combination, but two limitations, to wit, inclination transversely to the rolls, and a functional capacity whereby the loops are caused to travel freely over it by their own gravity and the propulsive power of the rolls. Was the prior art so barren of advance in these directions as to justify this sweeping claim? We think not, and that such a claim must be denied, particularly in view of the advance shown in a German publication, noted below; the McCallip patent, No. 331,516, of December 1, 1885; and the Lenox patents, No. 351,836, of November 2, 1886, and No. 351,840, of same date.

In 1885, two years prior to the alleged date of Roberts' invention, there was printed by Arthur Felix, in the city of Leipsig, Germany, a publication entitled "Das Eisenhüttenwesen Schwedens, Von Josef Von Ehrenwerth, K. K. A. O. Bergakademie, Professoren in Loeben." It contained a draft and description of a mill at Damnarfvet, Sweden. The plan and accompanying description clearly show an inclined floor located transversely to the rolls (part of which are set end to end), and of such inclination that, in combination with a series of bumps or caps, the loops take care of themselves without the use of hooker boys. It is contended, indeed, that the inclined plane here shown was not such an inclined floor as Roberts made, but was a comparatively short inclined step, which guided the loop to the main floor, which was horizontal. We cannot accede to this view. The description and draft do not support it. The former says:

"The cast-iron floors on both sides of these rolling mills are inclined, and between every two sets of rolls there are provided horizontal steps, rounded towards the outside. *By this arrangement, the hooker boys are entirely done away with, since the wire loop, in consequence of the inclination of the floor itself, draws or bends outwards, and hereby is perfectly conducted or guided by the steps.* But it is easy to understand that this arrangement is practically only applicable where the rolls (calibers) are arranged in one line and the pairs of standers (rolls) follow one another. It gives, besides the advantage of a saving of labor to the process of rolling, a finished aspect."

It will be noted, the inclined portions are spoken of as "floors on both sides" of the rolls, "are inclined," "horizontal steps" "are provided," and are "rounded towards the outside." To read this intelligently, these steps must be placed on the "floors on both sides," and, in the absence of any limitation, they would presumably be coextensive with the length of the floor. And that the inclination and bumps extended to the loop limit is clear from the fact that an entire, completed operation is contemplated by their united functions, and not a mere guiding of the loop to a level floor, where hooker boys would be necessary to assist. The language is explicit:

"By this arrangement, the hooker boys are entirely done away with, since the wire loop, in consequence of the inclination of the floor itself, draws or bends outwards, and hereby is perfectly conducted or guided by the steps." This construction of the written description is fortified by the accompanying drawing, wherein the bumps on both sides extend to the limit of indicated floor space. Indeed, this is admitted by the complainants' expert, who very fairly says:

"I think the construction of mill which is shown in this German publication, taken in connection with the description of the same contained in said work, would naturally have suggested to a rod-mill man, on reading the same, at the date of the said publication, the combination of rolls arranged on different lines of feed, and an inclined floor common to said rolls, for the purpose of facilitating the movements of the loops, and also for dispensing with or lightening the labor of the hooker boys."

The next step in the art, in point of time, is shown by the overfeed regulator of McCallip's patent, No. 331,516, granted December 1, 1885. This device we are satisfied was intended to take care of the overfeed of the loop on the square side of the mill only, and this, in the preferred form, by an inclined plane provided with caps or bumps. But the conception of the application of the principle of inclination to an entire floor on the square side, or to, indeed, any inclination on the oval side, does not seem to have occurred to McCallip, so far as his patent shows. In these two respects it did not go as far as the German device, where we have seen the entire floor was inclined, and that, too, on both sides of the mill. In another respect, that of "longitudinal guards along the sides, adapted to prevent the metal from bending outwardly," and which was embodied in one of his claims, is found a step by McCallip in advance of the German publication. But the whole scope of the patent shows the inclined plane was an entity in itself, quite separate and distinct from the main floor, which is evidenced by the fact that the patentee contemplated it could be inclined to the floor from the repeater as shown in the drawing, or be "upwardly inclined from the repeater, or horizontal, as desired." While in his drawings he shows an inclined plane, and in his specifications says: "This regulator floor horizontally inclined from the repeater downwardly and rearwardly, while the caps are themselves horizontal. This permits the loop of working metal to pass freely over the caps, in movement rearward from the rolls," etc.,—yet the downward slope of the plane on which the bumps are placed is not a necessary functional element of the device. Indeed, the gist, so to speak, of his contribution to the art, so far as this patent is concerned, lies in the use of the caps, a fact evidenced by the name generally accepted in the trade of "McCallip's Bumps." But, for all this, his use of an inclined plane cannot be ignored in the study of the rod-mill art. Conceding, what we think in fairness must be done, that the regulator did not and was not intended to extend the length of the mill floor, nor to be used on the oval side at all, yet it would clearly seem that, during the passage of the loop along it, McCallip made use of the conjoint principles of the gravity of the loop arising from the inclination of the regulator and of the propulsive power of the rolls to automatically

take care of the loop until the level floor was reached, where the hooker boy first began to care for it. To that extent, the hooker boy's labor, as well as his danger, was abridged. And this view would seem in keeping with the implied admissions in the patent in suit, for, after the application had been rejected on citation of this patent, this disclaimer was inserted in the specifications:

"In said patent [McCallip's] is shown the usual horizontal mill floor, on which the rod loop is received and distributed by 'hooker-boys,' and a short oval feed regulator is used, in conjunction with a repeater, simply to guide the loop to the level of the horizontal floor, where it is received and drawn away from the rolls by the hooker boys; there being in said patent no inclined mill floor or other means whereby the gravity of the loop and the force of the rolls are utilized to distribute the loop after it leaves the overfeed regulator."

The next steps in the art are disclosed in the patents to Lenox, No. 351,836 and No. 351,840, both granted November 2, 1886. They concern "continuous rolls," as distinguished from the "end to end" rolls of the Roberts device. In a continuous mill, in order to complete the rolling process in one heating, the successive rolls must be run at an increased rate of speed. In order to avoid this being excessive at the last pass, it is necessary either to make it low at the first one (which allows the rod to cool) or to reduce it at some intermediate point. This latter plan Lenox carried out in the patents in question. In the first one, he separated the primary rolls by a considerable space from the secondary ones, and speeded the first secondary lower than the last primary. The rods passed from the primary rolls through a double-guide channel, and entered the "bite" of the secondary, slower-moving rolls. At once the progress of the rods was retarded, and a surplus of metal accumulated. By the propulsive force of the delivery rolls, the rods were forced from the channels, and formed lateral loops or overfeeds. These he took care of by providing on each side of the double-guided channel a large inclined table, over which the loops spread. In the second patent, he had two trains of secondary rolls, and a switch for using them separately, in connection with a different form of guide channel, and, instead of using the inclined table on both sides of this channel, he used it on but one. Of the function of his inclined table in the first patent, he says:

"The incline of the table or platform, B, laterally, permits the gravity or weight of the rod to act in assisting its distribution over the surface, and to obviate tangling of the loops as they are drawn in by the rolls of the supplemental train."

And in the second he says:

"The end of the rod, by its force of issue from rolls B [the primary ones] is caused to run along the hollow of the guide, D, and automatically enter and pass through one of the secondary trains. * * * When the end of the rod has been taken by the rolls F [the secondary train], the speed of issue at rolls B being greater than that at which it is drawn in by said rolls, the rod is caused to bow or buckle at some place between said rolls B and F, * * * and, as the bowing of the rod increases, it extends out upon the top surface of the deflecting device, K, and falls over the edge of the overhanging head, k'. This causes the rod to be forced against the outwardly curved or inclined front surface, i, whereby the rod is directed downward and outward.

thereby causing it to run out, as the overfeed increases, in a long loop, which slides down the inclined floor, L, within the pocket, M, as indicated by dotted line, w, on Fig. 1. While the rod is thus being run out upon the floor, L, the opposite end is being taken into the guide around the fender or guard plate. The action of the deflector and inclined floor, L, is to keep the overfeed expanded in a single increasing loop, and prevent the rod from becoming crossed at any portion of the loop, while the rod, which is constantly running forward at a high rate of speed, distributes itself within the pocket, M, as the loop grows longer."

A careful examination of these patents and of the construction therein employed satisfies us that Lenox recognized and positively made use of the propulsive force exerted upon the rod at the delivery roll, and that he did not make use of the gravity of the rod alone, in connection with an inclined surface, in order to take care of the overfeed. The fact that the inclined surface was laterally placed to the rod as it ran initially should not of itself exclude it, as bearing on the present question, from all consideration in reviewing the prior art; for even this condition was modified when the rod passed over a laterally extending deflector, and was "forced" (by what but the propulsive force behind it?) against the outwardly curved or inclined front surface, i, "whereby the rod is directed downward and outward," which would make the resultant of the propulsive force almost at right angles to its prior direction, a fact which will be plainly seen in Fig. 1 of the second patent. The use of the term "deflector" of itself illustrates this change of course and the direction of the propulsive force exerted in the rod. Indeed, the propulsive force of the rolls was what Lenox was seeking to countervail. He recognized it as a fact, and, by thus turning the course of the rod in the direction of the inclined plane, he availed himself of both elements in taking care of the loop. That the relative position of the table was different from that of the Roberts device, and that continuous and not end to end rolls were employed, are facts; but the Lenox patents show that Roberts was not the first to make use of the propulsive power of the rolls and the gravity of the overfeed on an inclined table. In his application, he distinguishes his device from the first patent by the fact of this different position relatively of Lenox's inclined plane, and by the asserted fact that Lenox did not make use of the positive propelling force of the delivery roll, "but, as stated by the patentee, it depends for its efficiency only on the gravity of the overfeed." Such statement we do not find in the Lenox patent. No reference is made in Roberts' specification to the second patent, nor does it seem to have been cited in the office proceedings. As to it, the complainants' expert admits that "the formation of the lateral loop in the case of the mill there shown is assisted or effected both by the propulsive action of the rolls and the inclination of the inclined overfeed floors"; and, also, that the inclination shown therein is greater than that of the Roberts floor shown in the patent in suit. In view of the advance evidenced by the foregoing devices, and that disclosed by the evidence in the cause, we are very clear in the opinion that Roberts is not entitled to the broad, generic claim of an inclined floor, in combination, embodied in his first claim, and that it must be held invalid.

In the third claim we find, in combination, a broad claim for a guide trough. Outside the combination, the guide here claimed has but three limitations: It must be open, sunken, and be placed on the delivery side of the primary rolls. Is he entitled to such a claim, in view of what had already been done in the art? It will be noted his claim of a guide is not confined to an inclined floor, or to either of the two sides of a mill. The patents of Lenox had shown the feasibility of open channels in a continuous mill, and, in the same character of mill, McCallip, in his patent, No. 277,044, of May 8, 1883, has disclosed the use of an "open trough or gutter-shaped box" placed below the level of an accompanying overflow horizontal table. In his patent, No. 331,516, of December 1, 1885, McCallip had shown on the square side of an end to end mill a form of open channel which, while not sunken in a strict sense, because at intermediate points its bottom was flush with the plane, yet, in effect, was sunken at the points where the bumps were placed. That its purpose was to control the primary branch of the loop is explicitly set forth in his patent. He says:

"The two sides of the metal loop fit, respectively, in the two corresponding channel guides, g, and are conducted longitudinally along the same, while the curve of the loop slides along the regulator floor in rear of said cap. The two sides of the latter thus constitute guards to prevent the sides of the loop from bending towards each other, as is their predominant tendency. The flanged sides of the regulator serve as side guards to prevent any outward bending of the loop, and thus the latter is maintained straight, and has movement along the length of the regulator free from tangling."

As bearing on the guide function disclosed by this patent, the views of complainants' expert, as shown in the following questions, are pertinent, to wit:

"Q. Do you mean to say that the construction of the McCallip overfeed regulator is not such that the guide channel in it controls the movement of the primary branch of the loop perfectly as it runs down the incline, so that it can neither expand unduly nor draw in or contract unduly? A. No. In the device shown, there is no doubt that the channel will prevent the primary branch of the loop from running either out or in. Q. In that respect, it operates precisely like the guide channel of the Roberts patent in suit, does it not? A. To a certain extent it does, especially in the case where only one loop is being rolled. If more loops than one were being rolled, the action would be somewhat different, owing to the rods pulling around the sharply undercut grooves which pass around the bumps; and if the channel were made long its operation would become dangerous to persons working around it. It seems well adapted to perform the function for which it was evidently intended,—of handling one loop in its passage down the pan."

Such being the state of the art, the advance made by Roberts to an open, sunken guide trough, as disclosed in the claim in question, was not such as to entitle him, in combination, to a broad claim for a sunken channel of the claimed functional capacity, without limitation to either side of an end to end mill or to any kind of floor. Construing the claim thus, as, indeed, it must be, in view of the fourth claim, we are very clearly of opinion it must be held invalid.

We now turn to the fourth claim, which embodies the gist of the invention. In a general way, it consists, in combination, of the union of the two elements we have been discussing, to wit, of an inclined floor extending transversely to the rolls, and by which the


gravity of the loop and the propulsive force of the rolls upon it are utilized, and a guide extending along such floor. It is as follows:

"In a wire-rod mill, the combination, with the main mill floor, having an inclined surface extending in a plane transversely to the rolls, substantially as described, of a series of rolls arranged on different lines of feed, whereby the propelling force of the rolls and the gravity of the loop are utilized to cause the loop to travel freely over the floor, and a guide extending along the said inclined main floor transversely to the delivery side of the primary rolls, and adapted to guide the primary branch of the loop, substantially as and for the purposes specified."

It is contended that an inclined floor was old in the art, and that guides were also old, and that their union in this claim was a mere aggregation or double use. We cannot thus belittle this meritorious device and shear it of all patentability. We have noted above its great advantages, its labor and life saving results, its multiplied output, and its economy of operation. Its substantial value to the commercial world is evidenced by the earnest contest made by both sides in this case. The proof is clear that, singly and alone, an inclined floor on the oval side of a rod mill, where a number of rods were being simultaneously rolled, would be of little, if any, advantage over the horizontal floor of the old construction. Hooker boys would still be necessary. Their work would be as skilled, and their dangers as great, if, indeed, they would not be increased, by the inclination of the floor. On the other hand, the guide channel on a horizontal floor would not automatically take care of loops of the length necessary in the manufacture of the long rods of later years. Whence has come the valued and conceded change in rod-mill operation and results, so far as the inclined floor is concerned? It consists in the blending of the two elements we have been considering. It lies in the conjoint efficiency of two united elements which, dis-united, were neither of them, in themselves, efficient. It consists in a new result, due to the conjoint and co-operative action of these two elements upon each other. The inclined plane is more than the mere plane it was before the union. By its conjunction it is modified by, and co-operates with, the guide. And, on the other hand, the guide, adapted to guiding the primary branch of the loop, is not the same guide it was, but a corresponding change in its functional work results from its new relation to an inclined floor. The presence of the guide has changed and enlarged the function of the plane, and the presence of the plane has done the same to the prior function of the guide. The two, thus united, and with changed function consequent upon and from such union, conjointly unite in producing a new result, to wit, the substantially automatic care of a number of oval loops simultaneously passing over them. Far from being a mere aggregation or double use, the device is a striking example of a genuine combination. After a full consideration of the proofs, we are of opinion that the combination therein shown was not anticipated in the prior art, and that Roberts' fourth claim should be held valid, unless his patent is to be adjudged invalid on the defense of fraud in its procurement, hereinafter considered.

The sixth claim relates to fender plates or guards, and is as follows:

"In a rod mill, the combination, with the rolls, of a feed plate arranged in the line of the feed, substantially as shown and described."

As gathered from the specification, it is an angled plate, similar to an L set on its face, with its long stem somewhat depressed, thus, , and placed on the floor near the rolls and between the secondary branch of the loop and the sticker in. Its purpose is to control the erratic motion of the rod, and prevent it flying laterally or upwardly and striking the sticker in. In view of the length to which this opinion extends, we refrain from giving in detail our reasons therefor, but simply note the conclusion reached. Conceding, for present purposes, the device shown involved patentable novelty, we are of opinion the claim must be restricted to the specific construction shown. Thus restricted, the claim is not infringed by the respondents' fender, which is not constructed so as to prevent the end of the rod flying upward, and it is not in form or function the construction shown by complainants' patent.

This leaves for consideration a question that involves the validity of the entire patent. Conceding, for present purposes, the element of patentability, and the infringement by respondents of the fourth claim, it is still averred by them the patent is void by reason of the fraud of Henry Roberts in procuring the same; that, in making oath in his application, Roberts falsely and fraudulently stated that he did not know or believe that the device therein shown was ever used or known prior to his invention thereof, when, in fact, he had before that time seen the same invention which he sought to have patented in use at the mill of Pearson & Knowles, at Warrington, England. This is a serious charge. Fraud is never presumed. The burden of overcoming the prima facies of the patent and of proving the falsity of the oath taken is on those attacking it; and to do this they must show the actual existence of the invention sought to be patented, and that the applicant knew of it.

To do this, the respondents have taken the testimony of Thomas Morris, the manager of the mill at Warrington, England. His testimony was given in 1893, when he was in his sixty-fifth year. He says: Roberts was brought to his home in Warrington by J. J. Thompson, a metal broker of Manchester. That the same evening, between 7 and 9 o'clock, he took him through the entire works for an hour, 10 or 15 minutes of which was spent in the rod mill. That they then and since had an inclined floor on the oval side of the mill, and that over the end was a bridge or balcony, about 6 feet above it, and facing the rolls, which were 25 to 40 feet distant. The bridge hid 12 or 14 feet of the subfloor. That Mr. Roberts stood on this bridge. When asked explicitly what conversation they had in reference to the inclined floor, he said he could not remember; that he made several comments about it being a nice arrangement. He says Roberts returned a couple of weeks later, and was in the mill from 10 minutes to half an hour; that he spent an hour and a half, all told, in the entire works, that day, which was between 7 and 9 o'clock in the evening; that he went to the square side of the mill, also, during that stay. He says every part of the mill was discussed by them, but he is unable to give any details of

the discussion. He says a person standing on the bridge would not have much difficulty in seeing the loops through the niches between the iron plates. He says, from the square side, the view of the oval would be somewhat obscured by the rolls and the stickers in, but it could be seen. When asked who was the inventor of the inclined floor, he said: "I don't know. Mr. Bleckley and I put it in. I saw it at a place I was at. I saw the idea, and told Mr. John Bleckley about it."

The testimony of James Ashton, the roller in the mill, was also taken. He did not meet Roberts, and it is not clearly shown whether Ashton's testimony refers to Roberts' first or second visit. Mr. Morris told him his name. When, does not appear. He differs from Morris in fixing the visit in the afternoon, instead of at night, and says Roberts was standing for 10 or 15 minutes on the balcony, and looking down on the loops go under it. He cannot say whether Roberts went on the square side. Says from that side he can see over the rolls. He does not state what is the incline of the floor or the mode of operating the mill.

J. J. Thompson, a metal broker of Manchester, a mutual friend of Roberts and Morris, proves that he took him to Warrington in 1885, and introduced him to Morris; that he himself remained in the house while Morris and Roberts went into the mill, some time during the evening.

J. J. Bleckley was the managing director of the company. He did not see Mr. Roberts, but says it was reported to him by Morris that Roberts had been surreptitiously introduced into the mill; a fact which is at variance with Morris' account, as the visits testified to by the latter were open and consentible ones. He says they put an inclined floor in the mill in August, 1878; that the floor is practically uncovered and open; that it is the most prominent feature of the mill; that it is impossible for any one going into the mill not to observe it; that they have no hooker boys on the oval side; that they put the inclined floor in to avoid using them. He does not give the time, but says he invented the inclined floor himself,—a different statement from Mr. Morris', who, as we have seen, claims to have seen it elsewhere and told him of it. He says they never passed more than one rod at a time. From his testimony it also seems there were no sunken guides, but movable long sections of sheet iron were used on the floor, which prevented the loop from bending outwardly. The rolls were known as "four-high" ones, and were peculiar to this mill in their construction. They were so finely adjusted that the slack was very slight, in some of the passes at least, and that from the oval to the square side was taken up by means of this adjustment, and a novel construction in the shape of a closed vertical repeater, embodied in a patent of Mr. Bleckley, was there used. He says the total dimensions of the inclined floor were 54 by 25 feet, and the inclination 1 in 12.

W. R. Poole, an iron worker in Warrington, has lived in this country since 1882. He worked in the old Warrington mill, but never in the new or "patent mill," as he terms it. He has visited the lat-

ter. Says the slope of the floor was about 1 in 10, and fenders extended its entire length. His account of it is as follows:

"Q. Wasn't the floor on the oval side of the mill, so far as one could observe in looking at it, level, and used for piling stock upon it? A. Yes, in the Pearson & Knowles mill. Q. Then where was this inclination that you speak of? A. Right underneath the floor on which they piled the stock. Q. Did you ever go underneath the top floor to see what was the character of the under floor? A. Yes. Q. When? A. I can't exactly state the time. I have been under there. Q. What business had you in going under that floor? In other words, what was the occasion? A. Curiosity prompted me. Q. What curiosity had you in that direction? A. I was interested in the mill, and wanted to see how it was working,—how it was going along. Q. And you could not see how it was working and going along unless you went underneath, could you? A. Yes, sir. Q. How could you? A. Standing at the end of it, against the rolls. Q. But unless you were up at the far end, and standing against the rolls, you could not determine as to the character of that under floor without going underneath, could you? A. No. Q. And it was for that reason you went underneath to look at it, was it? A. Yes; and I was interested in it."

As bearing on the formation of loops, he says:

"Q. Do you know what was the length of the loops? A. Well, I tell you—I told you before it depends on the ability of the man that's working on the rolls. Q. Don't you know, Mr. Poole, that the practice of that Pearson & Knowles patent mill was to so speed the rolls as to take up the rod about as fast as it was paid out, so as to avoid the formation of loops? A. Well, yes."

In answer to this, we have on part of the complainants the testimony of Mr. Garrett, who visited this mill in 1883 and twice in 1890. His credibility has been assailed on the ground that he and complainants have mutually given testimony in aid of each other in this case and other litigation involving Garrett's patents. A careful examination of the record has not satisfied us of any bias on his part, and, for reasons hereafter stated, we think the truthfulness of his story is confirmed by acts consistent with it, and which are utterly inexplicable on any other hypothesis than the truth of what he testifies to in relation to the Warrington mill. In 1883, Garrett, who was thoroughly posted in the theory and practice of rod rolling, visited the Warrington mill. He was courteously received by Mr. Morris, and was given full opportunity to examine the rod mill, which he says he did with interest, as it was considered the finest in England. His visit was from half to three-quarters of an hour, and included a talk with Ashton, the roller, and during all the time he was in company with Mr. Morris. The peculiar features, he says, were the four-high rolls and the closed vertical repeater. He says that he stood on the double floor on the oval side of the mill, a distance of about 30 feet from the rolls, and saw the loops disappear under the floor; that the distance between the floors was about 18 inches; that neither Morris nor Ashton referred in any way to the sloping floor, and as he saw large piles of rods standing on the floor near where he stood, ready for shipment, he concluded the only reason why the under floor was used was to obtain additional floor space, a method which he had before seen employed in guide mills for that purpose. He says he saw the floor on the oval side as far as it was exposed, which was for about 30 feet; that there was noth-

ing about it that excited his curiosity; that from the square side of the four-high mill it would be very difficult for any one, however anxious, to see the shape of the floor under the balcony or top floor. He says there was nothing in the mill that suggested to him the use of an inclined floor such as is shown in the Roberts device.

This testimony is and must be of weight, not from itself alone, as coming presumably from a reliable and disinterested witness, but from the irresistible conclusions which follow from Garrett's subsequent conduct. The first sight of an inclined floor of the Roberts device seems to have impressed every practical rod-mill man with its inherent worth and novelty. He needed no explanation or argument to convince him of it. Apparently, sight was demonstration. Mr. Fitch was so impressed with it the first time he saw it that he then and there determined to introduce it into his mill, although entailing radical changes and much expense. Mr. Garrett, when he saw it, at once determined to place it in the Joliet mill, which he was then building.

While such was the—we may say, instantaneous—impression caused by a sight of the alleged copy of the Warrington mill, an impression evidenced by the subsequent acts of those who saw it, what was the effect of the Warrington mill? Garrett says it made no impression upon him. He came back to America and built a level floor in the Oliver & Roberts mill, one for the Braddock Wire Company, and another for the American Wire Company at Cleveland. The conclusion is irresistible that, whatever the slope of the Warrington floor was, it suggested to the mind of a man who was keenly alive to every advance in his special line of work no advance whatever towards such a floor as Roberts afterwards made. Not for four years afterwards, during which his attention was largely drawn to the difficulties and dangers incident to the oval side of a rod mill,—emphasized as they were by the loss of his own leg,—did such a thing as an inclined floor suggest itself to him. This testimony is emphasized by Mr. Garrett's two subsequent visits to the Warrington mill in 1890, when he went there to see if any improvements had been made. He was then perfectly familiar with the Roberts floor. He says the mill was in the same condition as in 1883, except a change in the repeater; that, while he and Morris stood on the upper floor, the loops ran under, and the latter said this was what Roberts had stolen; that he looked intently, and could find no further decline in the floor exposed to view than would naturally be required to drain the rolls and carry the loop under the upper floor; that, even after Morris' remark, he could see nothing having any resemblance to the Roberts floor. That he made no reply at the time is not in itself evidence he agreed with Morris' remark. He was not called on to defend Roberts' invention, and, in addition thereto, the evidence shows that a bitter feeling between him and Roberts had existed, and he would possibly not feel inclined to defend him.

We turn next to the testimony of the patentee himself, who admits visiting the Warrington mill twice in 1885. At that time he was an experienced man in the wire business. His account is:

That he went to England, with members of his family, for his health, and spent about 60 days of his stay in Manchester, which had been his former home. There he met J. J. Thompson, who was a personal friend for many years. That they visited several places in England together, in a social way, and, among them, Warrington. That, on the occasion of his first visit to the Warrington mill, he went to the town at the request of Mr. Thompson, and did not know there was such a mill there. That, after Thompson was through the business he had gone to transact, he said he had a friend named Morris there, and they would go to dinner with him. That after dinner Thompson proposed to Morris to take witness through the mill, which he did that afternoon. That on entering the mill he was struck by the repeaters, as he had never seen or heard of a closed vertical one before. The rolls were adjusted to such a nicety that one roll took up the elongation of the other without any overlapping of the loop. That he was in the rod mill not to exceed three minutes, and went from there to the hoop mill. That he was not on the oval side that day at all, and did not see it. That he neither saw, nor did Morris suggest to him, the existence of an inclined floor in the mill. That after tea they returned to Manchester. He says Morris and Thompson were mistaken in saying the visit to the mill was in the evening. That he returned to Warrington a second time, where he was trying to negotiate an arrangement with Mr. Carson, of the White Cross Works, for the use of Roberts' galvanizing process; and from there he went to Morris' and took dinner, and told him he would like to see the repeater working again, as he was interested in it, and had not seen enough of it. That they went to the mill, made a circuit of it through the engine house, which would take them over the balcony, and went to the place where he had stood before. That he asked if they ever had any cobbles, and Morris said they had not had one for three months, and just then one happened, and Morris was much confused over it, and the mill had to be stopped. That when they got the cobble out, and were ready to start the mill, Morris took him out, and he never saw the mill again. He says he saw nothing in the mill that suggested an inclined floor. That from the nice adjustment of the rolls he could see no necessity for a loop any further than that which might form from the man's time in catching the end to insert it in the next bite of the rolls, which would be necessarily short. He says his second visit to the mill, including 5 minutes spent in the engine room, did not exceed 10 minutes.

Mr. Roberts' subsequent acts are consistent with this testimony. He returned to America and made no change in his mill. Later he became the active manager of it. And that he continued experimenting with a view to improving the methods is witnessed, in addition to his testimony, by the patent in which he tried to conduct the primary branch of the loop in a horizontal guide, by means of a rotary shaft, on a level floor. It is incomprehensible that if he had seen an inclined floor, with guides, in substance such as is shown by his patent in suit, in successful operation at Warrington, he would have suffered two years to pass without experimenting in that direction. His subsequent acts are irreconcilable with any other

hypothesis than what he and Mr. Garrett unqualifiedly testified to, namely, that they saw nothing in the Warrington mill which suggested to them the use of an inclined floor. Nor can we overlook the fact that if a floor having the functions of the Roberts one existed in the Warrington mill since 1878, unrestricted by any patent, its capabilities have not been appreciated in its own neighborhood, for the White Cross mill still uses the level floor. The subsequent acts of Roberts cannot be reconciled with the theory of fraud here contended for. His patent must not be taken from him on mere theory or conjecture, but only on clear proof of fraud, or, as is said in Kerr, Fraud & M. 385, by reason of "facts established from which it would be impossible, upon a fair and reasonable conclusion, to conclude but that there must be fraud." Such measure of proof has not been given. The mill at Warrington was of novel construction, and its four-high rolls, its closed vertical repeater, and its fine adjustment of roll speed would naturally have attracted the earnest attention of Roberts, as it did of Garrett. They were the special features which Mr. Bleckley seems to have regarded as worthy of patenting. The restricted size of the mill space and the necessity for floor room are consistent with the suggestion that the upper floor was intended to afford such space. And this suggestion is strengthened by the established fact that it was used for that purpose. The comparatively short length of the lower floor is consistent with the suggestion that the nice adjustment of the rolls made only short loops to be cared for. Nor were the guides or fenders of the mill adapted to guide the primary branch of the loop, for they in no way restrained them from bending inwardly. Nor has more than one rod at a time ever been rolled in the mill. The proof has not convinced us that the Warrington mill was in substance the device for which Roberts afterwards sought a patent. Conceding it was, the burden of affirmatively showing that Roberts knew it to be such has not been met. At most, not more than 42 feet of the floor was exposed, and Garrett says 30. It is not shown that Roberts looked through the cracks of the upper floor and saw the inclined subfloor, as Morris suggested could be done, nor that he went under it, as Poole testified he did when he was examining it, or that he stood in front of the rolls, which Poole says was the only place from which to determine its character without going below the upper floor. Granting that Roberts did stand on the upper floor, saw the inclination in front of him, and saw the loops go under the upper floor, still this, in view of the nice adjustment of the rolls, the consequent shortness of the oval loops, and the apparent necessity for floor space, do not force us to the sole conclusion that Roberts then and there saw what he afterwards embodied in his patent. Garrett says it had no such effect on him. Roberts says the same; and their subsequent actions are more convincing still that such was the case. We have given the entire testimony our most patient and painstaking study, and our conviction is firm that the burden of proof imposed in this issue upon the respondents of affirmatively establishing fraud has not been met. Such being the case, the fourth claim must be held valid.

This leaves the sole remaining question, do the respondents infringe? The proofs show they have an inclined mill floor set transversely to rolls arranged on different lines of feed. On this floor are cast-iron sunken guides extending transversely from the delivery side of the primary rolls. The floor and guides are of such functional capacity that the loops travel automatically by force of their own gravity and the propulsive power of the rolls. Infringement of the fourth claim is established. A decree to that effect may be prepared.

BOWERS v. SAN FRANCISCO BRIDGE CO.

(Circuit Court, N. D. California. August 5, 1895.)

1. PATENTS—FAILURE TO PAY FINAL FEE—SECOND APPLICATION.

Under Rev. St. § 4897, providing that any person having an interest in an invention for which a patent was ordered to issue on the payment of the final fee, but who fails to make the payment within six months from the time at which it was allowed and notice thereof sent to the applicant, may, within two years after allowance of the original application, make an application for a patent for such invention, the same as in the case of an original application, but no person shall be held responsible in damages for use of anything for which a patent was ordered to issue under such renewed application prior to the issue of the patent, the second application is not limited to what was allowed in the first patent, but may embrace the whole invention, if this be greater than that allowed.

2. SAME—INJUNCTION.

Injunction pending suit for infringement of patent will not be granted, notwithstanding a judgment for complainant in a suit against another person for infringement of the patent (where defendant is responsible), and evidence and patents (claimed to anticipate plaintiff's) which were not introduced in the former case, have been introduced, the effect of which was submitted to a jury, in an action at law between the parties, resulting in a disagreement of the jury.

Suit by Alphonzo B. Bowers against the San Francisco Bridge Company.

John H. Miller and John L. Boone, for complainant.

M. Delmas and R. Percy Wright, for defendant.

McKENNA, Circuit Judge (orally). This is a suit in equity for the infringement of certain letters patent, and a preliminary injunction is sought. The motion for the latter is made upon the bill and an affidavit of plaintiff and the opinion of this court in *Bowers v. Von Schmidt*, 63 Fed. 572, and certain testimony taken therein. It is opposed by the answer of defendant, denying the allegations of the bill, and an affidavit of the president of defendant, in reply to the affidavit of Bowers Company, and the record of proceedings in the patent office. The bill alleges that the plaintiff was the first inventor of certain dredging machines, machinery, and appliances, which are described, and that he applied, on the 9th day of December, 1876, for a patent, and, after proceedings had, a patent was ordered to be issued, on the 18th day of April, 1877, upon the payment of the final fee. It is further alleged that the claims which were allowed—

"Did not fully protect plaintiff in the inventions which he had made, and which were disclosed and described in his application, and the said claims were too narrow and too limited, and were not commensurate with the scope of your orator's actual invention; and, for this and other reasons, your orator failed to pay the final government fee within six months, and failed to have said patent issued within said period of time. That thereafter, to wit, on the 26th day of April, A. D. 1879, under and pursuant to the laws of the United States and the rules of the patent office of the United States in that behalf made and provided, your orator renewed his application in said patent office for a patent for said inventions, and filed a renewal application therefor, using the original specifications, oath, drawings, and model, which had been filed in his said original application of December 9, A. D. 1876, and which were then on file in the patent office; and said renewal application was treated and considered by your orator and by the said patent office, and the officials thereof, and the same was, both in law and in fact, a continuation of the said original application."

The bill also alleges that the renewed application was found, upon examination by the proper examiner of the patent office, to contain several independent inventions, and hence separate or divisional applications were made, and, after proceedings had, several patents were issued. The bill contains the usual and proper allegations about all the patents, and states their respective names and titles, and the infringement by the defendant of them. Each patent contains a number of claims; but with this motion we are concerned only with claims 10, 16, 25, 53, 54, and 59 of No. 318,859. For a full description of this patent and these claims I refer to the opinion in *Bowers v. Von Schmidt*, 63 Fed. 572.

It was asserted at the oral argument, and not denied, that these claims were not in the patent which was ordered to be issued on the 18th day of April, 1877, and not accepted by plaintiff. This will, therefore, be assumed to be true. And from this the defendant concludes and contends that the latter patents were not for the same invention as the former, and hence void, the commissioner having no jurisdiction to issue them. In the beginning, it may be said that against this contention is the action of the patent office in granting the letters, and its rules, which will hereafter be adverted to, providing for the jurisdiction, and what has been aptly called the "silence of the books,"—no case being found in the courts in which the point has been made or passed on. This is strong against its validity. It can hardly be conceived an occasion for making it has not arisen, or that the interest and ingenuity involved in patent litigation should not have discovered or urged its strength, if it had any. It is, however, advanced with earnestness and ability in this case, and the language of the statute is ambiguous enough to exercise and puzzle interpretation. The subject is provided for in section 4897 of the Revised Statutes, which is as follows:

"Sec. 4897. Any person who has an interest in an invention or discovery, whether an inventor, discoverer, or assignee for which a patent was ordered to issue upon the payment of the final fee, but who fails to make payment thereof within six months from the time at which it was passed and allowed, and notice thereof was sent to the applicant or his agent, shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application. But such second application must be made within two years after the allowance of the original application. But no

person shall be held responsible in damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent. And upon the hearing of renewed applications preferred under this section, abandonment shall be considered as a question of fact."

The ambiguity consists in the meaning of the word "invention" or "discovery." Is it to be confined to that which the patent office allows in the first patent, or may it embrace the whole invention, if this be greater than that allowed? In other words, is the purpose of the new application only to extend the time from six months to two years, to obtain the patent issued, or has it the more substantial and valuable purpose to review his pretensions again, and correct the judgment of the patent office if it was erroneous? The purpose of the patent laws favors the latter view; and, in their ample provisions securing inventors' rights, while protecting the public from imposition or embarrassment, I find nothing inconsistent with it. The rights of inventors are recognized by the constitution, and in executing its provisions the enactments and procedure of the law have been designed to secure to an inventor his whole discovery. To give effect to this purpose, the supreme court, in *Grant v. Raymond*, 6 Pet. 218, sustained the validity of the reissued patent, before the statutes in words authorized it. The right of amendment has been liberally allowed to the same end. Illustrations of this are found in the case, among others, of *Singer v. Braunsdorf*, 7 Blatchf. 521, Fed. Cas. No. 12,897, and in the *Corn Planters' Case*, 23 Wall. 181. I am not insensible to the strength of the argument that, after providing for full examination of the pretensions of an inventor, and allowing amendments liberally, and appeals from erroneous decisions, it is not unjust to make some actions of the commissioner final. Undoubtedly not; but until both are concluded there is no reason why either should be. In *U. S. v. Butterworth*, 3 Mackey, 233, it was held that the commissioner could, after making and communicating to an applicant a decision in his favor, and at any time before the issuance of a patent for the signature of the secretary, reconsider the decision, and make a contrary one. And, in *U. S. v. Colgate*, 32 Fed. 624, it was decided that, even after the commissioner's judgment refusing a patent had been affirmed on appeal, the commissioner, upon a new application and new facts, bearing either upon novelty or abandonment, could grant a patent. How far passing a patent to issue was intended to be a final determination of an applicant's rights may be gathered from legislation preceding section 4897, *supra*, and from which it was an evolution, and from other sections providing for re-issue. In 1863, by an amendment to previous laws, it was enacted (section 3) that every patent shall be dated as of a day not later than six months after the time at which it was passed and allowed, and notice thereof sent to the applicant or his agent; and, if the final fee for such patent be not paid within the said six months, the patent shall be withheld, and the invention therein described shall become public property, as against the applicant. This made an absolute forfeiture. An act was passed in June, 1864, extending the time until six months after its passage. March 3, 1865, was the first en-

actment allowing renewal applications. It is important, and I quote it in full. It is as follows:

"Be it enacted by the senate and house of representatives of the United States of America in congress assembled, that any persons having an interest in an invention, whether as inventor or assignee, for which a patent was ordered to issue upon the payment of the final fee, as provided in section 3 of an act approved March 3, 1863, but who has failed to make payment of the final fee as provided in said act, shall have the right to make an application for a patent for his invention, the same as in the case of an original application, provided such application be made within two years after the date of the allowance of the original application: provided, that nothing herein shall be so construed as to hold responsible in damages any persons who have manufactured or used any article or thing for which a patent aforesaid was ordered to issue. This act shall apply to all cases now in the patent office, and also to such as shall hereafter be filed. And all acts or parts of acts inconsistent with this act are hereby repealed."

This act did not limit the right "to receive the patent withheld on account of the nonpayment of the fee," as the act of 1864, by careful expression, did, but gave the right "to make an application for a patent for his invention,"—an important difference, and a larger right. Then came the act of 1870, section 35 of which provides for renewal applications. It is not in all particulars the same as the act of 1865, but does not return to the language of the act of 1864. It provides:

"That any person who has an interest in an invention or discovery, whether as inventor, etc., for which a patent was ordered to issue, * * * shall have a right to make an application for a patent for such invention or discovery the same as in the case of an original application."

The difference from the act of 1865 is in the use of the words "such invention" instead of "his invention." The act of 1865 provided for an exemption from damages as follows:

"Provided, that nothing herein shall be so construed as to hold responsible in damages any persons who have manufactured or used any article or thing for which a patent aforesaid was ordered to issue."

This was clear; but the act of 1870 added the words, "prior to the issue thereof," which introduced awkwardness and ambiguity. It could be said that the words, "prior to the issue thereof," had no use, unless the patent ordered to be issued was the one, and the only one, secured by the reapplication; and, on the other hand, it could be said, if that was the patent to be issued, why not say so in the clear and direct words of the act of 1863? It would seem a natural, if not necessary, inference, if congress intended to return to the purpose of the act of 1863, it would have expressed itself as in that act. The ambiguity is resolved somewhat, but not entirely, by Rev. St. § 4897. Its proviso is as follows:

"But no person shall be held responsible for damages for the manufacture or use of any article or thing for which a patent was ordered to issue under such renewed application prior to the issue of the patent."

This language implies reasonably, if not necessarily, a difference in the patents,—that is, the article or thing under one might not be the same as under the other. It may be conceded that all these inferences are disputable, as inferences from ambiguous language al-

ways are; but they receive support from other parts of the statute. The ambiguity consists in the word "invention." Does it refer to the idea of the inventor, or the limitations of that idea by the patent office? The bounds of the latter are in the claims; but that the claims of a patent are not coextensive with the "invention," as the word is used in the statute, is evident, from the construction of the provisions regulating reissues. These provisions, in certain specified cases (see Rev. St. § 4916), enable the commissioner to receive the surrender of a patent, and (to quote the section) "cause a new patent for the same invention and in accordance with the corrected specifications to be issued to the patentee." This language has been construed to allow new claims and enlarged claims. Walk. Pat. § 220, and case cited. See, also, *Topliff v. Topliff*, 145 U. S. 171, 12 Sup. Ct. 825, where the subject is elaborately considered. The court said:

"To hold that a patent can never be reissued for an enlarged claim would be not only to override the obvious intent of the statute, but would operate in many cases with great hardship upon the patentee."

To sustain their contention, counsel for defendant cite the opinion of Commissioner Butterworth in *Thompson v. Waterhouse*, 30 O. G. 177; and some of its language seems to do so. The learned commissioner said:

"Why is an assignment allowed to apply? Clearly, because all the questions of patentability, etc., under section 4894, have already been determined; and hence he may apply, the same as in an original application,—i. e. he may become an applicant, making the oath himself, and for the palpable reason stated above, to wit, the only invention for which the assignee may prosecute an application is such as is covered by the first or original application, and has been adjudged to be patentable, and a patent allowed, but not issued, by reason of the nonpayment of the final fee, the only question remaining being one of abandonment, which is one of fact."

But this language must be construed in reference to that which was before the commissioner. Abstract it from that, and it is as ambiguous as the section it is cited to explain. Confined to that, and considered in connection with other parts of the opinion, it is clear enough. The device in the original application and the device in the patent which issued were identical, and the commissioner was not called upon to consider a case in which they were not; but, even in the case which was before him, he asserted the necessity of resorting to the original application for the identity of the invention. He said:

"On the filing of the second application, under the provisions of section 4897, the commissioner is not permitted to regard the forfeited application as having no existence. On the contrary, the section mentioned expressly provides that any person may file a new application for the *same* invention, but *such second application must be made within two years after the allowance of the original application. Original of what?* Why, of the second application. So it is seen the statute clearly requires that reference must be had to the original to ascertain several facts, such as dates, identity of invention, etc." (The italics are the commissioner's.)

However, if counsel is right about this opinion, its authority is opposed by the practice of the office and the subsequent ruling of Commissioner Simonds in *Ex parte Barrett*, 56 O. G. 1564, in which the applicant was allowed in his renewal application to insert new

claims reversing the decision of the examiner. Upon the whole, therefore, I think the patents sued on are valid.

This brings us to the grounds relied on by plaintiff for the preliminary injunction. There are, as I have already said, the judgment in *Bowers v. Von Schmidt*, and certain testimony given in that case, explaining the claims and the affidavit of plaintiff. In reply, defendant relies on the affidavit of its president, contradicting that of Bowers; opposes to the testimony offered by plaintiff other testimony; and urges that the judgment in *Bowers v. Von Schmidt* is not determinative of anything, as it has been appealed from; and, besides, defendant introduces patents which it is claimed anticipate plaintiff's, and which were not introduced in that case. It is not necessary to consider at length the contention of the parties on the propositions. With the conclusions in the case of *Bowers v. Von Schmidt*, on the evidence which was then before me, I am entirely satisfied; but other evidence and other patents have been introduced in the case at bar. The effect of these was submitted to a jury in an action at law between the parties, and the jury failed to agree. The consequences of this, whether it makes the case for plaintiff doubtful or otherwise, it is not necessary to determine, under the circumstances of this case. I do not care to pass on the matter (which is to pass on the patents) on a motion for a preliminary injunction, in view of the affidavit of the president of the defendant company and its pecuniary condition, it appearing to be solvent. There is no reason why the hearing of the case should not be pushed, and the rights of parties speedily determined. Motion for an injunction is therefore denied.

WARING ELECTRIC CO. et al. v. EDISON ELECTRIC LIGHT CO. et al.

(Circuit Court of Appeals, Second Circuit. February 9, 1894.)

PATENTS—INFRINGEMENT—ELECTRIC LAMPS.

Appeal from the Circuit Court of the United States for the District of Connecticut.

This was a suit in equity by the Edison Electric Light Company and Edison General Electric Company against the Waring Electric Company and others for infringement of the so-called "incandescent lamp" or "filament" patent, No. 223,898, issued January 27, 1880, to Thomas A. Edison. The circuit court granted a motion for a preliminary injunction. See 59 Fed. 358, where the opinion by SHIPMAN, Circuit Judge, is reported in full. From this interlocutory decree, defendants appeal.

Wm. E. Simonds and Chas. E. Perkins, for appellants.

R. H. Dyer and Frederick P. Fish, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs, on opinion of circuit judge.

HERMANN v. PORT BLAKELY MILL CO.

(District Court, N. D. California. September 13, 1895.)

No. 11,176.

1. ADMIRALTY JURISDICTION—TORTS COMMITTED PARTLY ON LAND AND PARTLY ON WATER.

Where a tort is committed partly on land and partly on water, the question whether admiralty has jurisdiction over it is determined by the locus of the damage, and not the locus of the origin of the tort. *Held*, therefore, that where the tort complained of was that a laborer working in the hold of a vessel was struck and injured by a piece of lumber, sent, without warning, down through a chute, by a person working on the pier, the case was one of admiralty jurisdiction.

2. MASTER AND SERVANT—NEGLIGENCE OF FELLOW SERVANT—PLEADING.

A libel in personam to recover damages for personal injuries, after describing defendant as a corporation, alleged that libelant was working in the hold of the vessel, and that "defendant" carelessly and negligently sent down upon him, through a chute, a piece of lumber, without giving notice of its coming, and that "defendant" was required to give notice, etc. *Held* that, although the acts of negligence ascribed to defendant must necessarily have been performed by some agent or employé, yet the court could not hold, on a demurrer to the libel, that such agent or employé was a fellow servant of libelant.

This was a libel in personam by Charles Hermann against the Port Blakely Mill Company, a corporation, to recover damages for personal injuries alleged to have been sustained while employed by defendant on the American vessel *Kate Davenport*. Defendant excepts to the libel.

H. W. Hutton, for libelant.

Van Ness & Redman, for defendant.

MORROW, District Judge. This is a libel in personam to recover damages for injuries alleged to have been sustained on board of the American ship *Kate Davenport*, while said vessel was being loaded with lumber at a wharf in Port Blakely, state of Washington. It appears from the allegations of the libel that the libelant was employed, in the month of January, 1895, in the capacity of mate on the *Kate Davenport*; that the vessel proceeded, with the libelant on board, to Port Blakely, there to load lumber; that on the 20th of January, 1895, while the vessel was lying at a wharf in said port, owned by the defendant, and was being loaded with lumber, the libelant was in the hold of the vessel, with several of the crew, engaged in receiving the lumber which was being loaded; that the manner of loading was to slide the lumber down a chute into the hold, and, as each piece was slid down, warning was given, to notify those in the hold, to enable them to escape from the descending lumber; that this warning was relied upon by the libelant in order to get out of the way of the lumber coming into the hold as aforesaid; that the defendant so carelessly, negligently, and improperly slid down a piece of lumber, without giving any warning or notification, to those in the hold, that the same was coming down the chute, that said piece of lumber struck the libelant, breaking his right leg, thereby seriously injuring him, to his damage in the sum of \$10,000. Exceptions are filed to the libel

upon two grounds: (1) That the court has no jurisdiction of the tort alleged in the libel; (2) that, upon the face of the allegations of the libel, it appears that the wrong of which libelant complains was the act of a fellow servant in a common employment, for which the defendant is not, in law, liable.

Taking these exceptions up in their order, it was urged upon the argument that the court has no jurisdiction of the tort alleged, for the reason that it originated on land,—that is to say, on the wharf from which the lumber was being loaded,—and not on the water; that, to give a court of admiralty jurisdiction over torts, not only the injury must take place on water, but the whole tort, from its incipency to its conclusion, must occur on the water; and that where the tort has its origin on land, although it is consummated, and the injury sustained, on water, a court of admiralty can have no jurisdiction of the wrong. "It has been uniformly held * * * that the American admiralty has a general maritime jurisdiction, embracing all maritime causes of action, as well matters of contract as matters of tort; that in matters of tort the jurisdiction depends upon the locality, and embraces all damages and injuries upon the sea." Ben. Adm. § 261, p. 149 (2d Ed.). To the same effect are the following cases: *The Plymouth*, 3 Wall. 20; *The Rock Island Bridge*, 6 Wall. 213; *The Neil Cochran*, 1 Brown, Adm. 162, Fed. Cas. No. 10,087; *The Ottawa*, 1 Brown, Adm. 356, Fed. Cas. No. 10,616; *The Mary Stewart*, 10 Fed. 137; *The Arkansas*, 17 Fed. 383; *The Professor Morse*, 23 Fed. 803; *The H. S. Pickands*, 42 Fed. 239; *The John C. Sweeney*, 55 Fed. 540; *The Mary Garrett*, 63 Fed. 1009.

While this statement of the rule as found in the text-books and authorities is certain enough for all ordinary purposes of general admiralty jurisdiction, it is not sufficiently explicit in its application to a case like the present, where the tort is claimed to have occurred partly on land and partly on water. I have not been cited, nor have I been able to find, any case where precisely the same point as is here raised was involved. While there have been dicta in favor of the jurisdiction of the admiralty court, as claimed by the libelant in this case, the question has never come up squarely for decision, so far as I am advised. In *The Plymouth*, 3 Wall. 20, the origin of the wrong was on the water, but the substance and consummation on land. It was held that the admiralty courts of this country were without jurisdiction where the substance and consummation of the injury had happened on land, and the fact that the tort had originated on the water made no difference. Mr. Justice Nelson, in the course of his opinion, said:

"But it has been strongly argued that this is a mixed case (the tort having been committed partly on water and partly on land), and that, as the origin of the wrong was on the water (in other words, as the wrong began on the water), where the admiralty possesses jurisdiction, it should draw after it all the consequences resulting from the act. * * * Much stress has been given to the fact, by the learned counsel who would support the jurisdiction, in his argument, that the vessel which communicated the fire to the wharf and buildings was a maritime instrument or agent, and, hence, characterized the nature of the tort. In other words, that this characterized it as a maritime tort, and, of course, of admiralty cognizance. * * *

After discussing the right of action, the learned justice thus concludes:

"We can give, therefore, no particular weight or influence to the consideration that the injury in the present case originated from the negligence of the servants of the respondents on board of a vessel, except as evidence that it originated on navigable waters,—the Chicago river. And, as we have seen, the simple fact that it originated there, but the whole damage done upon land,—the cause of action not being complete on navigable waters,—affords no ground for the exercise of the admiralty jurisdiction. The negligence, of itself, furnishes no cause of action. It is '*damnum absque injuria*.' The case is not distinguishable from that of a person standing on a vessel, or on any other support in the river, and sending a rocket or torpedo into the city, by means of which buildings were set on fire and destroyed. That would be a direct act of trespass, but quite as efficient a cause of damage as if the fire had proceeded from negligence. Could the admiralty take jurisdiction? We suppose the strongest advocate for this jurisdiction would hardly contend for it. Yet the origin of the trespass is upon the navigable waters, which are within its cognizance."

Applying this reasoning to the case at bar,—although the facts alleged in the libel present a counter proposition to that involved in *The Plymouth*, in this, that in the latter case the origin of the tort was on water, while in the case at bar it is alleged to have been on land,—it would seem to be strong argument in favor of the jurisdiction of the court. For, if it is the locality where the substance and consummation of the tort happened which is the ultimate test of admiralty jurisdiction, and not the origin, the case at bar clearly comes within the rule. What the learned justice says, in the concluding sentence of the paragraph just quoted, about the cause of action not being "complete on navigable waters," has reference, plainly, from a reading of the whole opinion, to the "substance and consummation of the tort"; that is to say, the locality where the injury is inflicted, and the damage sustained. This latter must be upon the high seas, or the navigable waters, in order to be within the admiralty jurisdiction.

The *Maud Webster*, 8 Ben. 547,¹ was a case where a libel in rem had been filed against the schooner for injuries sustained to a derrick and other articles belonging to the libellant by reason of a collision between the schooner and the derrick. The derrick was being used to construct a pier for a lighthouse to be erected at the Middle Ground, Stratford Shoals, in Long Island Sound, a place entirely surrounded by water. A cross libel was filed by the owners of the schooner against the owner of the derrick. The court entertained jurisdiction of the cross libel, as being for an injury to a vessel afloat, but dismissed it on its merits, holding that there was no fault on the part of the owner of the derrick. But it declined to take jurisdiction of the libel in rem of the owner of the derrick, on the ground that, although the origin of the wrong was on the water, yet the consummation and substance of the injury was on the land. The learned judge said:

"In this case, the schooner which did the injury to Howell's property was on the water, was afloat and engaged in navigation; but Howell's property was a part of the soil of the earth, or was affixed to it, and was wholly on land. In a case of tort, there can be no jurisdiction in the admiralty unless

¹ Fed. Cas. No. 9,302.

the substantial cause of action, arising out of the wrong, was complete upon navigable waters."

In commenting on the case of *The Ottawa*, 1 Brown, Adm. 356, Fed. Cas. No. 10,616, as authority for his decision, Judge Blatchford says, further:

"Although the criterion of admiralty jurisdiction in cases of tort is locality, yet, as was correctly remarked in that case, the place or locality of the injury is the place or locality of the thing injured, and not of the agent by which the injury is done."

In *Leonard v. Decker*, 22 Fed. 741, it appeared that two canal boats had been damaged while moored to a pier. The pier was somewhat out of repair, by reason of some piles or fenders having been torn away, leaving the bolts which had secured them exposed, and projecting outward and beyond the side of the pier. The bolts were under water, except when the tide was low. The canal boats were injured by mooring alongside the concealed bolts, without notice of the obstructions, or of the danger from them. Judge Brown said:

"Counsel for respondents has submitted an elaborate argument against the jurisdiction of the district court in this case, on the ground that the tort is not a maritime one, since the bolts that did the injury were attached to the pier, and belonged to the land, and not to the water. Among the cases cited are the well-known cases supporting the counter proposition that injuries done by vessels to wharves, or objects upon wharves, bridges, etc., are not maritime torts, and hence not within the jurisdiction of the district court. *The Plymouth*, 3 Wall. 20; *The Neil Cochran*, 1 Brown, Adm. 162 [Fed. Cas. No. 10,087]; *The Ottawa*, 1 Brown, Adm. 356 [Fed. Cas. No. 10,616]; *The Maud Webster*, 8 Ben. 547 [Fed. Cas. No. 9,302]. Without entering at length into a discussion of these and other cases cited, which I have carefully examined, I need only say that they do not seem to me to sustain the contention of the respondents, but, on the other hand, to be entirely consistent with, and to recognize, the jurisdiction of this court over torts like the present, and that upon two distinct grounds: First, that the bolts which caused the injuries were an obstruction to navigation; and, second, because the damage done was inflicted upon a vessel afloat, and because the place where the injury is consummated, and the damage actually received, is regarded as the locus of the tort."

After quoting from the case of *The Maud Webster*, supra, the learned judge continues:

"In all the above cases the decision is made to turn, not upon the place where the negligence, as the cause of the damage, originates, but upon the place where the injury is received and consummated. It must appear that the damage, as the substantial cause of action arising out of the negligence, 'is complete within the locality upon which the jurisdiction depends, namely, upon the high seas or navigable waters.' *The Plymouth*, 3 Wall. 36. The canal boats, in this case, were moored alongside the wharf, for the purpose of discharging their cargoes, a work which is maritime, and one of the necessary incidents of navigation, and the vessels were afloat upon navigable waters. The whole damage and injury were received by them in this situation. The locus of the damage was upon navigable waters. That was, therefore, the locus of the tort; and, as that tort was upon the water, it was within the admiralty jurisdiction."

This case differs from the case at bar in that the injury there sustained not only originated on the land, but was done by the land itself, the pier being deemed an extension or continuation of the shore; but it is clear authority for the proposition that it is the

locus of the damage, and not the locus of the origin of the tort, which is the real test of admiralty jurisdiction over torts.

In the case of *City of Milwaukee v. The Curtis, The Camden, and The Welcome*, 37 Fed. 705, a libel in rem was filed by the city of Milwaukee against the vessels named, for injuries to a bridge. The libel was dismissed for want of jurisdiction. The proposition involved there was counter to that in the case at bar. It was for an injury to land, and not for an injury originating on land. Nevertheless, the remarks of Judge Jenkins as to the locality of the damage being conclusive of the question of admiralty jurisdiction are in point. He says:

"In cases of tort, locality is the test of jurisdiction in the admiralty. The ultimate judicial authority has determined the principle that the true meaning of the rule of locality is that, although the origin of the wrong is on water, yet, if the consummation and substance of the injury are on the land, a court of admiralty has not jurisdiction; that the place or locality of the injury is the place or locality of the thing injured, and not of the agent causing the injury. *Ex parte Phenix Ins. Co.*, 118 U. S. 610, 7 Sup. Ct. 25. Within this settled principle, a tort is maritime, and within the jurisdiction of the admiralty, when the injury is to a vessel afloat, although the negligence causing the injury originated on land. *The Rock Island Bridge*, 6 Wall. 213; *Leonard v. Decker*, 22 Fed. 741. In the former case it was ruled that an action in personam would lie against the owners of the bridge, because the injury was consummate upon navigable waters, being inflicted upon a movable thing engaged in navigation, but that a proceeding in rem against the bridge was not maintainable, because a maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. And so an injury happening, through default of the master, to one upon a vessel discharging cargo at a wharf to which she was securely moored, is within the admiralty jurisdiction (*Leathers v. Blessing*, 105 U. S. 626), but otherwise if the injury occurred to one upon the wharf (*The Mary Stewart*, 10 Fed. 137). In the latter case there is an inadvertent remark to the effect that both the wrong and the injury must occur upon the water,—a proposition not sustained by authority. It suffices if the damage—the substantial cause of action arising out of the wrong—is complete upon navigable waters. *The Plymouth*, *supra*."

Counsel for respondent relies greatly upon *The Mary Stewart*, *supra*, and particularly upon the remarks criticised by Judge Jenkins in the case just quoted, as indicating that the tort must be complete on the water before a court of admiralty will take jurisdiction. That was a case involving the proposition counter to the one in the case at bar, viz. the tort there originated on the water, but the consummation and the injury were sustained on land. The facts of the case were, briefly, that one, an employé of the stevedore engaged in loading the vessel, was injured, while standing on the wharf, by a bale of cotton, which was being hoisted aboard the ship, but which fell before it reached the ship's rail. It was contended that a court of admiralty could not take jurisdiction. The district judge correctly held that jurisdiction could not attach, but, in sustaining this contention, went a little further than the facts justified him. He said:

"It is clear that the cause of action set out in the libel is without the jurisdiction of the admiralty. In cases of tort, the locality alone determines the admiralty jurisdiction. Only those torts are maritime which happen on navigable waters. If the injury complained of happened on land, it is not cognizable in the admiralty, even though it may have originated on the water.

The Plymouth, 3 Wall. 20. This springs from the well-known principle that there are two essential ingredients to a cause of action, viz. a wrong, and damage resulting from that wrong. Both must concur. To constitute a maritime cause of action, therefore, not only the wrong must originate on water, but the damage—the other necessary ingredient—must also happen on water. Now, the injury in the case at bar happened on the land."

This language must, of course, be taken subject to the facts of that case, and to the question of law which the learned judge was then considering. I do not think that he meant to lay it down as a general principle that "the wrong must originate on the water," for that would be to make the test of admiralty jurisdiction depend upon the locality where the tort originated,—a proposition not countenanced by a single authority or dictum. I think that the only true and rational solution of the jurisdictional question, where the tort occurs partly on land and partly on water, is to ascertain the place of the consummation and substance of the injury. This latter element of the wrong is necessarily the only substantial cause of action, otherwise it would be "*damnum absque injuria*."

With reference to other cases cited by counsel for respondent, they may be disposed of with the statement that, discarding scattered and isolated expressions, and reading the opinions cited as a whole, they rather make for than against the jurisdiction of admiralty. While, as previously stated, I have been unable to find any case on "all fours" with the one at bar, yet there are many authorities upon the counter proposition—viz. where the tort has its origin on water, but is consummated, and the injury sustained, on land—which seem to me to furnish convincing authority for the jurisdiction of the court in this case. In those cases, where the facts showed that the tort originated on water, but was consummated, and the injury sustained, on land, it is held that courts of admiralty have no jurisdiction. The authorities even go further, and hold that where the tort originates on water, and results in injury to land, as wharves, piers, bridges, etc. (e. g. a vessel colliding with a wharf, etc.), libels for damages sustained by such wharves, etc., will not be entertained in admiralty, because the injury took place, to all intents and purposes, on land, and not on water, and the fact that the agent causing the injury was afloat made no difference. The Plymouth, supra; The Neil Cochran, supra; The Ottawa, supra; The Arkansas, 17 Fed. 383; The Professor Morse, 23 Fed. 803; The John C. Sweeney, 55 Fed. 540; The Mary Stewart, supra; The H. S. Pickands, 42 Fed. 239; The Mary Garrett, 63 Fed. 1009; The Rock Island Bridge, 6 Wall. 213. But it is held, on the other hand, that if a vessel sustain injury by colliding with wharves, piers, etc., they may maintain an action in personam against the owners thereof, the damage having been sustained on water. Greenwood v. Town of Westport, 53 Fed. 824; Id., 60 Fed. 561; Hill v. Board, 45 Fed. 260. The central idea found running through all these cases is, so far as jurisdiction over torts is concerned, that the admiralty law looks to the place where the injury was suffered, and not to the locality of the agent causing the injury. If this be the correct doctrine with respect to cases where the tort originates on water, but results in damage to land or on land, I see no valid reason why the same test of jurisdiction is not applicable to cases

where the tort originates on land, but results in damage on the water. Applying this criterion to the case at bar, it will be readily conceded to be conclusive in favor of the question of jurisdiction.

The second exception interposed is that it appears from the allegations of the libel that the wrong of which libelant complains was the act of a fellow servant, for which the respondent is not, in law, liable. The allegations to which this exception is directed are:

"That, in passing the same or said lumber on board of the said vessel, it was slid down a chute into her hold, and, as each piece was so slid down the said chute, warning was required, to notify those in the said vessel's hold, to enable them to escape from the said lumber as it slid down the said chute; and warning was given by the said defendant, and relied upon by the said libelant, for all of said lumber received down the said chute, up to the sliding of one piece, to wit, a large piece of lumber which the said defendant carelessly, negligently, and improperly slid down the said chute without any warning or notification that the same was coming or sliding down the said chute; and, the said defendant so allowing the said piece of lumber to slide down the said chute, the libelant, having no knowledge that the same was coming, was unable to avoid it, and, in consequence thereof, the said piece of lumber struck libelant's right leg, and broke the same, etc."

The "defendant" is described in the libel as the Port Blakely Mill Company, organized and existing under and by virtue of the laws of the state of California. Being a corporation, it must necessarily act by and through its agents and servants. The company itself is not a fellow servant. When the libel mentions the "defendant," it means, obviously, an employé of the defendant. But who this person was, or what occupation he was engaged in, or what relation he bore to the company and to the libelant, is not disclosed by the averments of the libel. It is plain, therefore, that the court cannot, on the present exception, determine affirmatively that the libelant was injured by the carelessness or negligence of a fellow servant. The final disposition of this question must wait until the court has become more fully advised in the premises. The exceptions are therefore overruled.

THE BOLIVIA.

DECHAN v. BARROW STEAMSHIP CO., Limited.

(Circuit Court of Appeals, Second Circuit. November 16, 1894.)

Appeal from the District Court of the United States for the Southern District of New York.

Samuel B. Johnson, for libelant and appellant.

Wing, Shoudy & Putnam, for claimant and appellee.

Order filed declaring action abated by reason of death of the libelant.

CENTRAL VERMONT R. CO. v. LEWIS.

(Circuit Court of Appeals, Second Circuit. January 8, 1895.)

Appeal from the Circuit Court of the United States for the Northern District of New York.

Louis Hasbrouck, for appellant.

Shedden & Booth, for appellee.

Dismissed, per stipulation of consent withdrawing appeal.

CLEVELAND, C., C. & ST. L. RY. CO. v. FOSTER et al.

(Circuit Court of Appeals, Second Circuit. November 12, 1894.)

Nos. 19 and 20.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Lourey, Stone & Auerbach, for appellants.

Henry Melville, for appellees.

Order of discontinuance on consent.

THE DELAWARE.**THORNE v. WINNETT et al.**

(Circuit Court of Appeals, Second Circuit. April 16, 1895.)

Appeal from the District Court of the United States for the Eastern District of New York.

J. Parker Kirlin, for appellant.

Harrington Putnam, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

No opinion. Certified to the supreme court of the United States as to the effect of the act of congress of February 13, 1893, and, if decided adversely by that court, the order is to be affirmed.

EDISON ELECTRIC ILLUMINATING CO. et al. v. ACCUMULATOR CO.

(Circuit Court of Appeals, Second Circuit. November 11, 1894.)

No. 131.

Appeal from the Circuit Court of the United States for the Southern District of New York.

E. H. Lewis and John R. Bennett, for defendants and appellants.

Betts, Hyde & Betts, for complainant and appellee.

Before WALLACE and SHIPMAN, Circuit Judges, and TOWNSEND, District Judge.

No opinion. Affirmed.

EDISON ELECTRIC LIGHT CO. et al. v. STAFFORD et al.

(Circuit Court of Appeals, Second Circuit. November 14, 1894.)

Appeal from the Circuit Court of the United States for the Southern District of New York.

Eaton & Lewis, for appellants.

Hobbs & Gifford, for appellees.

Order entered on stipulation of consent withdrawing appeal.

EISING et al. v. OSBORN et al.

(Circuit Court of Appeals, Second Circuit. October 13, 1894.)

Appeal from the Circuit Court of the United States for the Southern District of New York.

Rose & Putzel, for appellants.

Jones & Govin, for appellees.

Dismissed, pursuant to the twenty-third rule.

THE FINANCE.

BEDFORD et al. v. NEWPORT NEWS SHIPPING & DRY DOCK CO.

(Circuit Court of Appeals, Second Circuit. October 30, 1894.)
Appeal from the District Court of the United States for the Eastern District of New York.

Carter & Ledyard, for claimants and appellants.

Benedict & Benedict, for libelant and appellee.

Discontinued by consent.

HUMPHREYS HOMEOPATHIC MEDICINE CO. v. HILTON.

(Circuit Court of Appeals, Second Circuit. January 23, 1895.)

Appeal from the Circuit Court of the United States for the Southern District of New York.

Henry F. Homes, for appellant.

Wise & Lichtenstein, for appellee.

Discontinued by consent.

JOLIET NAT. BANK v. THIRD NAT. BANK OF CITY OF NEW YORK.

(Circuit Court of Appeals, Second Circuit. November 14, 1894.)

No. 34.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Jackson Wallace, for appellant.

Thos. G. Shearman, for appellee.

Dismissed by consent.

McALLISTER et al. v. TEBO et al.

(Circuit Court of Appeals, Second Circuit. March 11, 1895.)

Appeal from the District Court of the United States for the Southern District of New York.

J. A. Hyland, for respondents and appellants.

Goodrich, Deady & Goodrich, for libelants and appellees.

Appeal dismissed, pursuant to the twenty-third rule.

THE MARK K. CAMPBELL.

ROSS v. HOUGHTON et al.

(Circuit Court of Appeals, Second Circuit. May 31, 1895.)

Appeal from the District Court of the United States for the Southern District of New York.

Wilcox, Adams & Green, for intervening mortgagee, appellant.

H. D. Hotchkiss, for appellees.

Appeal dismissed by consent.

THE MARY McWILLIAMS AND THE CITY OF BROCKTON.**McWILLIAMS et al. v. DELAWARE & H. CANAL CO.**

(Circuit Court of Appeals, Second Circuit. October 30, 1894.)

Appeal from the Circuit Court of the United States for the Southern District of New York.

Carpenter & Mosher, for claimants of the Mary McWilliams and appellants.

S. Hanford, for claimants of the City of Brockton and appellee.

David Willcox, for libelants and appellees.

Stricken from calendar for failure to answer call of docket, pursuant to the seventeenth rule.

MAYOR, ETC., OF CITY OF NEW YORK et al. v. WORKMAN.

(Circuit Court of Appeals, Second Circuit. May 6, 1895.)

No. 118.

Appeal from the District Court of the United States for the Southern District of New York.

Application for certification to the supreme court of the United States. Denied.

NEW YORK & H. R. R. CO. v. ACCUMULATOR CO.

(Circuit Court of Appeals, Second Circuit. March 13, 1893.)

Appeal from the Circuit Court of the United States for the Southern District of New York.

W. H. Kenyon, for appellant.

Frederick H. Betts, for appellee.

Stricken from the calendar for failure to answer the call of the docket, pursuant to the seventeenth rule.

PRESS PUB. CO. v. FALK.

(Circuit Court of Appeals, Second Circuit. November 15, 1894.)

No. 27.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Platt & Bowers, for complainant and appellant.

Benno Lewinson, for defendant and appellee.

Dismissed by consent.

PROVIDENT FUND SOC. v. WILLIAMS.

(Circuit Court of Appeals, Second Circuit. March 13, 1895.)

Appeal from the Circuit Court of the United States for the Southern District of New York.

A. M. Sanders, for appellant.

Carter, Hughes & Kellogg, for appellee.

No opinion. Dismissed, pursuant to the sixteenth rule.

In re SPOFFORD.

(Circuit Court of Appeals, Second Circuit. December 10, 1894.)

No. 47.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Miller, Peckham & Dixon, for appellant.

Root & Clarke, for petitioner.

Appeal dismissed by consent.

STATE OF WASHINGTON v. MORRISON.

(Circuit Court of Appeals, Ninth Circuit. June 14, 1895.)

No. 236.

Appeal from the District Court of the United States for the Northern Division of the District of Washington.

Chas. Page, for appellees.

Case docketed and dismissed on motion of counsel for appellees.

TRAVERS v. AMERICAN CORDAGE CO.

(Circuit Court of Appeals, Second Circuit. December 7, 1894.)

Appeal from the Circuit Court of the United States for the Southern District of New York.

Briesen & Knauth, for appellant.

Betts, Hyde & Betts, for appellee.

Discontinued by consent.

THE VOLUNTEER.

MURRAY et al. v. NEW YORK, N. H. & H. R. CO.

(Circuit Court of Appeals, Second Circuit. November 14, 1894.)

No. 23.

Appeal from the District Court of the United States for the Eastern District of New York.

W. W. Goodrich, for claimants and appellants.

Henry W. Taft, for libellant and appellee.

Before WALLACE and LACOMBE, Circuit Judges, and TOWNSEND, District Judge.

No opinion. Affirmed.

YUCU v. McCARTHY, United States Marshal.

(Circuit Court of Appeals, Second Circuit. May 6, 1895.)

Appeal from the Circuit Court of the United States for the Southern District of New York.

G. M. Curtis, for appellant.

Wallace Macfarlane, for appellees.

No opinion. Appeal dismissed, pursuant to the sixteenth rule.

HOME & FOREIGN INVESTMENT & AGENCY CO., Limited, v. RAY.

(Circuit Court, N. D. Georgia. June 26, 1895.)

JURISDICTION OF CIRCUIT COURT—JURISDICTIONAL AMOUNT.

Suit was brought to enforce a mortgage securing a bond for \$2,000 and two annual interest coupons which had been severed therefrom. The bond itself was not yet due from lapse of time, but, by its terms, became due on the nonpayment of one interest coupon. *Held*, that the coupons could not be considered as separate obligations for the purpose of making up the jurisdictional amount, and, at the same time, be regarded as interest for the purpose of maturing the bond; and that, consequently, the court was without jurisdiction.

This was a bill by the Home & Foreign Investment & Agency Company, Limited, against Lavender R. Ray, to foreclose a mortgage securing a bond with interest coupons.

Payne & Fye, for complainant.

Lavender R. Ray, pro se.

NEWMAN, District Judge. The question in this case is one of jurisdiction, by reason of the amount involved in the suit. It is a bill to foreclose a mortgage securing a bond for \$2,000, and two past-due annual interest coupons for \$160 each, besides interest on the coupons from maturity. The coupons have been clipped from the bonds for the purpose of leaving them in bank for collection. Suit is brought on them now, however, in connection with the bond, as to which they represent two years' interest.

The defendant, a member of the bar, himself, rather as *amicus curiæ*, suggested to the court the question of jurisdiction, stating that there was no defense to the case, and that he desired to put in no appearance, except to bring the matter of jurisdiction to the attention of the court. The simple and sole contention for complainant is that the clipping of the coupons from the bond makes them separate obligations, and authorizes the court to consider them in making up the jurisdictional amount. The bond itself is not due. It becomes due by its terms on the nonpayment of one interest coupon. For the purpose, therefore, of making the debt due, these coupons must be considered as interest past due and unpaid on the bond. The coupons cannot be considered as interest for the purpose of maturing the debt, and as separate, distinct obligations for the purpose of giving this court jurisdiction. It is not believed that the fact, suggested in argument, that, if these coupons amounted to over \$2,000, suit could be brought on them alone, affects the question in any way. Suit on them here is in connection with the bond on which they are interest, and as, under the terms of the acts of 1887 and 1888, the amount involved must be \$2,000, exclusive of interest and costs, it is not believed that the suit in this case is for the necessary jurisdictional amount.

Cited for complainant as to separate obligations: *Bernheim v. Birnbaum*, 30 Fed. 885; *Walnut v. Wade*, 103 U. S. 696; *Granniss v. Cherokee Tp. of York Co.*, 47 Fed. 429; *Moore v. Town Council*

of Edgefield, 32 Fed. 501; Peeler's Adm'x v. Lathrop, 1 C. C. A. 93, 48 Fed. 786. As to coupons, and effect of same, see, also, Howard v. Bates Co., 43 Fed. 277.

CENTRAL TRUST CO. OF NEW YORK v. EAST TENNESSEE, V. & G. RY. CO. (SIMMONS et al., Interveners).

(Circuit Court, N. D. Georgia. June 28, 1895.)

No. 507.

1. JURISDICTION OF FEDERAL COURTS—RAILROAD FORECLOSURES—ANCILLARY SUITS.

Proceedings were instituted in the circuit court for the Eastern district of Tennessee to foreclose a railroad mortgage, and a foreclosure decree was rendered which provided that the fund arising from the sale should, among other things, be applied to such claims "as are decreed by the court to be prior in lien or equity to the lien of said mortgage." Ancillary proceedings were had in the circuit court for the Northern district of Georgia, and that court rendered a decree ratifying and adopting the foreclosure decree rendered in Tennessee, but with a provision reserving to itself the right to "determine what amount of the purchase price of the property sold shall be paid into this court" for payment of costs, "and such other claims filed in this cause in this court as may be allowed, and adjudged prior in lien to the mortgage," etc. In a subsequent decree of the court in Georgia, confirming the sale, a provision was inserted which stated that the question of distribution of the funds, the priority of liens, payment of costs, etc., were reserved for future action "by this court." *Held*, that in view of these provisions the court in Georgia would assume jurisdiction to determine the question as to the priority of claims filed therein on judgments recovered in Georgia over the lien of the mortgage bonds, and would not remit such questions to the court in Tennessee. *Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co.*, 30 Fed. 895, distinguished.

2. RAILROAD COMPANIES—BONDS AND MORTGAGES—TENNESSEE STATUTES.

The Tennessee statute of 1873, "to authorize certain railroad companies in Tennessee to issue consolidated or income bonds" and secure the same by mortgage, is a special statute, limited to a particular class of railroads and securities, and does not apply to mortgages executed by the East Tennessee, Virginia & Georgia Railroad Company, which was incorporated under the act of 1877 (Code, § 1271).

3. SAME.

The Tennessee statute of 1877 (Code, § 1271), providing that no railroad company shall have power to create any mortgage which shall be valid against judgments and decrees for timber furnished, work and labor done, or damages done to persons or property, is limited by its express terms to judgments obtained on causes of action arising within the state.

4. SAME.

Where a mortgage executed by a Tennessee railroad corporation, whose road extends into Georgia, is in course of foreclosure, and ancillary proceedings are had in the federal circuit court in Georgia, the question as to the priority of judgments filed in that court, and recovered in Georgia, on causes of action there arising, over the lien of the mortgage, must be determined by the laws of Georgia, and not by the laws of Tennessee.

5. SAME—PRIORITY OF LIENS—JUDGMENTS AND MORTGAGES.

Under the laws of Georgia, the lien of judgments recovered in that state, on causes of action arising therein, against a railroad company, is subordinate to the lien of a mortgage filed in the state prior to the time the causes of action arose.

6. SAME—EQUITABLE ASSETS.

The fact that a railroad extending into different states cannot be sold on execution at law, but can only be reached by proceedings in equity, does not render the proceeds of such a road, when sold by a court of equity under a decree of foreclosure, equitable assets, in the sense that such assets must be administered *pari passu* among creditors, irrespective of legal priority. On the contrary, the distribution must be according to the legal liens and priorities.

7. SAME—PREFERENTIAL CLAIMS.

In railroad foreclosure proceedings in the Fifth circuit, the court cannot give priority, over the mortgage, to a judgment for personal injuries, even if sustained less than six months before the appointment of receivers, unless the order of appointment contained some provision for the payment of prior claims. *Cutting v. Railroad Co.*, 9 C. C. A. 401, 61 Fed. 150, followed.

In the matter of the exceptions of Charles W. Simmons and others to the report of the special master.

Reference was made to B. H. Hill, Esq., as special master in the above-stated cause, of certain questions to be determined by him, in view of the sale of the East Tennessee, Virginia & Georgia Railway, and settlement of its affairs, and distribution of the proceeds of sale. Among other matters for the consideration of the special master in this reference was that of the claim made by certain judgment creditors in this state of priority over the lien of the mortgage under which this road was sold. The claim of priority was by reason of certain statutes of the state of Tennessee, the home of this corporation. In addition to the bill filed in the circuit court for the Eastern district of Tennessee, a bill was also filed in the circuit court for this district, under which the property was held and managed in this state up to the time of the sale, in 1894. The master, in his report, disposes of the questions now before the court, and which have been heard on exceptions to the report, in this way:

Counsel representing the defendant corporation make verbally before me the question of jurisdiction. They contend that the original bill in this cause was filed in the United States circuit court for the Eastern district of Tennessee, and that this court is simply ancillary thereto, and that judgment creditors of the mortgagor company who set up priority over the mortgage, and ask for an order for the payment of their claims out of the funds raised by the sale of the mortgaged property in the hands of the receivers, should apply to the court having original jurisdiction; that that court alone was the tribunal to decide such questions, and to order the payment out of the funds coming to the hands of the receivers. In support of this contention, they cite the case of *Central Trust Co. of New York v. East Tennessee, V. & G. Ry. Co.* (In re Intervening Petition of Miller) decided by this court, and reported in 30 Fed. 895. I do not assume to decide the question of jurisdiction, for that is a matter exclusively for the court. I deem it not inappropriate, however, in this connection, to refer to the judgments and orders of this court on the question of the distribution of the funds arising from the sale of the road in the hands of the receivers, in so far as they may throw light on the question of jurisdiction. In the original decree of foreclosure rendered in the main suit, at Knoxville, Tennessee, it is ordered as follows: "The purchaser or purchasers at said sale shall, as part of the consideration for such sale, take the property purchased upon the express condition that he or they, or his or their assignees approved by the court, will notwithstanding pay off and satisfy any and all outstanding and unpaid receivers' certificates, or receivers' notes or obligations issued under the orders of this court, and having priority over the lien of said mortgages, and all other claims filed in this cause, or in either of the causes consolidated herein, but

only when said court shall allow such claims, and adjudge the same to be prior in lien to the mortgages foreclosed in this suit, or either of them, and in accordance with the order or orders of the court allowing such claims and adjudging respect thereto." See original decree of foreclosure and sale rendered on the 4th day of April, 1894, United States circuit court, Eastern district of Tennessee (page 26, par. 101). "Also, the purchaser or purchasers at said sale shall also, as part of the consideration, in addition to the payment of the sum or sums bid, take the property purchased upon the express condition that he or they, or his or their assignees, approved by the court, will pay off and satisfy all debts or obligations incurred or to be incurred by the receivers having possession of such property, which have not been or shall not be paid by said receivers, or out of the proceeds of the sale or sales herein ordered, or otherwise, and which shall be adjudged by the court to be debts or obligations properly chargeable against the property purchased, and to be prior or superior to the lien of said mortgages, or either of them." Id. p. 26, par. 104. "Also, the fund or funds arising from the sale or sales shall be applied as follows: * * * (2) To the payment of all such claims as are decreed by the court to be prior in lien or equity to the lien of said mortgages, or either of them." Id. p. 27, par. 108. In the decree of April 9, 1894, of this court, ratifying and adopting the decree of foreclosure rendered in the main suit, it was, among other things, decreed as follows: "This court, however, reserves the right, upon the coming in of the report of the special master of the sale hereinbefore ordered, to fix and determine what amount of the purchase price of the property sold shall be paid into this court for the payment of the costs of this cause in this court, and such other claims filed in this cause in this court as may be allowed, and adjudged prior in lien to the mortgages foreclosed in this suit." This order was passed by Judge Pardee, and, by its terms, provides for the payment of money into this court arising from the sale of the mortgaged property for the purpose of paying the costs accruing in the ancillary cause, and also for the purpose of paying such claims as may be filed in this court, as interventions in this cause, that may be allowed, and adjudged prior in lien to the mortgages foreclosed in this suit. In the order of Judge Newman confirming the sale on the coming in of the report of the special commissioner, the following language is used: "The questions of distribution of the fund arising from the sale, priority of liens, payment of costs, etc., are not disposed of by this order, but all such and similar questions are hereby reserved for future action by this court." From these recitals, it clearly appears that this court, in confirming the decree of sale and foreclosure rendered in the main suit, reserved to itself the right to pass upon questions of priority which might arise in cases filed within its jurisdiction, and to grant orders for payment of any claims that it held prior in lien to the mortgage, out of the funds arising from the sale of the mortgaged property. In view of these judgments of this court, and the order of the court appointing the special master, with directions that all claims which are alleged to be superior to the lien of the mortgages under which said road was sold should be referred for the purpose of hearing and deciding that question, to wit, the question of priority, I deem it my duty to consider the matters covered by the order of reference, leaving the question of jurisdiction to be settled by the court, if it should be insisted upon.

The East Tennessee, Virginia & Georgia Railway Company is a corporation organized under the provisions of an act of Tennessee passed March 12, 1877, by the purchasers of the East Tennessee, Virginia & Georgia Railroad Company, which had been sold under mortgage. See articles of incorporation (Pamph. pp. 26, 27). The act of March 12, 1877, above referred to, is entitled "An act as to the sale of railroads under mortgage; granting certain powers to purchasers and authorizing incorporation of the purchasers." See pages 22-25 of the certified pamphlet. On the 1st of September, 1888, the East Tennessee, Virginia & Georgia Railway Company issued its bonds, or provided for their issuance of that date, in the sum of six million dollars, and secured their payment by a mortgage of that date upon certain properties described in said mortgage. The bonds issued and secured by this mortgage are known and designated as "Equipment and Improvement Bonds." See copy of mortgage of September 1, 1888, herewith filed. Subsequently said

railway company duly issued fifteen million dollars more bonds, for the purpose of retiring what are described as the "First Extension Bonds" of said company, and to provide means for the purpose of building branches, extensions, double-tracking the main line, and providing additional equipment; and those bonds are known as the "General Mortgage Five per Cent. Bonds," and their payment is secured by mortgage bearing even date, upon all the properties of said railway company. See copy of mortgage, December 1, 1890, herewith filed. The record in this cause, filed in this court, shows that default was made in the payment of interest on these bonds, and the foreclosure suit was instituted originally in the United States circuit court for the Eastern division of Tennessee, at Knoxville. Ancillary proceedings were had in the United States circuit courts of Georgia and Alabama. Previous to the foreclosure proceedings, a suit had been filed by Samuel Thomas and others in the same courts, and on June 25, 1892, the receivers were appointed. The causes were consolidated by order of the court, and all further proceedings were had under the consolidated causes.

Petitioners holding the judgments against the East Tennessee, Virginia & Georgia Railway Company for causes of action accruing prior to the receivership, and subsequent to the execution and registration of the mortgages, claim that they are entitled to priority over said mortgages, because of the statute law of the state of Tennessee. No attack is made upon the validity of said mortgages, or the record thereof, but they claim that they are entitled to be paid out of the funds arising from the sale of the mortgaged property, prior to the bonds secured by the mortgage, because of the act of 1873 of the state of Tennessee. This is an act entitled "An act to authorize certain railroad companies in Tennessee to issue consolidated or income bonds and to mortgage their property to secure the same for the purpose of paying off their indebtedness." The first section provides that any of the railroad companies of this state which has heretofore leased its road, roadbed, and rolling stock to any other person or corporation for a term of years, and which is indebted to this state by reason of bonds loaned or indorsed or otherwise, and to other individuals or creditors by reason of the mortgage bonds of such railroad company being owned or held by such individuals or corporations, be and they are hereby authorized and empowered to issue bonds to be known as "Consolidated Mortgage Gold Bonds," in denominations of one thousand dollars each, and bearing seven per cent. per annum gold interest, payable semiannually, in order to enable such railroad companies to raise money for the purpose of paying off such indebtedness to the state and individuals and corporations, and also for the purpose of discharging any other indebtedness or liability which said railroad companies may incur or have incurred in the exercise of their lawful pursuits or objects. Section 2 provides that in order to secure the payment of said consolidated bonds and the interest thereon, as it falls due, the railroad companies be, and they are hereby, authorized and empowered to execute mortgages, deeds of trust, etc. Section 3 provides that any railroad company in this state owing outstanding floating debts, and being desirous of making provision for the payment of the same, be, and they are hereby, authorized and empowered to issue bonds, to be known as "Income Bonds," for an amount fully sufficient to cover and pay off the aforesaid indebtedness specified in this section of this act, which said income bonds may bear a rate of interest not exceeding ten per cent. per annum, which interest may be made payable either annually or semiannually; and the railroad company may negotiate and sell said income bonds for the aforesaid purpose, and, in order to secure the payment of the principal and interest of said income bonds, may mortgage or convey, by deed of trust, either the whole or any part of the rents and profits, and the other property and franchises of said railroad company. Section 4 provides the number of bonds that the company availing itself of the benefit of this act shall issue of consolidated or income bonds per mile. In section 5 of said act there is a proviso that no such mortgage shall bar any judgment against such roads for work or labor done, or damages done to person or property. Acts Tenn. 1873, p. 8. Under this last proviso, the interveners claim that their judgment, being against the railroad company for damages to person or property, should be paid in preference to the bonds secured by the mortgages foreclosed in this

court. I do not think that this position is supported by a consideration of the language of the act. I think this act of 1873 is very clearly a special act, applying only to the class of railroads particularly specified by said act, and to the certain classes of bonds authorized by said act to be issued by such railroads, of a certain character and for certain purposes. The act does not provide for any general authorization for the issuing of bonds and execution of mortgages by a railroad company. The caption of the act is express: "An act to authorize certain railroad companies in this state to issue consolidated or income bonds and to mortgage their property to secure the same for the purpose of paying their indebtedness." The first section only authorizes the issuance of bonds by any railroad company which has heretofore leased its roadbed and rolling stock to any person or corporation for a term of years. It restricts the character of bonds to the class known as "Consolidated Gold Mortgage Bonds," bearing seven per cent. interest, and the second section of said act authorizes the execution of mortgages to secure the payment of the consolidated bonds provided for and described in the first section. The third section of the act authorizes the issuance of "income bonds," to bear a rate of interest not to exceed ten per cent., for the purpose of paying the floating debts, and the execution of mortgages to secure the same. The fourth section limits the aggregate amount of consolidated and income bonds to two thousand dollars per mile of road mortgaged, and the fifth section contains a proviso that the character of mortgages issued under the provisions of this act, and for the specific purposes and by the character of railroads described by said act, to secure the special kind of debts specified by the terms of said act, shall not bar any judgment against such roads specified in the act for work or labor done, or damages done to persons or property. Construing the provisions of the act itself, with the title thereof, it is very clear to my mind that this act does not apply either to the East Tennessee, Virginia & Georgia Railway Company, or to the bonds secured by the mortgages foreclosed in the case of the Central Trust Company of New York against said railway company. It is clear to my mind, from a consideration of this act, that the bonds issued by the East Tennessee, Virginia & Georgia Railway Company, and the mortgages executed by it are not embraced within the terms of this act of 1873, and were not issued and executed under the authority thereof. This position is borne out, not only by a consideration of the act itself, but by a consideration of other statutes of the state of Tennessee authorizing the issuance of bonds and the execution of mortgages by railroad companies in said state, and that it is a special act, confined to the class of securities and character of railroads therein mentioned, and is regarded as limited in its application. The learned counsel for the defendant calls attention to the fact that in the compilation of statutes made by Milliken & Vertrees, pursuant to legislative action, in 1884, the act of 1873 was not embodied in that compilation, while all statutes of a general character relating to the issuance of bonds and mortgages by the railroads are included in that compilation. The East Tennessee, Virginia & Georgia Railway Company is not one of the class of roads designated in the act of 1873, and the bonds issued by said railway company are not within the two classes of bonds authorized and provided for in said act. That is to say, they are neither consolidated nor income bonds. See description of said bonds in deeds of trust of file in this court. As above stated, the East Tennessee, Virginia & Georgia Railway Company was incorporated under the act of 1877. This act of 1877 is section 1271 of the Code of Tennessee (Ed. 1884). The act of 1877 also contains a provision, in favor of operating expenses, and damages for personal injuries and injuries to property, somewhat similar to the proviso in the act of 1873. The proviso in the act of 1877 (Code Tenn. § 1271) is in the following language: "No railroad company shall have power to give or create any mortgage or other kind of lien on its railway property in this state which shall be valid and binding against judgments and decrees and executions therefrom or timbers furnished and work and labor done, or for damages done to person and property in the operation of its railroad in this state." It will be seen, however, that this proviso expressly limits the superiority of such claims over the lien of the mortgage to the property "in this state," and to judgments or decrees and executions therefrom, or timbers furnished

or work or labor done on its road, or for damage done to person and property in the operation of its road, "in this state." In other words, the very terms of the act exclude any extraterritorial force or effect, and, in order to come within the provisions of the act, such claims must be based upon judgments or decrees issued from the courts of Tennessee for damage done to person or property in the operation of the railroad in the state of Tennessee, and such claims constitute a lien only upon the property of the defendant railroad located in the state of Tennessee. Indeed, it is conceded by counsel who represent interveners in these cases that they do not come within the proviso of the act of 1877, but they claim that the act of 1877 did not repeal the act of 1873, and that said latter act is still of force, and under its terms they are entitled to priority of payment over the bonds secured by the mortgages. It is true that the act of 1877 did not repeal the act of 1873. The two acts are entirely consistent. But this question is not material to be considered, because, as above stated, in my opinion the act of 1873 has no application whatever to classes of bonds and execution of mortgages issued by the East Tennessee, Virginia & Georgia Railway Company.

Even if I am incorrect in this proposition, and this act of 1873 does apply to the class of securities issued by the East Tennessee, Virginia & Georgia Railway Company, and secured by mortgages foreclosed in this court, yet I am of the opinion that the proviso of the act of 1873 in reference to priorities and liens of judgments therein mentioned has no extraterritorial force or effect, and does not apply to causes of action accruing in the state of Georgia, or to judgments for damages to person or property rendered by the courts of this state. This view, I think, is entirely consistent with the law that all contracts are made with reference to the laws of the state in which the subject-matter of the contract is, and that all laws of a general character enter into, and become a part of, contracts executed within said state. In the determination of priorities or liens, the *lex fori*, and not the *lex loci contractus*, controls. The judgments in behalf of these interveners against the railway company being rendered by courts in the state of Georgia, their priorities or liens are determined and fixed by the laws of the state of Georgia, and not by the laws of Tennessee; and as the mortgages executed by said East Tennessee, Virginia & Georgia Railway Company to secure the bonds issued by said railway company were duly recorded in the state of Georgia before either the cause of action accrued or the judgments were rendered, by the laws of the state of Georgia they take precedence over such judgments. The laws of no state have any extraterritorial existence, save by comity, and laws which affect titles or liens upon property are controlled by the state where the property is located, and where the liens are declared. *Walworth v. Harris*, 129 U. S. 364, 9 Sup. Ct. 340; *Green v. Van Buskirk*, 5 Wall. 307; *Story, Conf. Laws*, § 390; *Insurance Co. v. Hanford*, 143 U. S. 187, 12 Sup. Ct. 437; 3 *Am. & Eng. Enc. Law*, p. 508, par. 3, and note to paragraph; *Morgan v. Neville*, 74 Pa. St. 52.

Counsel for interveners insist that the fund in the hands of the court arising from the sale of the mortgaged property under the foreclosure proceedings in this cause constitutes equitable assets, and ought to be administered as such. They claim that as a railroad cannot be levied on by common-law process, but must be sold and debts paid by means of proceedings usual in a court of equity, that the distribution of the fund arising from such sale should be controlled according to justice and right in the particular case; the general rule being that equality is equity. It is true that railroads extending into a different state cannot be levied on and sold under any common-law process, but creditors are compelled to resort to a court of equity to secure the sale of a railroad, its properties and franchises; but where a mortgage executed by a railroad company on its properties extending into different states, is foreclosed by proceedings in equity, and sold under decree of foreclosure, the fund arising from such sale is not equitable assets, in the sense that such assets must be administered by a court of equity *pari passu* among the creditors of the mortgagor, irrespective of legal priority, but such fund should be distributed according to legal liens and priorities. It is admitted in this case that the mortgages, as executed by the said railway

company to the Central Trust Company of New York to secure its bonds, were duly executed and recorded, and constitute a valid, subsisting lien—first lien—on all the property therein described; and to say that, because such a mortgage is foreclosed in equity, that the lien of the mortgages is divested, and the fund arising from the sale of the mortgaged property distributed to other creditors of the mortgagor, is unsupported by any principle of law, justice, or equity, and is not sustained by any decision cited by counsel. The lien of the mortgages in this case cannot be displaced or divested, except by a limited class of what is known as "preferential claims," placed upon the property by the court appointing the receivers.

The judgments held by the interveners in all of the cases are for injuries to persons or property, rendered after the execution and record of the mortgages, and upon causes of action arising subsequent to such execution and record. It is contended in only one of the cases that such judgment comes with the operation of what is known as the "six-months rule." This is the judgment in favor of C. W. Simmons for personal injuries received while an employé of the railway company, which judgment was rendered by this court on the 31st day of August, 1894; the cause of action arising on the 11th day of February, 1892, less than six months before the appointment of the receivers in this case. I do not think that, the cause of action arising within the six months, that fact alone makes it a preferential claim. I do not think that there is any fixed rule, adopted by the federal court, barring claims contracted more than six months before the appointment of the receiver, nor giving claims a preferential character, contracted less than six months before such appointment. The question is one of superior equity in each case. The supreme court of the United States, in one case, gives such priority to materials furnished three years before the appointment of a receiver, and a great many debts were denied this priority which were contracted a few weeks or days before the appointment of a receiver. But counsel for Simmons insist that his judgment comes within the spirit of the rule adopted by the federal courts in reference to preferential claims, and the facts of the case, in my opinion, do make a strong case for the application of the rule, and the payment of his judgment in preference to the mortgages. He was a brakeman in the employment of the railway company. A collision between a freight train and a passenger train of such company was imminent, and, but for the prompt and heroic action of the employé, the collision would inevitably have occurred. Great destruction, in all probability, would have been had, not only to the property covered by the mortgage, but there would doubtless have been many claims for damages for personal injuries. This employé received his injuries at the command of the conductor of the railway company, and in his successful effort to save the property and passengers of the railway company. His labor and work at the time he received his injuries aided in the preservation of the property covered by the mortgages, and occurred within a reasonable time before the appointment of receivers. It seems, therefore, that this claim certainly stands upon the same footing of reason, justice, and equity as a claim for labor done or supplies and materials furnished to keep the railway a going concern just prior to the appointment of the receivers; and I would hold and find in favor of this claim of the intervener, Simmons, as a preferential debt, which should be paid out of the funds arising from the sale of the mortgaged property now in the hands of the receivers of this court for distribution, on the authority of the numerous cases decided by the courts of the United States, beginning with the case of *Fosdick v. Schall*, 99 U. S. 235, and especially under authority of the decision of the circuit court of Kansas, made by Judge Caldwell, in the case of *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, cited in 53 Fed. 183; but in view of the decision of the circuit court of appeals, reported in 9 C. C. A. 401, 61 Fed. 150 (*Cutting v. Railroad Co.*), for this judicial circuit (decision rendered by Judge Pardee), I do not think I have a right to so report. It is contended that when the receivers were appointed no provision was made for the payment of such claims, either from the current earnings of the property or from the corpus thereof; and, under this decision of the circuit court of appeals, it is held: "Upon the sale

of a railroad on foreclosure, it is error to direct payment of claims for supplies furnished prior to the receivership out of the purchase money, where no provision was made for such payment when the receiver was appointed." This decision is in conflict with several others on the same subject in the federal courts,—notably, in the case of *Blair v. Railroad Co.*, 22 Fed. 471, and in the case of *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, supra; also *Central Trust Co. v. St. Louis, A. & T. Ry. Co.*, 41 Fed. 551. But I think this decision is binding upon the courts of this circuit. None of the other interveners contend that their judgments come within the principle of preferential claims, but concede the contrary.

Counsel for interveners further insist that their judgments should be paid by the purchaser of the road, or out of the fund in court, under the terms of the decree and the order granted by Judge Newman when the sale was confirmed. This would be true, if these judgments or claims were prior in lien to that of the mortgages, and which should be adjudged by the court to be prior in lien to the mortgages; but, as I have held that none of these judgments or claims are entitled to such priority, therefore none of them fall within the terms of the decree and order above mentioned.

Upon a consideration of the whole case, I conclude as follows: (1) That the mortgages executed by the East Tennessee, Virginia & Georgia Railway Company to the Central Trust Company of New York, dated September 1, 1888, and December 1, 1890, to secure its bonds, constitute a first lien on the properties of the mortgagor described therein. (2) That the interveners herein first above mentioned have valid judgments against the defendant, the East Tennessee, Virginia & Georgia Railway Company; that all of said judgments were rendered subsequent to the execution and record of the mortgages to the Central Trust Company of New York, and were based upon causes of action arising subsequent to such execution and record. (3) That none of said judgments so held by said interveners have any right or priority over said mortgages, and are not entitled to be paid out of the fund in the hands of this court, arising from the sale of the mortgaged premises, in preference to the bondholders secured by said mortgages. (4) That the act of the state of Tennessee, of 1873, has no application to the mortgages executed by the East Tennessee, Virginia & Georgia Railway Company to the Central Trust Company of New York, but that said act has a restrictive and limited application to the class of securities and the character of railroad specified in said act. (5) That, even if said act of 1873 did apply to said mortgages, it has no extraterritorial force or effect, and that all of these judgments held by the interveners, having been rendered by courts in the state of Georgia, the causes of action arising in said state, must be controlled, on the question of priority, by the laws of the state of Georgia. (6) That the judgments in behalf of the interveners, being for injuries to person or property, are not entitled to any priority over the mortgages, either in law or equity, as preferential debts, but these interveners are simply general creditors of the railway corporation, and, as such, cannot be paid out of the funds in the hands of the court, arising from the sale of the mortgaged property. I therefore find and report against the claim of priority set up by the interveners, and in favor of the paramount lien of the mortgages executed by the East Tennessee, Virginia & Georgia Railway Company to the Central Trust Company of New York, above noted.

The evidence, being documentary in its character, is herewith filed, with the minutes of the proceedings had before me. All of which is respectfully submitted.

This March 29th, 1895.

Benj. H. Hill, Special Master.

Butler, Stillman & Hubbard and Lucky & Sandford, for complainant.

Dorsey, Brewster & Howell, for defendant.

Mynatt & Wilcoxon, for interveners.

NEWMAN, District Judge. As to the contention that this court has no jurisdiction to hear and determine the questions raised as

to the priority of liens of Georgia judgment creditors over the bonds secured by the mortgage, this may be said first: The decision made by Judge Pardee, in which I concurred, in *Re Intervening Petition of Miller*, 30 Fed. 895, was made in a case somewhat different from this, as to the manner in which two bills for foreclosure and for receiver were originally brought. The bill in this case is more in the nature of an original bill, although the primary litigation has been in Tennessee. It is doubtful if it can be considered ancillary only, as the proceeding here clearly was in the former case. But, be this as it may, the extract from the decree of foreclosure of April 4, 1894, and of the decree of April 9, 1894, and from the order passed here confirming the sale, as shown in the foregoing report, clearly distinguish the question, as now presented from that passed on by Judge Pardee and myself in the *Miller Case*, *supra*. Under the practice which has grown up in this receivership case of the East Tennessee Railway, and similar cases, of late years, it is doubtful if the rule announced in the *Miller Case* can be adhered to, and a proper and satisfactory disposition made of the numerous intervening petitions which come into these cases, raising questions similar to the one now presented. The rights of parties under the local law may be better ascertained in their respective jurisdictions than they would be if sent, as a whole, to the court of primary jurisdiction. I would not undertake to question the correctness of the rule in the *Miller Case*, without concurrence of the circuit judge who delivered the opinion; but, in my judgment, it is not applicable here, in view of the direction which has been given this case, and of the orders and reservations contained in the record.

As to the exceptions of interveners who claim priority over the mortgage as to the fund arising from this sale, by virtue of certain statutes of the state of Tennessee, the very able report of the special master is so full, clear, and so entirely satisfactory, that nothing need be said on that question. I have no doubt as to the correctness of the conclusion arrived at by the special master, and set out in his report. Further discussion of the matter is unnecessary, and the exception will be overruled, and the report of the special master confirmed.

AMERICAN BELL TEL. CO. v. WESTERN UNION TEL. CO. et al.¹

(Circuit Court of Appeals, First Circuit. September 3, 1895.)

No. 53.

1. EQUITY PRACTICE—RIGHT OF PLAINTIFF TO DISMISS—REFERENCE TO MASTER.

After the parties have, by a stipulation, agreed to refer the cause to a master, "to hear the parties, report the facts, and his rulings on any question of law arising in the case," and the court has entered a decree of reference in accordance therewith, the defendant acquires a right to have a hearing before the master and to obtain his report and decision, and the plaintiff consequently thereby loses his right to dismiss the cause without prejudice. 50 Fed. 662, reversed.

¹ Rehearing pending.

2. SAME.

Even if it were conceded that the mere stipulation, and the decree ordering the reference, would not, of themselves, take away the right of dismissal, that right would be lost after a full hearing has been had, and after the master has communicated his decision to counsel.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a bill by the Western Union Telegraph Company and others against the American Bell Telephone Company for discovery and accounting in respect to certain rentals upon patented devices, alleged to be due under a contract. The case was heard in the circuit court upon complainants' motion to dismiss the cause without prejudice, which was granted. 50 Fed. 662. Defendant appeals.

Ebenezer Rockwood Hoar, William G. Russell, and James J. Storrow, for appellant.

John F. Dillon and Josiah H. Benton, Jr., for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

WEBB, District Judge. The Western Union Telegraph Company, the American Speaking Telephone Company, the Gold & Stock Telegraph Company, and the Harmonic Telegraph Company, on and prior to November 10, 1879, owned, or claimed to own and control, a number of patents issued by the United States, covering and embracing numerous valuable inventions, appliances, and methods, useful in the art of transmitting messages by telephone, including the right to transmit call signals by electricity over wires in connection with the telephone business; and they had made many contracts with divers persons, granting licenses for the use of such appliances, methods, and inventions, upon payment of certain agreed rentals. At the same time the National Bell Telephone Company owned, or claimed to own, a number of patents, granted by the United States, covering instruments, inventions, and methods useful and valuable in the art of transmitting messages by telephone, and also claimed the right to transmit by electricity, over wires, call signals, in connection with its telephone system. And this company also had entered into many contracts with corporations and individuals, granting to such corporations and individuals, in consideration of the payment of certain rentals, the right to use the instruments, inventions, and methods by them owned, or claimed to be owned. On said 10th day of November, 1879, controversy having arisen between the National Bell Telephone Company, on the one side, and the other corporations above named, on the other side, with respect to the rights and powers of each, and of the grantees of each, in the business of transmitting messages by telephone, and litigation as to their respective rights having been initiated by and between the parties, and other burdensome litigation being threatened and probable, the corporations interested entered into negotiations for a settlement and adjustment of all such matters of controversy. Those negoti-

ations resulted in a written agreement and contract between the Western Union Telegraph Company, acting in its own behalf and in behalf of the American Speaking Telephone Company, the Gold & Stock Telegraph Company, and the Harmonic Telegraph Company, the complainants in this case, as party of the first part, and the National Bell Telephone Company, as party of the second part, which said agreement and contract in writing was executed, ratified, and approved by all the parties. Since the said 10th day of November, 1879, the National Bell Telephone Company has transferred all its property and rights to the American Bell Telephone Company, a corporation under the laws of the state of Massachusetts, and the said American Bell Telephone Company is made the sole defendant in this suit.

The written agreement between the parties contains a large number of provisions and particulars, which, for present purposes, do not need to be referred to in detail. It is enough to say that under that contract the defendant became bound and promised to conduct certain business in regard to telephones, letting instruments, granting licenses, and other things, for the benefit of all parties to the agreement, upon carefully specified terms, and to collect rentals, render accounts, and to pay over to the others interested a proportion of the moneys collected. The complainants became dissatisfied with the accounts rendered and the amount paid to them, and claimed that under the contract they had an interest in, and a right to an account of and a share in, the profit of certain business of the defendant, and that a large amount was due to them,—how much, they had no means of ascertaining. The defendant, on the other hand, denied that such business was embraced in the contract, and that the complainants were entitled to participate in the profits of the same, and insisted that it had, in all respects, fully and justly kept and performed all its obligations under the contract. To enforce their claims, and to compel performance of what they demanded as their due, the complainants have commenced this suit; setting out in their bill the written agreement of November 10, 1879, and praying for a discovery and an account, and for a decree for the sum shown to be due to them. The American Bell Telephone Company appeared and answered, admitting the contract or agreement, and its obligation to perform all the undertakings of the National Bell Telephone Company under it so made, but not admitting the entire accuracy of the copy of that agreement as set out in the bill of complaint. The defendant, in its answer, declared that all its said obligations had been promptly, fully, and justly performed, and that it had paid to the complainants their full share and proportion of all rentals and profits. It further denied the right of the complainants to any of the relief sought, and it referred to copies of licenses granted to, and of contracts made with, other parties for the transaction of telephone business; also, to schedules of all corporations to whom it had granted licenses or with whom it had made contracts for the use of telephones; but said copies and schedules do not appear to have been, in fact, filed till during the hearing before

the master. The bill of complaint was filed November 16, 1883; the answer, June 30, 1884; and the replication, November 19, 1884. At the May term, 1886, of the circuit court, on the 24th of May, the following agreement was filed:

"Agreement for Reference to a Master.

"It is agreed that the above-named cause may be referred to the Hon. John Lowell, as master, to hear the parties, report the facts, with such part of the testimony as either party shall request, and his rulings on any question of law arising in the case.

W. G. Russell,

"For Defendant.

"Dillon & Swayne,

"Hale & Walcott,

"For Complainants."

Thereupon, on May 28, 1886, the following order of court was entered:

"And now, to wit May 28, 1886, upon agreement of the parties filed, it is ordered that the above cause be referred to Hon. John Lowell, as master, to hear the parties and report the facts, with such part of the testimony as either party shall request, and his rulings on any question of law arising in the case."

The cause was thence continued to the October term, 1890, when, on February 19, 1891, the master filed his report, with accompanying papers, and on the next day the following agreement was filed:

"It is agreed that the paper filed in this case as the master's report shall be taken into his custody, and considered not filed (with accompanying documents).

Geo. S. Hale, for Plaintiff.

"W. G. Russell, for Defendant."

And thereupon the clerk delivered to the said master that report and accompanying papers. This proceeding, in his final report, filed August 11, 1891, the master thus explained:

"After I had filed a report in court, the parties reminded me that they had agreed that a draft report should be furnished them for their suggestions before the final report was made and filed. Therefore the report was taken from the files by consent, and several hearings were had before me; and I have, in some particulars, modified my report accordingly."

The cause was continued to the May term, 1891, of the circuit court, and on the 1st day of June, 1891, the following petition was filed:

"The Western Union Telegraph Company, complainant, sheweth that your petitioner, having exhibited its bill in this honorable court against the above-named defendant, which has appeared and put in its answer thereto, your petitioner is now advised to dismiss its said bill. Your petitioner therefore prays that the said bill may stand dismissed out of this court without prejudice, but with costs to be taxed by the clerk.

"Western Union Telegraph Company,

"By J. H. Benton, Jr., Attorney."

On this motion no action was at once taken. August 11, 1891, the master filed his report, with accompanying papers. In it he states that in June the counsel for the complainants notified him that they had filed in court a petition to dismiss the bill, and asked him to make no report pending said petition, but that he considered it his duty to proceed, and leave to the court all questions arising

out of the petition. October 19, 1891, the following joinder was filed:

"Joinder in Motion to Dismiss.

"The American Speaking Telegraph Company, the Gold & Stock Telegraph Company, and the Harmonic Telegraph Company join in the petition for leave to dismiss heretofore filed by the Western Union Telegraph Company.
"By J. H. Benton, Jr., Attorney."

November 26, 1892, a decree was entered dismissing the bill of complaint, without prejudice, upon payment of costs. From this decree the American Bell Telephone Company appealed, and duly perfected its appeal.

The single question contested is the right of the complainants thus to dismiss their bill. To the discussion of this question great learning and extensive examination of authorities have been devoted. But in the opinion of this court the question lies in narrow compass. All the authorities recognize that in the progress of a suit a stage may be reached when the right of the complainant to end the cause by dismissing his bill ceases. With sufficient exactness, the decisive point may be said to be when the cause has proceeded so far as to give the defendant rights of which he would be deprived by allowing the dismissal of the bill by the complainant on his motion. Such rights were acquired in this cause by the reference of the parties to the master, approved and confirmed by the decretal order of the court. The defendant, by the concurrent force of the stipulation of the parties to refer to the master "to hear the parties, report the facts, and his rulings on any question of law arising in the case," and of the order of court, acquired the right to have the hearing before the master, his report, and the decision of the master thereupon. Neither party could, at his pleasure, revoke or rescind the reference so made and confirmed. Even if the right of the defendant to have the cause go on was not fixed by the stipulation and the order of the court, which is not admitted, it was secured by the hearing before the master pursuant to that stipulation and order, at which the parties produced their evidence at great length, presented their arguments, and submitted the case to the master for his determination. But, further than this, the master reached a decision, and communicated it to the parties, or their counsel, before any suggestion by the complainants of a desire to dismiss their bill. It was only after it became known to them that the master's decision was in favor of the defendant, and adverse to them, that they sought to escape, and to deprive the defendant of the award of a tribunal of mutual selection. It is not by this meant that the report filed on the 19th of February, 1891, and afterwards withdrawn, is regarded as the technical report of the master. But it was a draft report, the contents of which were made known to the parties precedent to the ultimate report solely to give them opportunity to suggest errors, to ask revision and reconsideration, to take exceptions, and to do whatever might be necessary to put them in position to contest the approval and confirmation of the report as finally made. The record shows that some of those steps were taken before any motion to dismiss was filed;

that after the draft report was submitted and read to counsel at his office, and at the complainants' request, 30 days were allowed by the master for each party to submit objections or suggestions for alterations of said report, which time was several times further extended at the request of the plaintiffs' counsel; and some time near May 7th the counsel of both sides filed, and presented to the master, their respective objections and suggestions, and, before the motion to dismiss the bill, counsel on each side filed with the master their reply to the objections and suggestions of the other. No dissent is made from the view of the circuit court that the master's report cannot be deemed to have been filed till after the petition for leave to dismiss was made by the Western Union Telegraph Company, nor is any account made of the point that in form one only of the complainants signed that petition. The decision is that at the time the motion was made the complainants had not the right to dismiss their bill. Upon the effect of a reference like that in this case, see *Kimberly v. Arms*, 129 U. S. 513, 9 Sup. Ct. 355; *Davis v. Schwartz*, 155 U. S. 631-637, 15 Sup. Ct. 237.

COLBY UNIVERSITY et al. v. VILLAGE OF CANANDAIGUA et al.

(Circuit Court, N. D. New York. August 26, 1895.)

EMINENT DOMAIN.—LAWS N. Y. 1875, CH. 181.

The New York statute (Laws 1875, c. 181) permitting villages to construct systems of waterworks provides (section 22) that whenever "any corporation shall have been organized * * * for the purpose of supplying the inhabitants of any village with water and it shall become or be deemed necessary * * * that the rights * * * and properties of such corporation shall be required for any of the purposes of this act, the commissioners * * * shall * * * make * * * a thorough examination of the * * * properties owned or held by such corporations, * * * and if such commissioners shall determine that said * * * properties are necessary * * * they shall have the right" to acquire the same by condemnation. *Held*, that such statute does not make it mandatory upon the water commissioners of a village to acquire, either by purchase or condemnation, the rights or property of a private corporation organized to supply the village with water, and which has constructed a system of pipes, and acquired from the village authorities a franchise to lay and maintain the same, without any exclusive right.

John Gillette (Howard Mansfield and J. H. Metcalf, of counsel), for complainants.

James C. Smith and Thomas H. Bennett, for defendants.

WALLACE, Circuit Judge. The complainants, owners of mortgage bonds issued by the Canandaigua Waterworks Company, have brought this suit to restrain the village of Canandaigua and its board of water commissioners from building, maintaining, or operating a system of waterworks for the purpose of supplying the village and its inhabitants with water, and they now move for an injunction restraining the defendants from doing so pending a final determination of the cause. The theory of the suit is that the defendants are proceeding, in violation of the rights of the complain-

ants, to construct such waterworks, with a view to operating them, and if this is permitted the value of the property mortgaged to the bondholders will be practically destroyed, and the complainants will thereby sustain irreparable injury, for which an action at law will afford no adequate remedy. The case for the complainants rests upon the fundamental proposition that the village authorities are under legal obligation to acquire the company's system before they can rightfully proceed to install one of their own. Inasmuch as the complainants concede that if this proposition is unsound their case must fail, and it seems to me to be unsound, the present decision will be placed upon that ground, without considering the subordinate objections to the relief sought which have been raised by the defendants.

The Canandaigua Waterworks Company was incorporated in 1883, pursuant to the provisions of chapter 737 of the Laws of 1873 of this state, and the acts amendatory thereof; and in September, 1884, having duly acquired a franchise from the authorities of the village, giving it permission to place its pipes in the streets for the purpose of furnishing a supply of water to the inhabitants, it completed its system of waterworks in accordance with the conditions of the franchise. The system then consisted of about nine miles of mains, and later, at the request of the village authorities, and to promote better fire protection to the village, it has extended its system of mains. It has continued to furnish an adequate supply of water to the village and its inhabitants ever since, having expended upwards of \$150,000 in the construction of its system.

Although the company's system was constructed and completed in conformity with the conditions of the franchise acquired from the municipal authorities, that franchise did not confer upon the company any exclusive privilege of supplying water to the village or its inhabitants (*Syracuse Water Co. v. City of Syracuse*, 116 N. Y. 167, 22 N. E. 381; *In re City of Brooklyn*, 143 N. Y. 596, 38 N. E. 983); but it was competent for the village, through its duly-constituted agents, to avail itself of the benefits of the provisions of chapter 181 of the Laws of 1875, and construct and operate a system of its own. The complainants' position, however, is that section 22 of that statute makes it obligatory upon a municipality which proposes to acquire a system of its own, whenever a system owned by a duly-organized water corporation already exists, to acquire the existing system, either by purchase or by condemnation. The real question is, therefore, as to the meaning of that section. The section provides that whenever "any corporation shall have been organized under the laws of this state for the purpose of supplying the inhabitants of any village with water, and it shall become or be deemed necessary by the board of water commissioners herein authorized to be created that the rights, privileges, grants and properties of such corporation shall be required for any of the purposes of this act, the commissioners herein authorized to be created shall have the power, and it shall be their duty, to make, or cause to be made, a thorough examination of the works, rights, privileges and properties owned or held by such corporations, or

any of them, and if such commissioners shall determine that said works, rights, privileges and properties are necessary for the purposes of this act, they shall have the right to make application" to the supreme court for the purpose of acquiring the privileges and properties by condemnation.

It does not seem open to reasonable doubt that the object and intention of this section is to enable the municipality, if, in the opinion of its board of water commissioners, the acquisition of the system of the existing corporation is necessary, to acquire it by condemnation, and to invest the board with plenary discretion either to acquire the existing system or leave it intact. If the board do not deem it necessary that it be acquired, they need not make any examination. If they deem it necessary that it should be acquired, they are to make a thorough examination. After this examination has been made, they are again to exercise their judgment and determine whether the acquisition is necessary. If they determine that it is, they are permitted to resort to proceedings for judicial condemnation. The mandatory language which compels the board to make a thorough investigation if they should deem the acquisition necessary is inserted for the protection of the municipality, in order to preclude any action by the board based upon a superficial judgment. The whole matter is intrusted to their sound discretion. It is true that permissive words in statutes which invest public officers with authority to perform or abstain from acts which concern the common good or the interests of others are often construed as mandatory, but in each case the question whether the statute is to be read as mandatory, or only as permissive, is one of intent, to be deduced from the context as well as the language of the particular provision; and where, as here, it is plain that the power confided is a discretionary one, there is no room for the application of the rule of construction by which the word "may" is often read as "must."

The unfortunate situation of the complainants naturally evokes sympathy, and a desire to protect them against what seems to be a needlessly harsh exercise of the authority reposed in the board of water commissioners, but the plain meaning of the statute cannot be disregarded.

The motion is denied.

CLYDE et al. v. RICHMOND & D. R. CO. (WYCHE, Intervener).

(Circuit Court, N. D. Georgia. June 19, 1895.)

No. 587.

1. EQUITY PROCEDURE—CONCLUSIVENESS OF MASTER'S REPORT—QUESTIONS OF FACT.

The report of a special master in respect to a question of contributory negligence, depending upon conflicting evidence, where he was directed to report his conclusions upon the questions both of law and fact, will not be disturbed, unless manifestly erroneous.

v.69p.no.8—43

2. MASTER AND SERVANT—VICE PRINCIPAL—RAILROAD TRAIN DISPATCHER.

The train dispatcher of a railway company in the possession of receivers is the alter ego of the receivers, in respect to a locomotive engineer injured through his negligence in directing the running of trains.

8. SAME—COLLISION OF RAILROAD TRAINS—NEGLIGENCE OF TRAIN DISPATCHER.

The omission of a train dispatcher to notify a station keeper of the coming of an extra freight train, whereby the train was allowed to follow so closely upon the heels of another extra freight that a collision occurred in a fog, on a down grade, and resulted in injuries to the engineer of the overtaking train, held to have been the proximate cause of such injury, so as to render the receivers of the road liable.

The intervener, R. C. Wyche, filed his intervention in the above-stated equity cause, claiming damages for personal injuries received by him while in the service of the receivers. The intervention was referred to William D. Ellis, Esq., as special master, and his report is as follows:

By virtue of an order of reference from the circuit court of the United States for the Northern district of Georgia, the above-named intervention was referred to the undersigned, as special master, with directions to consider the questions of law applicable thereto, and to hear the testimony and report his conclusions to the court. Due notice of said reference was given, and the case was duly and legally assigned for trial; and at the time and place assigned the intervener appeared in person and by attorney, and the defendants, receivers, appeared by counsel. A full and complete report of the testimony and proceedings before the special master was made, and is herewith sent up, approved, identified, and made a part of this report.

Statement of the Case.

The intervener contended before the special master that the defendants were operating the property known as the Georgia Pacific Railway,—a line of road extending from the city of Atlanta, in the state of Georgia, to the city of Birmingham, in the state of Alabama, and that he was in their employ, as a locomotive engineer. He also contended that on the evening of the 28th of January, 1893, the defendants, by their servants and agents, sent out from Woodlawn, at or very near Birmingham, two freight trains which were not scheduled, and which were known and designated as "First and Second Extras": the first extra being designated also by the number of its locomotive, #558, and the second extra, or Wyche's train, was known by the number of its locomotive, #594. The two trains, he contended, were started out about the same time, and that they were to run without schedule, and by telegraphic order, under the control of the train dispatcher. He says that they were run without trouble or difficulty, and that at Bremen, a station on the road, a request was made for permission to go back to Birmingham, or, in the language of railroad men, he requested to be "turned" at Bremen, and that this request was made on account of anticipated difficulty in reaching Atlanta before 8 o'clock on the next morning, which was Sunday, it being claimed to be unlawful to run freight trains in the state of Georgia after the hour of 8 o'clock a. m. Mr. Wyche contended that permission to return to Birmingham was denied, and that instructions were given to go on to Atlanta, and that while he was waiting at Bremen an accommodation train (a scheduled train) passed in at that point, and got between him and the first extra, and that he never did know until after the collision had occurred when the passenger train ran out ahead of the first extra. He contended that at Douglasville the operator gave him the white board, or signal to go ahead, and that he proceeded according to such signal, and that between Douglasville and Lithia Springs, near which last point the collision occurred, there was a heavy down grade, and that by reason of his inability to control his train he ran into the first extra, and received painful, serious, and permanent injuries. He contended that he himself was without fault, and that he

was in the discharge of his duty when injured, and he contends that the defendants were negligent in several particulars: First. That they furnished him with a locomotive on which was a defective air pump, and that the defendants' governing officials at Birmingham knew of this defect when they put the locomotive in his charge. Second. That the hand brakes were defective, and failed to hold when applied, and that the defects in the hand brakes were such as could have been discovered by the defendants by the exercise of reasonable care and diligence in the line of inspection, or, in other words, by such inspection as reasonable care and diligence required them to make. Third. That the defendants, operating said road by a super intendent, and said superintendent, being represented by a train dispatcher were negligent in the management of these extra trains and of said passenger train, in this: that he was not notified at Douglasville that the passenger train at that point had gone forward ahead of the first extra, and that he was not held at Douglasville for the time required by the rule, to wit, twenty minutes after the first extra had departed. To all contentions on the part of the intervener, defendants replied: First. That the air pump was not defective. Second. That the hand brakes were not defective. Third. That the defendants, if said hand brakes were defective, could not be held liable, because they had made all inspections which ordinary care and diligence required them to make. Fourth. That the receivers stood in the relation to the intervener of master and servant, and that, if intervener was injured in the collision, that it was through the fault and negligence of fellow servants, and that he could not recover. Fifth. That the intervener was injured by his own negligence, and, if not, that his negligence contributed to the injury, and in either event he could not recover.

Conclusions and Findings.

The testimony in the Wyche case, according to the report herewith transmitted, covers 253 pages of typewritten matter, and, in addition thereto, it was agreed that the testimony taken in the Cosby and Dodgen cases might be considered in evidence; and it will be seen that the testimony in the Dodgen case footed up 122 pages on close, typewritten matter, and in the Cosby case the testimony covers in like manner 180 pages,—making 555 pages of testimony to be considered in this case. The special master heard the testimony delivered by the witnesses, and has read it all over since that time, carefully, twice, and has reached a conclusion after much difficulty.

The testimony shows that two extra freight trains left Woodlawn, near Birmingham, on the evening of January 28, 1893, with instructions to proceed in the direction of Atlanta. These two trains were running without schedule, and under telegraphic control from the train dispatcher, whose office was in Birmingham. They ran at a safe distance, and there was no trouble or difficulty for a part of the journey. At Bremen there was a request on the part of Wyche's train to be "turned," or, in ordinary language, to be allowed to return to Birmingham; and this request was denied, and instructions were given to proceed to Atlanta. At Bremen the accommodation train, designated on the schedule as #55, passed Wyche's train, and thus got in between these two extras. The evidence shows that at Douglasville the first extra took the side track, and #55 passed on beyond it, and proceeded towards Atlanta. At least, the evidence fails to disclose anything further in connection with that train after it passed Douglasville, and the subsequent developments of the morning show that it had safely passed at least beyond the scene of the wreck, near Lithia Springs. The evidence shows that Wyche had no notice that the passenger train had passed the first extra at Douglasville, nor is any notice shown to him as to at what time the first extra pulled out of the siding at Douglasville and proceeded towards Lithia Springs; but the testimony preponderates in favor of the proposition that the first extra had scarcely more than left the side track at Douglasville, and proceeded on its way, before Wyche's train came up to the station. The testimony shows that the train dispatcher at Birmingham was notified of the arrival of the first extra and of #55 at Douglasville; and the evidence shows that the telegraph operator at Douglasville, who reported the arrival of the other two trains, was not notified that Wyche's train, or the second extra, was on the road at

all. That was the testimony of the operator himself. The operator (Peace) at Douglasville, on page 160 (record in Wyche's case), says that it was well understood that there was no operator on duty on Sunday morning after the passenger train passed, and he had no notice of these extra trains. He says that it is not customary to run extra trains on Sunday, and that he would not let a train pass unless some one was on duty. On page 41 (testimony in Floyd Green case) he says he reported first extra and passenger train to train dispatcher, and, according to his testimony, there was no want of opportunity for notice to him of Wyche's train. There is conflict between the testimony of Wyche and the operator as to the character of the sign given him at Douglasville. Wyche testifies that he had received the signal of safety, and to proceed, and that he was following a passenger train. The operator testified that the boards were tied down, and that such position indicated that the operator was off duty. Conductor Slaton, on page 144, says his train (the same one Wyche was pulling) had "white," or a signal to proceed. The three witnesses agree that the boards were down,—both down. Wyche and Slaton testify that such a condition was equivalent to "white," or a signal to proceed. Mr. Peace, the operator, contends that the condition simply meant, "The operator is off duty, and there is no signal."

The intervener puts his case, apparently, mainly upon the idea that the air pump failed to work, and by that reason he had no air to control his train, and that when he called for brakes there was negligence in the conductor and his crew, in not putting them on, or, if they were put on, they were defective, and did not hold. From these facts, he claims that his train got away from his control, and ran down the hill rapidly, and into the rear of the first extra, and hence the collision. The special master heard the testimony of the experts on the condition of the air brakes, and on their construction and the proper method of operating them. In addition to all this, he had a complete air brake before him, and in addition to that a train was fixed up, and he saw the particular demonstration of the operation of air brakes; and upon this demonstration, and upon the testimony of the witness Broadnax, he arrives at the conclusion on this branch of the subject without difficulty. The truth is that an engineer sets his brakes by exhausting the air from his train pipe, and, if the train pipe leaked, it would have set every brake under the air cars. If there was a leak at the locomotive, through the packing, it was a most unusual thing. The special master believes the statement of Wyche that he had the sixty or seventy pounds of air when he turned over the hill, and his conclusion is that this fact destroys the contention that it all leaked out by the time he says he attempted to apply the air, just before the collision. The special master believes from the evidence that Wyche was greatly excited by the sudden appearance of the train ahead of him, and that the severe injury to his head produced a confused recollection of the events which took place at and about the time of the collision. No one could see and hear Wyche testify, and not feel that his recollection of what occurred at the scene of the accident was confused. He was unconscious for some time after the accident, and does not know how he got off the engine.

In searching after the cause of the collision, it will be well to consider the time it occurred. According to Conductor Dodgen's watch, he passed Douglasville at 7:35 a. m., and the collision occurred at 7:47 a. m., and by that calculation the train was out from Douglasville twelve minutes. Wyche says that he passed Douglasville at 7:37 or 7:39 a. m., and that the collision occurred at 7:54:40 a. m. At least, his watch stopped at that time, and the purport of his testimony is to the effect that the jar of the collision stopped his watch. Taking the average of the time of passing Douglasville as he gives it, it would show that, if his watch and Dodgen's were together, he left Douglasville only three minutes after Dodgen, and it took him until 7:54, or sixteen minutes, to get to the scene of the collision. This would make his train average about twenty miles an hour,—not above the maximum allowed by schedule. But by Dodgen's time the collision took place at 7:47 a. m., and by Wyche's at 7:54, or seven minutes later. It will be seen that the watches of these two men must have been widely apart, or else were jarred out of time by the collision. It is more than probable that the excite-

ment of the wreck, the terrible falls which each had, and the severe injuries each had, not only disturbed the condition of their timepieces, but the accuracy of their recollections. Mr. Peace says, on page 158 of the record in the Wyche case, that the passenger passed Douglasville fifteen or sixteen minutes before Wyche came up, and that the first extra left about ten minutes after the passenger. If this be true, then Wyche's train was allowed to pass Douglasville five or six minutes after the first extra had gone forward. The testimony shows that the two extra trains were out without schedules; they were run by telegraph. Orders were to be given by the train dispatcher, the "alter ego" of the company. It shows that at Bremen a refusal to let Wyche's train return to Birmingham came by wire, and instructions were given to go on to Atlanta. Defendants claimed that these telegraphic messages, if sent, were only to be regarded when received and delivered in a particular way; but Slaton says, on page 149, that they frequently got verbal orders, and he says this in connection with the order in question, received at Bremen, to go to Atlanta. At Bremen the time of the two extras was so arranged that the passenger train got between them, and Wyche says—and he is uncontradicted in this—that he never had any notice of when the passenger train passed, or was to pass out beyond the first extra, and thus leave him to follow a freight. The train dispatcher knew where all these trains were. None of the other trains knew exactly where the others were. The train dispatcher knew that the first extra had reached Douglasville. He knew that the passenger train reached that point, and there passed the first extra. He knew that Wyche was close behind, and he failed to notify Wyche of what had happened, and he failed to notify the operator even of the existence of Wyche's train, even though he was in communication with him, and knew that Wyche would be there in a few minutes. Peace was negligent in giving Wyche the white board, if he knew he was coming. He was negligent in letting him out in five or six minutes after the first extra left, if he knew he was coming. If he did not know it, the train dispatcher was negligent in not giving him the information; and this, in the opinion of the special master, was the proximate cause of the injury.

The contention by the intervener that the hand brakes were defective, and that the defendants either knew of the defects, or by the exercise of ordinary care could have discovered them, is not established, in the opinion of the special master. The testimony of Horace Reed is not believed. His contradictions, his manner, his statement in writing, all go to show that he is not worthy of credit. The only other witness to that effect, Wylie Harris, puts his statement on the subject that the brakes were not good on the fact that the train was not checked. But, even if they were defective, the evidence does not establish the fact that the defendants knew of it, or ought to have known of it. Judge Pendleton showed that there was a more perfect way to inspect brakes than the inspection, but the testimony shows that the way the inspection was made came up to the usual way, and that it was a good way. A careful study of the whole testimony, in the opinion of the special master, does not show that Wyche's train came down that hill at the tremendous speed he imagined, but rather that he came almost immediately after Dodgen, and, without knowledge that he was following him, ran into him in the dense fog of the early morning.

There is great conflict in the testimony on the subject of the extent of the injury. One eminent physician says Mr. Wyche is injured for life, and is past the hope of recovery. Another eminent physician says he is not permanently injured, but will be completely restored by a decision in his case and an easy and not dangerous operation. Each theory is strongly supported.

The special master reports as follows: First. The intervener was in the employ of the defendants as alleged. Second. Defendants, as receivers, were operating the Georgia Pacific Railway as alleged. Third. The relation of master and servant, as at common law, existed. Fourth. The intervener was of the age and earning capacity as alleged. Fifth. He was without fault that contributed to the injury. Sixth. The intervener was severely, seriously, and to some extent permanently, injured. Seventh. The collision was not brought about by defective air brakes. Eighth. The collision was not produced by defective hand brakes. Ninth. The collision resulted from negligent handling

of the two extra trains by the train dispatcher. Tenth. The train dispatcher was the "alter ego" of the defendants. Eleventh. The intervener is entitled to recover damages. Twelfth. The damages are fixed at the sum of three thousand dollars.

Respectfully submitted.

April 4, 1895.

Attention is called to the agreement of counsel to use testimony in other cases.

Smith & Pendleton, for intervener.

Jackson & Leftwich, for defendants.

NEWMAN, District Judge (after stating the facts). It will be perceived that the matters for the determination of the special master were almost entirely questions of fact, issues of fact, and conflicting testimony. The master, who is usually diligent and careful, seems to have given unusual care and attention to the consideration of this case. His report shows most thorough consideration of all the questions involved. The trial before the master occupied many weeks, and the testimony is voluminous. It seems clear that the master was correct in finding that the controlling cause of this accident was the negligence of the train dispatcher. The only doubtful question seems to be as to whether there was a contributory negligence on the part of intervener, Wyche, in running his train. This question of contributory negligence is one, above all others, which courts leave to the determination of jurors, when a case is for jury trial, or to a master, when the case is one for the determination of that officer. The finding of the jury or master in such a case will not be disturbed, unless it is manifestly erroneous. Such is not the case here. The question, it may be conceded, was doubtful, and so the master seems to have regarded it. He seems to have hesitated long, and to have given the subject the most earnest consideration. It comes within that class of cases where the court will not interfere with the finding of a master on questions of fact.

The only legal question involved is as to the finding of the special master that the train dispatcher is the alter ego of the defendant. The correctness of this finding is too clear for discussion. He is not, either upon principle or authority, a fellow servant of the engineer, and there is no difficulty whatever in the case on that ground. *Railroad Co. v. Camp*, 13 C. C. A. 233, 65 Fed. 952, citing the following authorities on pages 959 and 960, 65 Fed., and page 240, 13 C. C. A.: *Hankins v. Railroad Co.*, 142 N. Y. 416, 37 N. E. 466; *Dana v. Railroad Co.*, 92 N. Y. 639; *Sheehan v. Railroad Co.*, 91 N. Y. 342; *Slater v. Jewett*, 85 N. Y. 62; *Darrigan v. Railroad Co.*, 52 Conn. 285; *Lewis v. Seifert*, 116 Pa. St. 628, 11 Atl. 514; *Hunn v. Railroad Co.*, 78 Mich. 513, 44 N. W. 502; *Railroad Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097; *Railroad Co. v. McLallen*, 84 Ill. 109; *Smith v. Railway Co.*, 92 Mo. 359, 4 S. W. 129; *Washburn v. Railroad Co.*, 3 Head, 638; *Railway Co. v. Arispe*, 5 Tex. Civ. App. 611, 23 S. W. 928, and 24 S. W. 33; *McKin. Fel. Serv.* § 143.

The amount found in favor of the intervener by the special master was reasonable, and the exceptions must be overruled and the report confirmed.

WALTERS et al. v. WESTERN & A. R. CO. (McLENDON, Intervener).

(Circuit Court, N. D. Georgia. June 28, 1895.)

1. CORPORATIONS—DISSOLUTION—ABATEMENT OF SUITS.

The dissolution of a corporation, pending garnishment proceedings against it, and before the adjudication of any liability, abates such proceedings; and the plaintiff therein acquires no right, by virtue of such proceedings, to share in the distribution of the assets of the corporation.

2. CONTRACTS—PARTIES—RIGHTS OF SUBCONTRACTORS.

One P. was appointed to a clerical position by the W. R. Co. He asked to have the appointment transferred to one B. The railway company declined to consent to such transfer, but permitted P. to fill the office by deputy, and B. accordingly performed the duties, and sometimes drew the salary, which appeared on the pay roll in P.'s name. P. afterwards resigned, and B. continued for one month to perform the duties, his own name appearing on the pay roll. At the end of the month P. was reappointed, and the original arrangement resumed. *Held*, that there was no liability of the railway company to B., except for the month during which P. did not hold the appointment.

This was a suit by William T. Walters and others against the Western & Atlantic Railroad Company. J. S. McLendon filed an intervening petition, asking the allowance of a claim against the assets of the corporation, which petition was referred to a special master.

Julius L. Brown and Thos. L. Bishop, for intervener.

Payne & Tye, for defendant Western & A. R. Co.

NEWMAN, District Judge. This case is heard on exceptions to the special master's report, which states the facts and issues in the case as follows:

Special Master's Report.

To the Hon. William T. Newman, Judge of the United States Circuit Court for the Northern District of Georgia:

The subscriber, having been appointed by the honorable court special master to hear the evidence in said case, and to determine the liability therefrom, having heard and considered the evidence in said case and the arguments of counsel, reports as follows:

It appears from the evidence that a judgment was rendered against one Perino Brown on March 27, 1884, in the superior court of Fulton county, for \$1,916.66 principal, \$368.94 interest, with interest from the judgment at 7 per cent. per annum, on which there was a return of nulla bona. Garnishment issued upon the judgment, and was served upon the Western & Atlantic Railroad Company, which answered an indebtedness of \$80 to defendant in judgment. This answer was traversed by the plaintiff in judgment, and, upon the trial of the traverse before a jury, a verdict was rendered against the traverse. A motion for a new trial was made, and the verdict set aside, and a new trial granted; but before new trial was had the bill in this case was filed. The judgment above referred to was assigned to J. S. McLendon on January 7, 1888, and was alive at the date of the proceedings upon the garnishment, and is still alive. There were two garnishments,—the first was sued out January 28, 1888, and served January 31, 1888; the other was sued out on the 8th of November, 1888, and served the same day. The joint answer to the two garnishments was filed April 27, 1889, and was traversed upon the same day by the plaintiffs. The trial above referred to was upon the first garnishment sued out.

W. H. Patterson was appointed to a clerical position in the depot of the Western & Atlantic Railroad Company at Chattanooga in the year 1881 or

1882, at a salary of \$75 or \$80 per month. Subsequent to the appointment, Mr. Patterson went to Gov. Brown, through whom the appointment was made, and endeavored to make an arrangement by which he (Patterson) could resign, and have his father-in-law, Mr. Perino Brown, appointed to the position. Gov. Brown declined to consent to this arrangement, but stated that the company would have no objection to continuing Mr. Patterson's appointment and allowing Mr. Patterson to fill the duties of the office by a competent and satisfactory deputy. This suggestion was adopted, and Mr. Perino Brown personally performed the duties of the office to which Mr. Patterson had been appointed. It seems clear to me that this arrangement was made in good faith and was not the outcome of fraud or substitute. Some time subsequent to the consummation of this arrangement, Mr. Patterson resigned his situation, and Mr. Perino Brown seems to have assumed the position on his own account. But, after one month Mr. Patterson was reappointed to the same position, and Mr. Brown again assumed the position as deputy of Mr. Patterson. During this one month Mr. Perino Brown's name appeared on the pay roll of the defendant company, and an indebtedness appeared to him on said pay roll of \$80, opposite which amount was marked the word "garnisheed." During the remainder of the time covered by the controversy, both before and after the month just mentioned, the pay roll showed no indebtedness to Mr. Brown, but a salary appeared each month due W. H. Patterson. This salary was drawn sometimes by Mr. Patterson, and sometimes by Mr. Brown in Mr. Patterson's name, in accordance with an arrangement agreed upon between them.

After a careful examination of all the evidence in this case, and diligent search of the law controlling it, I am of the opinion that there is no liability on the part of the Western & Atlantic Railroad Company, for two reasons: (1) Upon the expiration of the charter of the Western & Atlantic Railroad Company, the suit pending at the time abated, and no legal judgment could be rendered upon that suit against the funds in the hands of the receiver. The equitable bill on which we are proceeding is for the distribution of the fund which existed upon the expiration of the corporation's charter. McLendon has no claim against this fund, and cannot participate in its distribution. His cross bill, therefore, under his allegations, cannot be sustained. (2) But, were this not the case, my finding is that the Western & Atlantic Railroad Company would not be indebted to the plaintiff upon the traverse to the answer of the garnishment. Mr. Brown, from the evidence, occupies the position of subcontractor, appointed by and deriving all his rights from Mr. Patterson. Mr. Patterson was the only party to the contract with the railroad company. They looked to him alone for a proper discharge of the functions of the office, and hold him alone responsible for the discharge of its duties. I see no reason for differentiating this case from any other case of contractor and subcontractor. If A contracts with B to build B's house, and sublets the work, or part of it, to C, and the payments under the contract with B are made at stated intervals to A, a garnishment served upon B against funds due C would not justify B in withholding the contract payments due to A; and that is precisely the case made by the evidence before us. I therefore find that the defendant, the Western & Atlantic Railroad Company, is not indebted to J. S. McLendon in any sum.

This January 31, 1895.

Albert Howell, Jr., Special Master.

The exceptions are to the correctness of the report on both grounds on which the decision is placed by the special master.

The first question made by the exceptions and the argument of the case is as to the effect of the dissolution of the corporation on the rights of McLendon against it as garnishee. Whatever rights McLendon was to have as against the Western & Atlantic Railroad Company were to be reached by his succeeding in his traverse to the company's answer to the garnishment. McLendon had no debt against the Western & Atlantic Railroad Company, except such as the court in the garnishment proceeding might have ad-

judged in his favor, provided it appeared that the company had not paid over money pending the garnishment which it ought not to have paid. This suit fell with the dissolution of the corporation, or, at least, when the Martin act, which was passed to uphold these suits, was declared unconstitutional by the supreme court of the state. Did he not thereby lose all rights he had acquired simply by virtue of his proceeding at law, there being no indebtedness originally as between the company and McLendon? Did not any right he might have had by virtue of that garnishment proceeding depend upon maintaining it and concluding it before the dissolution of the corporation, and before the assets went into a court of equity for distribution among the shareholders and creditors? Now, has McLendon any right, by virtue of his garnishment proceeding, to claim any equitable right as against these assets in the hands of the court for distribution? There appears to have been one trial on the traverse of the answer to the garnishment, and a verdict in favor of the company, which was set aside by the presiding judge. On what ground it was set aside we are not informed. There is no question about the contention of counsel for McLendon in this case that the debts of the creditors of a corporation, as well as claims for wrongs done by the corporation, are not lost by its dissolution, but may be enforced by proper proceeding as against the assets. The shareholders of a corporation will not be allowed to take its assets as against just debts incurred, or liabilities for torts committed by the corporation, during its existence. That may be conceded without discussion. But is McLendon a creditor of the corporation, or has it done him any wrong, in this sense? That presents the question here. My opinion is that any rights McLendon had were by virtue of the garnishment proceeding, were dependent upon it, and were lost when it fell by dissolution of the corporation. The language used by the supreme court of Georgia in *Coggin v. Railroad Co.*, 62 Ga. 685 (material language on pages 695, 696), may be given its full effect and yet not cover this case. If the company had been indebted to McLendon, or if there had been any liability on its part to him for tort, it would be applicable; but the facts here are peculiar, and that case cannot be held to apply to this case, and certainly not to control it. Suppose that this garnishment proceeding had been defective, and had been dismissed by the court on account of such defect,—an insufficient affidavit, for instance, as a basis for it,—the fact that the company had wrongfully paid over money, pending the same, between the time of the service of a summons and the time of answering, would not give the plaintiff any right, in a subsequent proceeding, to have claimed the amount so paid over, as against the company, as his rights were dependent upon maintaining that garnishment proceeding, by which and under which all his rights were acquired. There does not seem to be any difference between that case and one where the suit falls on account of the legal death of the corporation.

But, independently of the foregoing, I think the special master is right in the conclusion which he reached on the merits of this

matter. There is no reason why the company could not have contracted honestly and in good faith with Mr. Patterson for the discharge of the duties of the position which Mr. Brown filled. The special master, after considering the matter and all the evidence on the subject, has found that it was such a transaction. It appears very clearly that, as to the original employment, there was no effort whatever to evade any such matter as this garnishment, or to avoid the payment of debts. It seems very clear that Patterson was offered the appointment originally, and that he desired to give it to Mr. Brown; that the company refused to give it to Mr. Brown, but stated that, if Mr. Patterson thought proper, he might allow Mr. Brown to do the work. There is more doubt about the change back from Brown to Patterson, after Brown's name had appeared for one month on the pay roll of the company; but as to this also the special master finds against McLendon. It appears that the jury in the state court found the same way on a trial there, although the verdict was subsequently set aside. This is a doubtful matter, at most. The special master having heard this evidence, the examinations, cross-examinations, etc., I am not disposed to disturb his decision except in one particular. It appears that \$80 was held by the company for the month during which Mr. Brown's name was on the pay roll of the company, and pending garnishment. This amount must have gone into the hands of the receivers, and I think McLendon may well interpose an equitable claim to that amount. An order may be taken directing the receiver to pay J. S. McLendon this amount, and, with this modification, the report of the special master is confirmed, and the exceptions overruled.

TATUM v. RAY.

(Circuit Court, N. D. Georgia. May 3, 1895.)

MORTGAGES—INTEREST COUPONS—PRESENTATION FOR PAYMENT.

Interest coupons attached to a note were by their terms payable at a bank in Richmond, Ind. The debtor resided in Atlanta, Ga., and had no funds in the Indiana bank. A coupon, without being first sent to the Indiana bank, was left with a bank in Atlanta for collection, and due notice was promptly given to the debtor, who had paid a previous coupon in Atlanta without objection. *Held*, that the failure to present the coupon for payment at the place specified was no defense to a foreclosure of the mortgage for the interest.

This was a bill by Eleanor Tatum against Lavender R. Ray to foreclose a mortgage.

Rosser & Carter, for plaintiff.

L. R. Ray, pro se.

NEWMAN, District Judge. On the demurrer filed in this case, the court disposed of the question of the right to foreclose the instrument as a mortgage, and the only question left to be determined is as to the matter of the payment of the interest, and especially as to the place of paying the same. By the terms of the

coupons attached to the note, the coupons are made payable at the Second National Bank, Richmond, Ind. The proof shows that the coupon for default in payment of which the foreclosure is asked was not left for collection at the bank in Richmond, Ind. And it also shows that the defendant had no funds on deposit there to meet the same, and that the officers of the bank knew of no effort on his part to pay it then. It further shows that the defendant resides in Atlanta, and the coupon was left for collection at a bank in Atlanta, and that defendant was notified of the same; and that, after his failure to pay the same there, it went for collection to the counsel for complainant in this case (who had also been agent to negotiate the loan to the defendant), and that he was fully notified more than once that the coupon was in their hands for collection, and was given the amplest opportunity to pay the same before any proceedings were commenced. The evidence also shows that a coupon maturing prior to the one in question had been paid by the defendant in Atlanta without question. The fact seems to be, indeed, that the presentation of the coupons in Atlanta was an accommodation and benefit to the defendant, and there is no reason perceived why he should be allowed to make that defense to this foreclosure suit. The complainant is entitled to a decree.

CENTRAL TRUST CO. OF NEW YORK v. SAVANNAH & W. R. CO. (MILLER & SON, Interveners).

(Circuit Court, N. D. Georgia. June 13, 1895.)

No. 504.

CARRIERS—DELAY IN DELIVERY—BILL OF LADING—PAROL EVIDENCE—DAMAGES.

While a bill of lading which is silent as to the time of delivery is held to contain an implied obligation to deliver in a reasonable time, and this obligation cannot be varied by parol evidence, yet, for the purpose of affecting the measure of damages, it is competent to show by parol that notice was brought home to the carrier that unusual loss would result from delay in making the delivery.

This was a petition of intervention filed by G. H. Miller & Son against the receivers of the Savannah & Western Railroad Company to recover damages alleged to have resulted from delay in delivering a shipment of fruit trees.

Dean & Dean, for interveners.

H. B. Tompkins, for defendant.

NEWMAN, District Judge. Fruit trees were received by the defendant receivers from the interveners at Rome, Ga., for shipment to certain points in Texas and the Indian Territory. The trees were not delivered until after the time when the purchasers from interveners could be compelled, under their contract of purchase, to receive them. The petition of interveners claiming damages for this delay was referred to a special master, who reports in favor of the interveners for the full amount of the value of the trees so

shipped, less the amount for which they were actually sold, after making a general deduction of 10 per cent., which the proof showed was the usual loss to the shippers of the trees from failure on the part of the purchasers to receive and pay for them. The following agreement was entered into at the hearing before the special master:

"It is further agreed between counsel for the interveners and for the receivers that, independently of the contract for the sale of the trees, they were worth as much when they arrived at their destination as at any time previously; that is, that there was no fluctuation in the price of the trees generally."

No question is raised but that the receivers, as the initial carrier, are liable, under the facts of the case, to the interveners, provided there is any liability at all.

On exceptions to the report of the master, the main question discussed was this: Does the bill of lading embody the contract of carriage, so that parol evidence will not be heard to show notice to the carrier of the special circumstances connected with the shipment, and the necessity for a speedy delivery? The contention is that the bill of lading contains the whole contract, from which the question of liability, and the extent of liability, must be determined, as it stands upon the same footing as other written contracts, and cannot be varied by proof of contemporaneous parol understanding. The opposite contention is that while this is true, and that a bill of lading, such as was given in this instance, cannot be varied by evidence of a parol agreement so as to make it other than a contract for delivery within a reasonable time, yet evidence may be heard of notice to shipper, such as is above suggested, for the purpose of determining the measure of damages; that, while the carrier can only be held to delivery within a reasonable time, evidence that notice that peculiar and unusual loss will result to the shipper from a failure to so deliver may be heard on the question of the amount of the recovery, where delay has resulted. The rule admitting evidence of notice to a carrier, by a shipper, of peculiar circumstances surrounding the shipment, requiring prompt delivery, as affecting the measure of damages, is easily distinguishable, under the authorities, from that which rejects parol evidence to vary the terms of a bill of lading. In the latter case it is seeking to vary the express terms and the legal import of the contract of carriage, which has been reduced to writing. In the former case the contract contained in the bill of lading, as to its terms and legal import, stands unaffected by extrinsic evidence, and the testimony is admitted, not to vary it, but, conceding it to stand as it is written, and as the law implies, to affect only the measure of damages for its breach. The rule is stated in *Hutch. Carr.* § 772, as follows:

"But there may be circumstances under which the application of this rule would be inequitable. There may be, and frequently are, cases in which, for special reasons, the shipper may desire that the transportation of his goods shall be hastened; and if, with a knowledge of these circumstances, the carrier should unreasonably delay the carriage, or if, having expressly contracted to carry them within a given time, or for a given purpose, he should negligently delay them beyond that time, or so as to defeat that pur-

pose, the difference in the value of the goods at the time of their actual arrival and at the time when they should have been delivered may prove a very inadequate recompense to their owner. As where the owner of goods had made an advantageous sale of them, and the carrier, being informed of this fact, undertook to carry and deliver them within the time, but through negligence failed to do so, whereby the plaintiff lost the advantage of his bargain, it was held that the carrier was liable for whatever the owner had lost by the failure to deliver in time, and that this would be the difference between the contract price and the market value of the goods when delivered. But where the goods were sold 'to arrive' by a certain time and at a certain price, but the carrier was not informed of the fact, and knew nothing of the importance to the shipper of a prompt delivery, it was held that the carrier could be held liable only for the depreciation in the market value between the time when they should have been and the time when they were delivered. The fact that the carrier was notified of the special circumstances demanding greater diligence is thus seen to be a crucial one, and that the carrier was so informed must be both alleged and proved."

Besides the authorities cited in the notes to this section are: *Railroad Co. v. Cobb*, 64 Ill. 128; *Railroad Co. v. Ragsdale*, 46 Miss. 458; *King v. Woodbridge*, 34 Vt. 565; *Horne v. Railway Co.*, L. R. 8 C. P. 131.

A careful examination of the case so strongly relied on by counsel for receivers (*Railroad Co. v. Hasselkus*, 91 Ga. 382, 17 S. E. 838) shows that what it really decides is that where an ordinary bill of lading is given, and no time for delivery of the goods is specified, the law implies that they are to be delivered in a reasonable time, and that parol evidence will not be admitted to show that there was an express agreement to deliver at a specified time. Such is doubtless true of all the cases cited on this subject. Certainly, there is no conflict whatever between this class of cases and those which admit testimony of this character for the purpose of fixing damages.

The legal conclusions, as applicable to this case, may be stated in this way:

1. Where a common carrier receives goods for transportation, and the bill of lading is silent as to the time of delivery at the point of destination, the law implies an obligation to deliver them within a reasonable time.

2. Where there is a failure on the part of the common carrier to deliver goods at the point of destination within a reasonable time, ordinarily the measure of damages is the difference between the market value of the goods at the time of delivery and the time when they should have been delivered.

3. Where a common carrier has notice of peculiar circumstances connected with the sale and contract for delivery of goods, which will result in an unusual loss to the shipper from delay in delivery, the carrier is responsible for the real damages sustained from such delay if the notice given is of such character, and goes to such extent, in informing the carrier of the shipper's situation, that the carrier will be presumed to have contracted with reference thereto.

The real matter, therefore, for determination, is, was there such notice by the shipper to the receivers' agent at Rome as to put the receivers on notice of the special circumstances connected with this shipment? The master fails to find that there was or was not such notice. He finds that there were "peculiar circumstances" which

justified a recovery for the value of the trees, less the deductions referred to. John Miller, a member of the intervening firm, testified before the special master in reference to a conversation between himself and C. S. Pruden, the agent, in reference to the shipment of these trees. The following is an extract from his testimony as reported by the master:

"Q. State, Mr. Miller, what was said by you to Mr. C. S. Pruden, or any other agent of the road over which you shipped these trees, about the necessity and the reason for a prompt and speedy shipment. Begin at the beginning,—at the time when you first begun to make shipments, and when they solicited you to ship over their road. A. That is a branch of the business that I had very little to do with. My father attended to that, and I attended to the packing. Any conversation I would have with Mr. Pruden was when they would come out to our packing shed. Q. State what may have passed on such an occasion. What did pass? A. In regard to this particular shipment to Texas, Mr. Pruden came out where we were packing. We had some shipments to Texas previous to that time over the other roads, and he said we were not using them right in giving other roads our shipments, as they had put us in a spur, and they ought to have at least a share of that Western business; and I told him that we were willing, and would give them the preference, and, in regard to the other shipments, that their road didn't have the rates; and then I told him about a shipment that we were making up for Texas, and I told him about the time we had to put them into Fort Worth. That is about the substance of it. Q. What did he say, and what did you say about the time of the necessity for getting them there at a given time? A. I told him that we had certain dates to meet out there, and in shipping it would have to be put in there at a certain time or there would be a loss to us. Q. What did he say? A. He said that their road could put them in as quick as any other, and that about ten days would be ample time to put them into Fort Worth. Q. Did you tell him why—explain to him why—there would be a loss to you? A. I could not say whether I did or not at that special time. Q. At any time? A. I have done so at their office. Told them that the goods were sold to be delivered at a certain day and date, and if they were not there on that date the goods would be a loss to us. Q. Did you tell him why,—what would make the loss? A. The customer would not take the goods. If we did not fill our contract, the customers would not fill theirs."

This testimony is not denied by Mr. Pruden, who was a witness before the special master. On the contrary, he states in his evidence this:

"Mr. John Miller says I came out there in regard to these special shipments. I can't swear differently, as I have been there at various times, and don't remember whether I was there in regard to this special shipment or not. Perhaps I was. I can't say at this late date."

It seems, therefore, that the notice to the carrier was sufficient to bring the case within what is understood to be the correct rule on this subject, as it has been stated above. The report of the special master, while not explicit upon the precise question involved, is correct in its conclusion, and the amount found in favor of the interveners is justified by the evidence. Exceptions must be overruled, and the report confirmed.

SHAINWALD v. DAVIDS et al.

(District Court, N. D. California. August 23, 1895.)

No. 262.

1. BANKRUPTCY—RIGHT OF ASSIGNEE TO SUE—REV. ST. §§ 5046, 5047.

In 1880 S., as assignee in bankruptcy of the firm of S., C. & Co., and its individual members, brought suit against one L. to have a judgment and execution obtained by L. against S., C. & Co. set aside as fraudulent, and to have L. declared a trustee of certain property of the firm, bought by him at sheriff's sale, for the benefit of S., as assignee. In this suit a decree was entered granting the relief sought, and requiring L. to pay over to S., as assignee, a large amount of money. In a creditor's suit subsequently brought by S. against L. upon this decree, one R. was appointed receiver of all L.'s property, and L. executed to him an assignment thereof, but never delivered to him any of his property, but concealed the same. In 1895 S. brought a suit in California against L., together with D. and I., sundry insurance companies, and the P. Bank of Washington, alleging that L. had been conducting business, in the latter state, in the names of D. and I., with funds derived from the assets of S., C. & Co., fraudulently acquired by him; that all such business, its assets and profits, were in fact the property of L., except as against S. or R.; that the assets of such business had been insured by L. in the insurance companies which were made parties to the suit, and such companies, in consequence of the partial destruction of such assets by fire, had become liable to pay certain sums upon their policies, and were about to pay the same to L., or to D. and I., but that the same were rightfully the property of S., as assignee, or of R., as receiver, and that L., in the name of D. and I., was still carrying on business with funds which were rightfully the property of S. or of R. It was also alleged that L. had pretended to assign the moneys payable under the insurance policies to the P. Bank, as security for an indebtedness which had been fully paid, with the intent to defraud S. and R., said bank having full knowledge of the facts; that, unless restrained by injunction, L., D., and I. would proceed again to secrete the property; that R. was, and long had been, out of the jurisdiction of the court, and therefore could not be made a party; and that the facts relating to the existence of the property in the hands of L. had only come to the knowledge of S. within three months before the commencement of the suit. The bill thereupon prayed for discovery from the defendants as to the property; for an injunction restraining the disposition thereof by L., D., or I.; that all such property be adjudged to belong to S., as assignee, or to R., as receiver; that the insurance companies be required to pay over the funds in their hands to S.; and that the assignment to the P. Bank be declared void. *Held* that, notwithstanding the appointment of R. as receiver in the creditors' suit, and the assignment of the legal title of L.'s property to him, S., as assignee in bankruptcy, had a right to bring the present suit, for the protection and collection of the assets of the estate, by virtue of his equitable interest in such assets, and under Rev. St. §§ 5046, 5047.

2. SAME—JURISDICTION OF DISTRICT COURT—SAVING CLAUSE OF ACT OF JUNE 7, 1878.

Held, further, that the United States district court, as a court of bankruptcy, had jurisdiction to entertain the suit, such suit being saved by the act of June 7, 1878 (20 Stat. 99), repealing the bankrupt law.

3. EQUITY—JURISDICTION.

Held, further, that the complainant had not an adequate remedy at law, since the bill sought discovery, and also sought to impress a trust upon the property in the defendants' hands.

4. SAME—LACHES—REV. ST. § 5057.

Held, further, that the suit was not barred by the provision in Rev. St. § 5057, requiring suits between assignees in bankruptcy and persons

claiming adverse interests in the estate to be brought within two years from the accruing of the cause of action, since it was alleged in the bill that the cause of action had been fraudulently concealed, and not discovered until within three months before the commencement of the suit.

5. SAME—PARTIES—ASSIGNEE UNDER COLORABLE ASSIGNMENT.

Held, further, that the fact that the P. Bank could not be made amenable to the process of the court, and had not voluntarily appeared, would not prevent the court from enjoining the disposition of the funds in question, and examining into the merits of the case, since it was alleged in the bill that the assignment of the insurance moneys to it was merely colorable, and made, with knowledge on its part of the facts, for the purpose of defrauding S., as assignee.

6. SAME—SAME—ATTACHING CREDITOR.

Held, further, that an alleged creditor of L., who had attempted to attach the insurance moneys by the service of a notice of garnishment in Washington, was not a necessary party to the suit, it being alleged in the bill that such moneys were in California, and payable there.

Bill in equity to have certain personal property of Harris Lewis declared and adjudged to be trust funds in the hands of said Lewis, as trustee for the benefit of the complainant, as assignee of the bankrupt firm of Schoenfeld, Cohen & Co., and of the creditors thereof; such trust funds to be applied in payment and satisfaction of the decree of this court, rendered on November 5, 1880, in the case of Shainwald v. Lewis, No. 221 in equity (6 Fed. 753), as the same was revived and continued in force by the decree of June 14, 1890, in case No. 241 in equity (46 Fed. 839). Order to show cause sustained.

James L. Crittenden, for complainant.

Wal. J. Tuska (M. T. Moses and S. M. Van Wyck, Jr., of counsel), for D. S. Davids and Harris Lewis.

MORROW, District Judge. The bill in equity was filed January 15, 1895. A temporary restraining order and an order to show cause why an injunction should not issue as prayed for in the bill were made on January 19, 1895. An amended bill was filed April 22, 1895, in which the Puget Sound National Bank of Seattle, state of Washington, was made a party. It is sought, in and by this bill, to prevent Harris Lewis, I. J. Lewis, and D. S. Davids, or the Puget Sound National Bank, purporting to be the assignee of these parties, from receiving, and the insurance companies from paying to the above-named parties, certain moneys due on several policies of insurance upon goods and merchandise belonging to the firm of Davids & Co., composed of Harris Lewis, I. J. Lewis, and D. S. Davids, said firm owning a store in Seattle, state of Washington, and carrying on business under the name and style of "The Famous. Davids & Co., Proprietors," and which goods and merchandise had been damaged by fire; and it is further sought to have such sums of money as are due upon said policies of insurance declared and adjudged to be trust property in the hands of Harris Lewis, I. J. Lewis, and D. S. Davids for the benefit of Herman Shainwald, as assignee of the bankrupt firm of Schoenfeld, Cohen & Co., and of the creditors of said firm, such property being claimed to be the proceeds and profits of the assets of said firm held by Harris Lewis,

and fraudulently acquired by him, as adjudged by the former decrees of this court; and, further, that such trust property be applied in liquidation of the judgment and decree of this court in favor of the complainant herein, and against Harris Lewis, in case No. 221 in equity (6 Fed. 753), as the same has been revived by the decree of the court in case No. 241 in equity (46 Fed. 839), said judgment now amounting to the sum of \$68,829.25. The chief ends sought to be attained, therefore, are (1) to have the moneys due upon these policies of insurance declared trust property, and (2) to prevent the insurance companies from paying such moneys to Harris Lewis, I. J. Lewis, and D. S. Davids, or to the Puget Sound National Bank, but, on the contrary, to direct them to pay said sums to the complainant herein.

To fully and clearly understand the purposes and scope of this action, it will be necessary to refer somewhat fully to the allegations of the bill. It is averred: That on the 25th of June, 1877, and for a long time prior thereto, Louis S. Schoenfeld, Isaac Newman, and Simon Cohen were copartners doing and carrying on business in the city and county of San Francisco, state of California, under the firm name of Schoenfeld, Cohen & Co., each having an equal one-third interest therein, as dealers in toys, notions, and other goods, wares, and merchandise. That on the said 25th of June, 1877, the property of the firm consisted of goods, wares, and merchandise in said city and county of the value of about \$40,000, outstanding accounts due said firm of about \$18,000, and bills of lading for goods on the way, consigned to said firm, of about \$10,000. That on said 25th of June, 1877, the debts of the firm amounted to \$50,042.12, of which sum \$2,000 was due the defendant Harris Lewis, on a certain promissory note executed by the firm to him, and no other or greater sum whatsoever. That on or about said 25th of June, 1877, said Harris Lewis, Isaac Newman, and Louis S. Schoenfeld, with the intent, object, and design to defraud the said Cohen and the creditors of said firm, conspired, combined, and confederated together to make and issue certain promissory notes of and in the name of the firm, without receiving or requiring any consideration therefor, and to have said Lewis bring a suit against said firm, based in large part upon the apparent, but false and fictitious, indebtedness thereby created, and, in such suit, to cause to be levied an attachment upon all the property of said firm, and to have said Lewis obtain a judgment in said suit, and to have all the property of said firm sold at sheriff's sale under an execution issued upon such judgment. That in pursuance of said fraudulent conspiracy, and in the execution thereof, the said Schoenfeld and Newman did make, execute, and deliver to said Lewis the said false, fictitious, and fraudulent notes of said firm, and said Lewis did bring and commence a suit thereon in the district court of the Nineteenth judicial district of the state of California, for said city and county, and did therein cause all of said property of said firm to be attached, and did obtain a judgment in said suit against said firm, upon said fictitious indebtedness, for the sum of \$31,000, interest and costs, and did cause an execution to be issued upon such

judgment, and levied upon all the property of said firm, and did cause all of said property to be sold by the sheriff, and the said Lewis did bid in the same for \$20,050, or thereabouts. That said Lewis did thereafter sell and dispose of said property of said firm so obtained possession of by him, and did convert the same into money, and did realize and receive therefrom the sum of \$64,000, or thereabouts. That thereafter such proceedings were had in the district court of the United States for the district of California that the firm of Schoenfeld, Cohen & Co. and Louis S. Schoenfeld, Isaac Newman, and Simon Cohen, the individual members thereof, were on December 6, 1878, duly adjudicated bankrupts. That thereafter Herman Shainwald was appointed the assignee in bankruptcy of the firm, and of the individual members thereof, and said Shainwald on April 9, 1878, qualified and entered upon the discharge of his duties as such assignee, and ever since has remained and still is such assignee. That on the 3d day of October, 1879, Herman Shainwald, as such assignee, commenced a suit in equity in the district court of the United States for the district of California, against Harris Lewis, founded and based upon the aforementioned fraudulent acts, things, and transactions, which suit is numbered 221 in equity in said court. That, in this suit, the assignee sought to set aside said judgment and execution sale, and to recover from said Lewis the proceeds of the said property of said firm, and interest thereon, and to have Harris Lewis adjudged to be the trustee of all thereof for the benefit of Herman Shainwald, as such assignee. That a subpoena was duly served upon Harris Lewis, and he thereafter appeared and made answer, and a trial was thereafter duly had. That a judgment and decree was made and entered on November 5, 1880, in favor of Herman Shainwald, as assignee aforesaid, and against Harris Lewis, for the sum of \$98,524.33, and for costs (which were thereafter taxed at the sum of \$908.62), and for interest on the amount of said judgment and costs at the rate of 7 per cent. per annum. A copy of this judgment is annexed to and made part of this bill. That said judgment has been and is revived, and at all times kept alive and in force, and there now remains due and unpaid on account thereof the sum of \$69,829.25, with interest, etc., from June 14, 1890, at the rate of 7 per cent. per annum. That on or about November 16, 1880, an execution was issued out of said court on said judgment and decree of November 5, 1880, which execution was thereafter, on November 16, 1880, returned wholly unsatisfied. That thereafter, and on or about November 16, 1880, Herman Shainwald, as assignee as aforesaid, did present to and file in said court his creditor's bill against Harris Lewis, based and founded on the decree in suit No. 221, which said creditor's suit is numbered 231 in said court. That an injunction was issued and served on Harris Lewis on November 16, 1880. A copy of this injunction is annexed to and made part of the present bill. That on or about November 16, 1880, in suit No. 231, an order was duly made and entered appointing Ralph L. Shainwald receiver of all the property, estate, and effects of Harris Lewis. A copy of this order is also annexed to and made part of this bill. That said

Ralph L. Shainwald thereupon qualified and entered on the discharge of his duties as such receiver, and he ever since has been, and still is, such receiver. That such proceedings were thereafter taken and had, in said suit numbered 231, that Harris Lewis did, on or about December 20, 1880, make, execute, and deliver to Ralph L. Shainwald an assignment in writing of all his real and personal property. A copy of this assignment is also annexed to the bill. That an amended final decree in said suit 231 was made and entered in favor of Herman Shainwald, as such assignee, and against Harris Lewis.

The present bill, after reciting the issuance of a temporary restraining order, and an order to show cause, in case No. 221, and the issuance of an injunction in case No. 231, contains averments substantially as follows: That Harris Lewis has at all times refused, neglected, and failed, and still does refuse, neglect, and fail, to pay or discharge or satisfy the decree of November 5, 1880, in said suit numbered 221, as originally rendered and subsequently revived, either in whole or in part; and has at all times failed, neglected, and refused, and still does fail, neglect, and refuse, to surrender or deliver up to said assignee, or to said receiver, either in whole or in part, or at all, the aforesaid property and assets of said firm of Schoenfeld, Cohen & Co., or the proceeds thereof, or any of the interests thereon, or profits thereof; and has at all times retained, and still does retain, the same, and all thereof. That, at divers times, property and sums of money have been received by said assignee and said receiver from persons other than Harris Lewis, which have been applied on account of said judgment and decree in suit No. 221, and which have reduced said judgment and decree to the balance of \$69,829.25, still remaining due and unpaid. That neither the receiver nor the assignee has ever received from said Harris Lewis any of the property or proceeds of property included by said judgment and decree of November 5, 1880, in suit No. 221, and neither said receiver nor said assignee ever learned or discovered, nor had any notice or knowledge of, the identity, location, character, whereabouts, or situation of any other of the property of which said Ralph L. Shainwald was so appointed receiver, nor of any property which could be subjected to the payment of said decree in suit No. 221, until within less than three months prior to the commencement of this action. That said Harris Lewis at all times secreted and concealed from both said receiver and said assignee the identity, location, character, whereabouts, and situation of all such property, and kept the same in the names of other persons than Harris Lewis, and thereby prevented both said receiver and assignee from discovering the same; and said receiver and said assignee have even now only discovered a small part and portion of said property, to wit, that in the bill described, and certain other property, all of which, taken together, is insufficient in amount and value to satisfy and pay the decree in said suit No. 221. That said Harris Lewis has secreted his money, property, and effects with the purpose of defrauding said assignee and said receiver, and of preventing the same being seized or levied upon or applied towards

the satisfaction of said decree in suit No. 221, and has, at all times, since the rendition of said judgment, been the owner and possessed of property and effects of the value of many thousands of dollars, which were and are justly and legally applicable towards the satisfaction of said judgment and decree, and still has the same standing in the name of persons other than himself. The bill then proceeds to aver the disposition and use made by Harris Lewis of some of the assets of the bankrupt firm of Schoenfeld, Cohen & Co. decreed to be held by him in trust for the benefit of said firm and of its creditors, and indicates what property it is the object of the bill to reach. The averments in this regard are as follows: That on or about October 1, 1894, a certain business was being conducted and carried on in Seattle, state of Washington, under the name and style of "The Famous. Davids & Co., Proprietors," which said business was that of dealing in clothing and other merchandise, and was ostensibly managed and carried on by one D. S. Davids and one I. J. Lewis, nephews of Harris Lewis, as partners. That, on said last-named day, the goods, wares, and merchandise constituting the stock in trade of and the furniture and fixtures of "The Famous. Davids & Co., Proprietors," was of the value of \$70,000. That the said Harris Lewis was at all times the real and sole owner of said business, and of said stock in trade, and of said goods, wares, and merchandise constituting the same, and of said furniture and fixtures, and was carrying on said business in the name and style of "Davids & Co.," and of "The Famous, Davids & Co., Proprietors," for the purpose and with the intent of concealing the real ownership in him of the same, and to prevent the same being seized and applied towards the satisfaction of the decree in suit No. 221; and all of the money and property which was invested in said business and in said goods, etc., was and were the proceeds of the aforementioned property of the firm of Schoenfeld, Cohen & Co., bid in and obtained by Harris Lewis as aforesaid, and the profits thereof were the proceeds and resulting profits of property held and controlled by Harris Lewis at the time of the appointment of said receiver, and which he was directed, in and by said order, to deliver to said receiver; and all of said goods, etc., therefore, justly and legally belonged and belong to Herman Shainwald, as assignee, and to Ralph L. Shainwald, as receiver. That at no time did said D. S. Davids nor I. J. Lewis have any interest whatever in said business and store, but that Harris Lewis was the real and beneficial owner. Then follow several allegations, each of a similar purport, averring the corporate existence of the insurance companies sought to be enjoined from paying the insurance moneys to Harris Lewis, or to any other person except the complainant, and also setting forth the further fact that such companies transacted business in the states of Washington and California, and had an authorized agent in the city and county of San Francisco, state and Northern district of California; that Harris Lewis, through and in the name of Davids & Co., insured in said companies, through their agents as aforesaid, the goods, wares, merchandise, stock in trade, and other property of the said store and business conducted, as aforesaid, under the name of "The Famous,

Davids & Co., Proprietors," against loss by fire. The amounts insured with the several companies are set forth, and the specific allegation is made that the agents with whom the contracts of insurance were entered into did at all times, and now do, reside in the Northern district of California; that such agents have full charge, custody, and control of all the property and funds of said several corporations, respectively, and particularly their funds for the payment of losses under their said several policies; that said agents have kept, do keep, and now have in said Northern district of California, and not elsewhere, under their respective control, all the moneys and funds for the payment of losses under their policies of fire insurance in said states and territories referred to, and particularly the moneys and funds for the payment of the losses hereinafter alleged; and all such moneys and funds at all times were, and ever since have been, and now are disbursed and paid out only by and under the direction of said respective agents, managers, and resident secretary, and no other agents of said corporation, or any of them, have any control or management of said money or funds, or any thereof, or any authority to pay or settle for any losses or other demands whatever against any of said corporations, except by special instruction of said respective agents, managers, and resident secretary.

It is further averred: That Harris Lewis duly paid the premiums on said policies, and that said policies were delivered to Harris Lewis, and were in force on October 1, 1894, and at the time of the fire hereinafter mentioned. That on the 1st day of October, 1894, while said goods, etc., were so insured as aforesaid, they were in part consumed and damaged by fire, while in the store and building in said Seattle. That the losses, etc., have been ascertained and apportioned among the several insurance companies on the several policies as follows: From the Royal Exchange Assurance Company, \$7,270.41; from the Home Insurance Company, \$7,270.41; from the Liverpool & London & Globe Insurance Company, \$2,423.47; from the Fire Association of Philadelphia, \$1,938.78; from the American Fire Insurance Company, \$1,454.08; from the Westchester Fire Insurance Company of New York, \$1,454.08; from the Orient Insurance Company, \$969.39; from the National Fire Insurance Company, \$969.39; from the Western Assurance Company, \$1,000; from the Scottish Union & National Insurance Company, \$2,000,—making in all the sum of \$26,750. That all the insurance was effected and the losses adjusted under the name of "Dauids & Co.". That said losses and the money due from said several insurance companies, under said policies, by reason of said fire, really and in equity belong and are due to Herman Shainwald, as assignee aforesaid, and to Ralph L. Shainwald, as receiver aforesaid, and should be paid to them, to apply upon said judgment in case No. 221. That these several insurance companies threaten and are about to pay over to Harris Lewis, or to said Davids & Co., or to their agents, etc., the several amounts due under the policies aforesaid, and will do so unless restrained and enjoined by this court. That if said moneys should be paid over to

Harris Lewis, or to said Davids & Co., or to their agents, etc., it would be immediately secreted and hidden, with intent to deprive Herman Shainwald, as assignee, and Ralph L. Shainwald, as receiver, of the same; and the said Herman Shainwald and Ralph L. Shainwald, as assignee and receiver, respectively, will be greatly and irreparably injured and damaged thereby. That only a portion of the goods, etc., were damaged by fire, and that, very shortly after said fire, the said Harris Lewis, acting in the name of said Davids & Co., resumed the carrying on of said business, and has ever since carried on, and still carries on, the same, in the name of "Davids & Co.," or "D. Davids & Co.," or "The Famous," or "The Famous Clothing Company," or in other names, to the undersigned unknown, and has a large stock of goods therein, to wit, of the value of about \$40,000. That D. S. Davids and I. J. Lewis claim an interest therein as being owners thereof; but that they are merely employés, for a salary, of said Harris Lewis. That, unless restrained and enjoined by this court, said Harris Lewis and D. S. Davids and I. J. Lewis will immediately, upon their ascertaining that the facts as herein alleged are known either to Herman Shainwald or to Ralph L. Shainwald, or to their attorney, endeavor, by assignment, etc., to dispose of and put out of their hands all of said business and stock in trade and other property thereof, with the intent to defraud Herman Shainwald and Ralph L. Shainwald, and to prevent the same from being applied towards the satisfaction of said decree in suit No. 221, as originally entered or subsequently revived. That I. J. Lewis and D. S. Davids are both wholly irresponsible financially, and, unless they are restrained and enjoined as before prayed for, Herman Shainwald, as assignee and Ralph L. Shainwald, as receiver, will suffer great and irreparable injury and damage. That said Herman Shainwald, as such assignee, is informed that Harris Lewis has pretended to assign the said moneys payable for said losses and the insurance policies to the Puget Sound National Bank, a national banking corporation, doing business in the state of Washington. That such assignment, if made, was solely by way of security for indebtedness of said Harris Lewis, doing business under said name of "Davids & Co.," to the said bank, which said indebtedness did not exceed the sum of \$6,000. That said indebtedness has been fully paid, and that no sum whatever remains due to the said Puget Sound National Bank upon said indebtedness for which the said moneys due were pretended to be assigned as security, and said Harris Lewis still remains, except as against Herman Shainwald, as assignee, and Ralph L. Shainwald, as receiver, the owner of, and entitled to, all moneys due and payable under said policies, and said Puget Sound National Bank has no interest therein, and never had any interest therein, or right thereto, save the right to hold or receive the same as security for said indebtedness, if the same was in fact assigned to the said bank. That said assignment, if made, was made by Harris Lewis with the intent, etc., to defraud and delay Herman Shainwald and Ralph L. Shainwald, and of placing amounts due under said insurance policies outside of and beyond the jurisdiction of the court, and to at-

tempt to defeat and defraud the jurisdiction of this court. That said Puget Sound National Bank took said assignment with full knowledge and notice of all the rights of Herman Shainwald, as such assignee, and Ralph L. Shainwald, as receiver, and to defraud and delay the latter, and to attempt to defraud, defeat, and oust the jurisdiction of this court.

The allegations of the bill conclude with the averment that Ralph L. Shainwald, the receiver, is now, and for several years last past has been, away from and outside, and a nonresident of, said Northern district of California, and has been during said time, and is, in and a resident of the state of New York, and outside the jurisdiction of this court, and for that reason is not made a party to this suit; and complainant prays that process issue to make said Ralph L. Shainwald, as receiver, as aforesaid, a party hereto, if he should come within the jurisdiction of this court.

The prayers of the bill are (1) that each and every of the respondents, other than Harris Lewis, be required to make discovery of money, estate, effects, credits, and other property of the said Harris Lewis, or in which he may have an interest, they, and each of them, may have in their possession, or under their control, or in the possession or control of either of them; (2) that they, and each of them, and their agents, attorneys, and employes, be enjoined and restrained from surrendering, delivering, parting with, or otherwise incumbering or disposing of to said Harris Lewis, or to any person or persons other than said Herman Shainwald, as assignee, as aforesaid, and said Ralph L. Shainwald, as receiver, as aforesaid, any money, estate, effects, credits, and other property of the said Harris Lewis, or any interest which he may have in the same; (3) that they be adjudged and decreed to surrender, pay over, and deliver the same to the complainant, as assignee, or to the said Ralph L. Shainwald, as receiver, and that the same be applied on account of the said decree in said suit numbered 221, and upon the decrees reviving, or to revive, the same; (4) that all the assets, stock, effects, and property of or invested in the store called "The Famous," or "Davids & Co.," and all moneys due on account thereof, by reason of said insurance or otherwise, and all other moneys and proceeds above referred to, be declared and adjudged to be the proceeds and results of the property of Schoenfeld, Cohen & Co., fraudulently obtained by Harris Lewis, and that the same be transferred or delivered up to the complainant, or to Ralph L. Shainwald, as receiver, and that said Davids & Co. be adjudged and decreed to consist and be composed solely of the said Harris Lewis, and that the said D. S. Davids and I. J. Lewis be adjudged to be trustees of all the property of the so-called firm of "Davids & Co.," etc.; (5) that each of said insurance companies be required to pay over to the complainant, or to Ralph L. Shainwald, as receiver, all moneys due or payable for insurance on the goods and property aforesaid; (6) that all assignments and transfers of property and moneys of said Davids & Co., or of the business of "The Famous," and of said insurance companies, to John Doe or Richard Roe, or to any other person, be declared to be null and void, and

fraudulent, and made with intent to defraud the complainant and the said Ralph L. Shainwald, as receiver. An order to show cause why an injunction should not issue is prayed for; also a temporary restraining order prohibiting said insurance companies from paying, and the said Harris Lewis, D. S. Davids, I. J. Lewis, Davids & Co., or any other person or persons, from receiving, the sums of money due upon said policies of insurance, or that any of the respondents, or their agents, etc., collect, receive, assign, transfer, incumber or otherwise interfere with or dispose of, or assert any right or title or interest in or to, any of the money, goods, wares, merchandise, credits, estate or effects, choses in action, or claims or demands, or other property whatsoever, or interest therein, of the store and business now or heretofore carried on and conducted in Seattle, state of Washington, under the name of "The Famous," or "The Famous, Davids & Co., Proprietors," or under any other name, etc.

As was previously stated, on January 19, 1895, a temporary restraining order, and an order to show cause why an injunction should not issue as prayed for, were granted upon the original bill. The question now presented to the court for determination occurs upon the return to the order to show cause, and is whether or not the order should be continued. Harris Lewis and D. S. Davids (I. J. Lewis not having been served) and the several insurance companies, through their respective counsel, have appeared specially, and deny the power of the court to issue the injunction prayed for in this case, or, indeed, the jurisdiction of the court to entertain the case at all. The Puget Sound National Bank was not named until the filing of the amended bill, being then substituted for John Doe. The corporation being domiciled at, and a resident of, the state of Washington, it was sought to bring it before the court by serving an alias subpoena on a law firm of this city. An affidavit had been made by one Robert Levy to the effect that Messrs. Rothschild & Ach, attorneys at law, practicing in the city and county of San Francisco, and elsewhere, had been retained to represent the Puget Sound National Bank in this controversy. Upon this affidavit, the court made an order that a substituted service be made on the company by serving the alias subpoena on the law firm designated. Service was also made upon one of the directors of the corporation, who was within the district. Rothschild & Ach appeared specially, and moved to set aside the service on them, on the ground that the court was without jurisdiction to enter such order. This question has been fully argued, and the court has arrived at the conclusion that the motion to set aside the substituted service should prevail. The reasons therefor will be found indicated in my opinion upon the motion to set aside the substituted service.¹ The result is that the Puget Sound National Bank is not now before the court, and cannot be made a party unless it appears voluntarily. In disposing of the objections presented to the order to show cause why an in-

¹ 69 Fed. 701.

junction should not issue, the attitude of the various respondents before the court, as stated in the bill, should be kept in mind. The insurance companies form one group. Harris Lewis, I. J. Lewis, and D. S. Davids, and the Puget Sound National Bank, if it were in court, form another. It is sought to prevent the former from paying to the latter. The insurance companies occupy, to all intents and purposes, the position of interpleaders, who have in their possession the fund which complainant seeks to reach, and to prevent Lewis and others from getting. The respondents Lewis and Davids present the following objections to the issuance of the injunction against them: First, that it appears from the amended complaint that the complainant is not a party in interest in this action; second, that it appears that the court has no jurisdiction of the subject-matter of the action; third, that the complainant has an adequate remedy at law; fourth, that the court has no jurisdiction over the respondents; fifth, that the complainant has been guilty of laches, and that the alleged cause of action is barred by the statutes of limitations.

Taking these objections up in their order, I am of opinion that the complainant has unquestionably the right to sue. His statutory right is found in sections 5046, 5047, Rev. St. U. S. He is the duly-appointed and qualified and acting assignee of the estate of the bankrupt firm of Schoenfeld, Cohen & Co. The fact that a receiver has been appointed in suit No. 231, upon the creditors' bill, to receive all of Harris Lewis' property, and that the legal title to all of Lewis' property, real and personal, and the profits, incomes, and gains thereof, was, by the order of this court, vested in Ralph L. Shainwald, does not impair or diminish the independent right of the assignee to bring any and all suits which concern the estate or trust of which he has been appointed assignee. While it may be conceded that the receiver has the legal title to Lewis' property, yet the complainant, as assignee, has an equitable title which he may enforce in a court of equity. The appointment of a receiver, and the passing of the legal title to him, to assist in the collection of the assets of the estate of the bankrupt firm, which were decreed to be held in trust by Harris Lewis by the judgment of this court in suit No. 221, as revived in No. 241, does not interfere with the paramount rights, powers, and duties of the assignee in preserving, protecting, and collecting the assets of the estate. Such fact does not have the effect to render him a mere supernumerary, nor should it hamper him in any way from doing his whole duty. Besides, a sufficient showing is made in the bill, under equity rule 22 of the supreme court of the United States, to excuse the failure to make the receiver a party.

As to the second objection, viz. that the court has no jurisdiction of the subject-matter of the action, I also entertain no doubt. The jurisdiction of this court as a court of bankruptcy, conferred by the bankruptcy act (Act March 2, 1867), and reproduced in section 4972 of the Revised Statutes, extends, among other things, to: "Second. To the collection of all the assets of the bankrupt,"—and: "Sixth. To all acts, matters, and things to be done under and in virtue of

the bankruptcy, until the final distribution and settlement of the estate of the bankrupt, and the close of the proceedings in bankruptcy." The bill in the present case could come within either of these subdivisions. It is a suit to collect "the assets of the bankrupt," and it has direct reference to "acts, matters, and things to be done under and in virtue of the bankruptcy, until the final distribution and settlement of the estate of the bankrupt," etc. The bill seeks to stamp certain personal property as trust funds. This trust fund, it is claimed, is part of the assets of the firm of Schoenfeld, Cohen & Co., or the proceeds or profits thereof, of which Harris Lewis has been adjudged, by the solemn decree of this court, to be trustee for the benefit of the assignee of the bankrupt firm and of its creditors. Nor did the repeal of the bankrupt act impair or take away the right to institute these proceedings. Suits of this character were expressly saved and authorized by the act to repeal the bankrupt law (Act June 7, 1878; 20 Stat. p. 99).

The third objection, viz. that the complainant has an adequate remedy at law, is answered by the fact that the bill seeks a discovery, a subject peculiarly of equitable cognizance. Moreover, it is sought to impress a trust character on certain personal property, and this alone would give the court jurisdiction as a court of equity. *Oelrichs v. Spain*, 15 Wall. 211, 228. Furthermore, the complainant holds the equitable title to the assets of the firm for the benefit of the creditors thereof, and this suit seeks to reach property claimed to constitute such assets.

The fourth objection, viz. that the court has not jurisdiction over the respondents, is important in so far as the absence of the Puget Sound National Bank of Seattle, the pretended assignee, may be deemed fatal to any further proceedings against the remaining respondents. This is really the only question of any serious moment in the case, and, for the sake of convenience, it will be considered further on in connection with the objections urged by the insurance companies to the jurisdiction of the court because of a defect of parties.

The last objection presented by counsel for Lewis and Davids is that the complainant has been guilty of laches. Section 5057 of the Revised Statutes is cited. It provides:

"That no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy, and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrues for or against such assignee."

There is, however, a well-settled qualification to this rule, viz. that, where there has been fraud in concealing the cause of action, the right to sue runs only from the date of the discovery of the fraud, or, what is held to be the equivalent of knowledge, being in possession of facts which ought to put a reasonable man on inquiry. As was said in *Yancy v. Cothran*, 32 Fed. 687, 689, in interpreting the above section:

"The courts have, however, ingrafted on this act the recognized rule, as to statutes of limitation, that if the facts on which any right of action is based

have been fraudulently concealed by the parties in interest, or if the fraud is of such character as conceals itself, the statute will only commence to run from the date of the discovery of the fraud, or of such information as, if diligently followed up, would discover it."

The following cases are cited to sustain this proposition: *Carr v. Hilton*, 1 Curt. 390, Fed. Cas. No. 2,437; *Bailey v. Glover*, 21 Wall. 342; *Upton v. McLaughlin*, 105 U. S. 640; *Rosenthal v. Walker*, 111 U. S. 185, 4 Sup. Ct. 382. See, also, *Martin v. Smith*, 1 Dill. 85, 102, Fed. Cas. No. 9,164; *Cook v. Sherman*, 20 Fed. 168.

The complainant asserts in his bill that the fraudulent concealment by Harris Lewis of the assets of the bankrupt firm, or of their proceeds, was not discovered until three months previous to the bringing of this action. He therefore brings himself within the limitation of the rule referred to, and the court, for the purposes of this motion, must so consider it.

We now recur to the fourth objection, presented by Lewis and Davids, which is substantially the same as that raised by the insurance companies, viz. the defect of a necessary party,—the Puget Sound National Bank of Seattle. It is claimed that Davids & Co. has assigned said policies of insurance to the Puget Sound National Bank for a consideration; that such assignments were made in the months of November and December, 1894; that, as this court has not jurisdiction of the assignee, no order made in this proceeding will be binding on said assignee, or in any wise protect these respondents, or any of them, from the demand of said assignee under said assignment. It is further claimed, as to two of the respondent insurance companies,—the Royal Exchange Assurance Company and the Home Insurance Company,—that the moneys in their hands due to said Davids & Co., or their assigns, and the debt due and owing from it to said Davids & Co. under their policies of insurance, in said order to show cause mentioned, were, in the state of Washington, attached by writ of attachment duly issued out of the superior court of the state of Washington, county of King, in a suit pending in said court, wherein the United States Clothing Company was plaintiff, and Davids & Co. were defendants; the said writ being intended for the purpose of securing to the United States Clothing Company payment to it of a demand by it made and asserted against said Davids & Co. It is claimed that the United States Clothing Company is an indispensable party, and that because it is a resident of another state, and not amenable to the process of this court, it cannot be made a party unless it should appear voluntarily. With respect to this claim, it is sufficient to say that it does not appear how funds in the possession of the companies in San Francisco could be attached by the service of a notice of garnishment on the agent of the companies at Seattle. If, as is alleged in the bill, the funds out of which such insurance moneys are to be paid is within the jurisdiction of the court, it has plenary power to enjoin the payment thereof, and preserve the fund intact until the rights of the respective parties have been adjudicated upon. The further contention is also made that, since the policies of insurance are made out

in favor of Davids & Co., and the assignment, if such was in fact made, was in the name of that firm, this court cannot proceed against the firm, for the reason that it is a resident of and does business in, another district. On the other hand, it is claimed that if said policies were really not for the benefit of Davids & Co., but for the benefit of Harris Lewis, the policies are void, the contract of insurance being a personal one. With reference to this alternative contention, it would seem to be met squarely by the averments in the bill that the use of the firm name and style of Davids & Co. was part of the fraudulent scheme to conceal from the assignee the true character of the assets and trust funds then being utilized by Lewis for his own benefit and gain, and was done for the express purpose of defrauding said assignee and the creditors. The mere fact that the policies were made out in the name of Davids & Co. must be treated, therefore, as immaterial. If the facts set out in the bill be true, the style of Davids & Co. was intended simply as the firm name. The insurance companies intended to and did insure Davids & Co., of which Harris Lewis, as alleged, was the real and sole owner. The whole question resolves itself into this proposition: Are the averments of fraud as to the colorable and pretended assignment to the Puget Sound National Bank sufficient to justify this court in proceeding further with the case, and, during its pendency, to grant the injunction prayed for, in the absence of that corporation? It may be conceded that, if there were no allegations of fraud as to this assignment, the court would decline to proceed without the presence of the assignee of these policies, and would treat such assignee as an indispensable party. But the court cannot, at this stage of the proceedings, ignore the allegations contained in the bill. For the purposes of this motion, the facts therein set forth must be taken as true. *Minnesota Co. v. St. Paul Co.*, 2 Wall. 609, 632. The best criterion as to the merit of the allegations in the bill is to consider what the course of the court probably would be, assuming that such a state of facts as is alleged were proved. Would the court permit itself to be imposed on by colorable and fictitious assignments? Would it allow parties, by fraud or collusion, to deprive it of its jurisdiction, to the detriment of its own citizens seeking to enforce their rights in their own forum? Would it suffer itself to be ousted of its jurisdiction by reason of the nonresidence of the transferees, to whom the transfer had been fraudulently made for the purpose of depriving the court of its cognizance over the case, the real title remaining all the time in the original owner, who is subject to the jurisdiction of the court? Unquestionably not. *Bank v. Stafford*, 12 How. 327; *Banking Co. v. Stafford*, Id. 343; *Ward v. Arredondo*, 1 Paine, 410;¹ *Bank v. Cooper*, 120 U. S. 778, 7 Sup. Ct. 777; *Fost. Fed. Pr.* pp. 102, 103, §§ 54, 59. A court, and particularly a court of equity, will look through the mere surface and form of the transaction, and scrutinize closely the merits and substance. If the allegations of the bill be true, the Puget

¹ Fed. Cas. No. 17,148.

Sound National Bank is not a party to this suit. The truth of the allegations in this regard involves the jurisdictional question. The court must proceed far enough into the merits of the case to enable it to decide that question. *Ward v. Arredondo*, supra. And, until it can do so, it is a matter of the very first importance to the complainant that the property or fund in dispute should be kept inviolate and in statu quo. Otherwise, if he should finally be held entitled to recover, any diversion or diminution of the fund might be to his irreparable injury, as alleged in the bill. In *Great Western Ry. Co. v. Birmingham & O. J. R. Co.*, 2 Phil. Ch. 602, Lord Cottenham said:

"It is certain that the court will, in many cases, interfere and preserve property in statu quo during the pendency of the suit in which the rights are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights. * * * It is true, the court will not so interfere if it thinks that there is no real question between the parties; but, seeing that there is a substantial question to be decided, it will preserve the property until such question can be regularly disposed of."

See, also, *Glascott v. Lang*, 3 Mylne & C. 455.

The court must accept the averments of the bill as true until the contrary is established. As they appear, they are sufficient to justify the continuance of the restraining order. The objections to the bill and order are, therefore, overruled and the further hearing of the order continued.

SHAINWALD v. DAVIDS et al.

(District Court, N. D. California. August 29, 1895.)

No. 262.

1. PRACTICE—SUBSTITUTED SERVICE.

A party to a suit which, as to him, is an original proceeding, cannot be brought before the court, in a jurisdiction foreign to his residence, by substituted service of process upon a law firm retained by him to represent him in case it should be necessary for him to appear voluntarily, but who are not his general agents or representatives.

2. PRACTICE.

Substituted service cannot be made upon a law firm retained to represent a nonresident party, but who are not his general agents or representatives.

Bill in equity. Motion to set aside substituted service on the Puget Sound National Bank of Seattle, state of Washington. Motion granted.

Rothchild & Ach, for the Puget Sound National Bank.

James L. Crittenden (M. T. Moses and S. M. Van Wyck, Jr., of counsel), for complainant.

MORROW, District Judge. By the amended bill in equity, filed April 22, 1895, the Puget Sound National Bank of Seattle, Wash., was formally made a party, being substituted for John Doe. It being a nonresident of this district, it was sought to bring it be-

fore the court by substituting the service of the alias subpoena on Messrs. Rothchild & Ach, a law firm of the city of San Francisco. The order for this substituted service was made upon the affidavit of one Robert Levy, who deposed that Messrs. Rothchild & Ach had been retained by the Puget Sound National Bank to represent them in this controversy. Rothchild & Ach have appeared specially, and move to set aside the service made on them for and in behalf of the bank, on the ground that the court was without jurisdiction to enter such an order, and that such service was illegal, invalid, and improper. The question presented for decision by this motion is whether the court can bring the Puget Sound National Bank, of the state of Washington, before it by substituting service of the alias subpoena on a law firm of this city, alleged to have been retained by the bank to represent it in this suit. While resort may be had to substituted service, in order to compel parties to appear before the court, through some legal and acknowledged representative, yet this is done only in exceptional cases. The practice itself is now well settled, but its use has been confined, as a general rule, to cases where the defendant has absconded to escape service, or has concealed himself, or cannot be found, or has a legal and acknowledged general agent or representative within the jurisdiction of the court; also, upon bills to restrain actions at law, or to reform instruments which are the basis of actions at law, or, under certain circumstances, upon cross bills. In the three last instances, service upon the attorneys who appeared for the parties in the actions at law, or, in the case of a cross bill, who appeared for the complainant in the original bill, is held to be sufficient for all purposes to bring the party before the court. The following authorities, English and American, establish the general proposition: *Sergison v. Beavan*, 9 Hare, Append. 29; marg., 16 Jur. 1111, *Stewart, V. C.*; *Hope v. Hope*, 4 De Gex, M. & G. 328; *Hobhouse v. Courtney*, 12 Sim. 140, 6 Jur. 28; *Webb v. Salmon*, 3 Hare, 251, 255; *Cooper v. Wood*, 5 Beav. 391; *Weymouth v. Lambert*, 3 Beav. 333; *Pulteney v. Shelton*, 5 Ves. 147; *Hunt v. Lever*, 5 Ves. 14; *Baker v. Holmes*, 1 Dickens, 18; *Thomson v. Jones*, 8 Ves. 141; *Carter v. De Brune*, 1 Dickens, 39; *Hyde v. Forster*, 1 Dickens, 102; *Lady Carrington v. Cantillon*, Bunb. 107; *Dunn v. Clarke*, 8 Pet. 1; *Logan v. Patrick*, 5 Cranch, 288; *Herndon v. Ridgway*, 17 How. 424; *Rubber Co. v. Goodyear*, 9 Wall. 807; *Hitner v. Suckley*, 2 Wash. C. C. 465, Fed. Cas. No. 6,543; *Eckert v. Bauert*, 4 Wash. C. C. 370, Fed. Cas. No. 4,266; *Ward v. Seabry*, 4 Wash. C. C. 426, Fed. Cas. No. 17,161; *Shainwald v. Lewis*, 5 Fed. 517; *Id.*, 6 Sawy. 585; *Bowen v. Christian*, 16 Fed. 729; *Bartlett v. Sultan of Turkey*, 19 Fed. 346; *Fidelity Trust & Safety Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. 850; *Abraham v. Insurance Co.*, 37 Fed. 731. I have been referred to no authority which lays down the proposition that a party who is a nonresident, and who does not come within any of the classes above referred to, and who has no regularly constituted and acknowledged agent within the district where suit is brought, can be effectually and legally served with process of subpoena by substitution. The Puget Sound Na-

tional Bank is a nonresident of this district. It has no general agent or representative attending to its affairs in this district, upon whom service can be had. While it may be true, as deposed in the affidavit, that the firm of Rothchild & Ach has been retained to represent the bank in this suit, should it be necessary for it to appear voluntarily to protect its interests, yet this does not ipso facto make such law firm agents for the purpose of receiving service of the subpoena issued on this bill. The proposition is well stated in *Fost. Fed. Pr.* § 96, p. 155. The author says:

"Independently of any express statutory authority, there is no power in a court of equity to order actual personal service to be effected upon a defendant beyond its territorial jurisdiction; but, in a few cases, such courts have for more than a century assumed the power of ordering service to be made within their jurisdiction upon some person for the absent defendant, and have treated such service as valid. In suits to stay proceedings at law in the same court, the service of a subpoena upon the attorney of the plaintiff at law may be allowed, and will then bind the latter, if he be beyond the territorial jurisdiction of the court. A similar practice would, in all probability, be allowed in serving process under bills not original,—namely, bills of revivor, supplemental bills, and bills of revivor and supplement,—which are nothing more than continuations of the suits upon which they operate."

It is claimed by the counsel for complainant, in support of the substituted service upon Messrs. Rothchild & Ach, that this suit is merely ancillary and subsidiary to the original suit No. 221 (6 Fed. 753), and the ancillary suits growing out of case No. 221 which have occupied the attention of this court for now 16 years past, and whose ultimate object is to recover the assets of the bankrupt firm of Schoenfeld, Cohen & Co. fraudulently obtained by Harris Lewis, as adjudged by the former decrees of this court, and now alleged to be held and concealed by him. While the palpable purpose of the present bill is to reach certain personal property in the hands of Lewis and others, alleged to be proceeds or profits of the assets of Schoenfeld, Cohen & Co., and while, as to Lewis, the present bill is in the nature of a continuation of the original suit, still, as to the Puget Sound National Bank of Seattle, it is an original proceeding. This is the first attempt to bring it into this litigation. The reasons that would justify the service by substitution of the subpoena on Harris Lewis, the original defendant, were he out of the jurisdiction of the court, would, obviously, not obtain as to the Puget Sound National Bank of Seattle, an entirely new party, and a stranger to the former proceedings. *Bowen v. Christian*, supra; *Christmas v. Russell*, 14 Wall. 69, 80. This point was definitely settled in *Dunn v. Clarke*, 8 Pet. 1. In that case, it was held, upon a bill to enjoin a judgment at law recovered in the circuit court against the representative of the plaintiff, that if other parties are made by the bill, and different interests involved, the bill is, as to them, an original suit, and the jurisdiction of the court must depend upon their liability to be sued by the plaintiff, as in other cases. Under this view of the law, I do not see how the Puget Sound National Bank of Seattle, Wash., not transacting business or having a regularly constituted and acknowledged agent in this district, can be brought before the court by means of a substituted

service upon a law firm claimed to have been retained for the purposes of representing it in this suit. The motion to set aside the substituted service will, therefore, be granted.

SHAINWALD v. DAVIDS et al.

(District Court, N. D. California. September 11, 1895.)

No. 262.

JURISDICTION OF FEDERAL COURTS—FOREIGN INSURANCE COMPANIES.

A foreign insurance company which, in compliance with the laws of a state, has appointed an agent therein upon whom service may be made (Pol. Code Cal. § 616), is to be considered an "inhabitant" of the state within the meaning of the judiciary act of 1887-88, and may be sued therein in the federal courts.

This was a bill in equity by Herman Shainwald, as assignee in bankruptcy of the firm of Schoenfeld, Cohen & Co., and of the individual members thereof, against D. S. Davids, I. J. Lewis, and various other defendants, including the Home Insurance Company, a corporation organized under the laws of the state of New York. See 69 Fed. 687, 701. The Home Insurance Company moves to dismiss the bill, as against it, for want of jurisdiction.

James L. Crittenden (M. T. Moses and S. M. Van Wyck, Jr., of counsel), for complainant.

E. W. McGraw, for Home Ins. Co.

MORROW, District Judge. This is a motion by counsel for the Home Insurance Company to dismiss the action as against said company. The motion is made on the ground that it appears by the bill of complaint that the Home Insurance Company is a corporation organized and existing under the laws of the state of New York, and, for that reason, cannot be sued in the Northern district of California. The allegations of the bill to which this objection is directed must be considered in connection with another allegation, as follows:

"That, at all the times in this bill mentioned, each and all of said agents, managers, and resident secretary was and were, and now are, by said respective corporations, duly authorized, empowered, and appointed by said respective corporations as and to be the general agent of said several corporations, and to manage, conduct, and carry on, in the name, and on behalf, and as the act of said respective corporations, all the business, affairs, and property of said corporations, and particularly the business of fire insurance, in the states of California and Washington, and in the other states and territories in the United States and west of the Rocky Mountains, and to have, and having, full charge and control of all thereof, and the custody and control of all the property and funds of said several corporations respectively, and particularly their funds for the payment of losses under their said several policies; and all said agents were to, and at all said times did, and now do, reside in the Northern district of California; and each and all of said corporations at all said times complied, and now do comply, with the laws of the state of California regulating and providing for the carrying on of business, and particularly of the fire insurance business, in said state, by foreign corporations; and at all said times each of said agents, managers, and resident

secretary above referred to was and were, and now is, the duly-appointed, designated, and acting agent of said respective corporations, as provided in said laws, and upon whom all process in the state of California for or against said several corporations should, could, and can and may be served; and at all said times, and ever since, and now, each and all of said corporations were and are engaged in and transacting and doing a general fire insurance business in said Northern district of California and elsewhere, and kept and keep and now have in said Northern district of California, and not elsewhere, and under the control of said respective agents, managers, and resident secretary, all their moneys and funds for the payment of losses under their policies of fire insurance in said states and territories, and particularly the money and funds for the payment of the losses hereinafter alleged and referred to; and all such moneys and funds at all said times were, and ever since have been, and now are, disbursed and paid out only by and under the direction of said respective agents, managers, and resident secretary; and no other agents of said corporations, or any of them, have any control or management of said moneys or funds, or any thereof, nor any authority to pay or settle for any losses or other demands whatever against any of said corporations, except by the special instruction of said respective agents, managers, and resident secretary."

The constitution of the state of California provides in article 12, § 15:

"No corporation organized outside the limits of this state shall be allowed to transact business within this state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this state."

Section 616 of the Political Code of this state provides:

"The insurance commissioner must require, as a condition precedent to the transaction of insurance business in this state by any foreign corporation or company, that such corporation or company must file in his office the name of an agent, and his place of residence in this state, on whom summons and other process may be served in all actions or other legal proceedings against such corporation or company. All process so served gives jurisdiction over the person of such corporation or company. The agents so appointed and designated shall be deemed in law a general agent, and must be the principal agent or chief manager of the business of such corporation or company in this state. * * *

It is contended, in support of the motion to dismiss the bill as against the Home Insurance Company, that the company is not an inhabitant of the state of California, and that the law of the state is not applicable to proceedings in the United States courts. Both of these questions appear to have been definitely settled by the supreme court of the United States in *Ex parte Schollenberger*, 96 U. S. 369. It is true that section 1 of the act of March 3, 1875 (chapter 137), which was under consideration in that case, has since been amended by the act of March 3, 1887 (chapter 373), and again corrected by the act of August 13, 1888 (chapter 866). In the first-named act, it was provided that:

"No civil suit shall be brought before either of said courts against any person by an original process or proceeding in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding."

This act was amended by the act of March 3, 1887, and the act of August 13, 1888, by omitting the last provision; and it is contended that as the supreme court, in deciding the *Case of Schollenberger*, based the decision upon the last provision, and upheld the

service of process because the insurance company, in complying with a statute of Pennsylvania, had consented to be "found" in that state for the purpose of the service of process in the suit, the decision of the court is not applicable to the statute as amended, with this provision omitted. But I do not understand that the principle involved in the decision of the court is so limited. The real proposition was that the corporation, by complying with a state statute requiring the appointment of an agent within the state upon whom process might be served, thereby submitted itself to the jurisdiction of the courts held within that state. In this respect, the corporation became as much an "inhabitant" of the state as it did a person "found" within the state, because it had agreed to be sued there. By the appointment of an agent in this state under the provisions of section 616 of the Political Code, the Home Insurance Company has distinctly agreed with the people of this state that summons and other process may be served upon it in all actions or legal proceedings against the company, and that all process so served gives jurisdiction over the person of such company. For all purposes of legal proceedings, the company is, therefore, an "inhabitant" of this state. The motion to dismiss is denied.

WALTERS et al. v. WESTERN & A. R. CO. (BROWN, Petitioner).

(Circuit Court, N. D. Georgia. June 26, 1895.)

1. COMPENSATION OF ATTORNEYS—COUNSEL FOR RECEIVERS OF DEFUNCT CORPORATION.

Counsel for the receivers of a defunct corporation are not entitled to a compensation of 5 per cent. on the amount of money which came into the receivers' hands for the benefit of creditors and stockholders, where such amount has not, in any sense, been realized by reason of his services. He is entitled only to a reasonable compensation for the services actually performed.

2. EQUITY PROCEDURE—CONCLUSIVENESS OF MASTER'S REPORT.

Where receivers employed counsel under an agreement that his compensation should be determined by a master in chancery under the supervision of the court, and a reference was accordingly had and acquiesced in, with directions, not merely to take testimony, but to determine the amount of compensation, *held*, that the master's report must be accepted by the court, in the absence of evidence of bias or clear mistake.

This was a petition filed by Julius L. Brown, in the case of W. T. Walters and others against the Western & Atlantic Railroad Company, to recover his compensation as counsel for the receivers of the defendant company. Heard on exceptions by the petitioner to the report of a special master.

Julius L. Brown (with Bishop & Andrews), pro se.
Jackson & Leftwich and Payne & Tye, contra.

NEWMAN, District Judge. This is an application by Julius L. Brown, Esq., for compensation as counsel for complainants in the above-stated case, and also as counsel for the receivers appointed therein. The matter was referred to Mr. John T. Pendleton as

special master, and he has reported for Mr. Brown an allowance of \$10,000 as complainants' solicitor, and an additional amount of \$10,000 as counsel for the receivers; the latter subject to a reduction of \$2,500 on account of retainers received from the company whose assets are being administered, prior to the appointment of the receivers. To this report exceptions have been filed by Mr. Brown. The exceptions all go to the correctness of the amount allowed him as complainants' solicitor and as receivers' counsel.

On the 27th day of December, 1890, the charter of the Western & Atlantic Railroad, a corporation which has been operating the road of that name and the property of the state of Georgia for the period of 20 years, expired. A few days prior to the expiration of the charter, Hon. Joseph E. Brown and Major E. B. Stahlman were appointed receivers by the Hon. Don A. Pardee, circuit judge. The bill was filed by certain shareholders, the allegations in the bill showing the expiration of the charter, the fact that considerable assets were on hand to be distributed between the creditors and the shareholders, and the necessity for receivers of the court to hold the same until these assets could be administered. Mr. Julius L. Brown was counsel for the complainants in this bill. He prepared it and obtained the appointment of the receivers, and has represented the case for the complainants ever since. He has also acted, since their appointment, as counsel for the receivers.

The first matter for consideration is that of the compensation of Mr. Brown out of this fund as counsel for complainants. He claims \$35,000, alleging that there has been brought into the hands of the receivers something over \$700,000, and that he should have what is about 5 per cent. of that amount for bringing the fund into court. It is denied on the part of counsel representing Receiver E. B. Stahlman (Hon. Joseph E. Brown having died), and by counsel representing the shareholders, that the premises upon which Mr. Brown bases this claim are correct. That is to say, they deny that any fund has been brought into court by this proceeding in the sense in which that expression is used when allowing counsel compensation for such services. The facts as to this issue seem to be about as follows: There was on hand, in cash and cash items, at the time of the appointment of the receivers, something over \$300,000. The company set up a claim against the state of Georgia for betterments to the road during the period of its lease, and recovered from the state \$99,000 on this ground. Mr. Brown and two other members of the bar received for this service \$10,000, Mr. Brown having received as his proportion \$4,442, according to his testimony in this investigation. Part of this was paid by the company and part by the receivers. This sum made the amount in the receivers' hands approximate \$400,000, to which was added the amount received from the sale of the rolling stock and traffic balances from other railroads, and other minor matters, which made a sufficient sum to aggregate a little over \$700,000 in the receivers' hands. A comparatively small amount collected from the sureties of a defaulting agent is the only amount, unless it be some trivial matter which has escaped attention, collected through the special efforts of coun-

sel, except the amount for betterments, which, as stated, was paid for by special contract with Mr. Brown and his associates. The effect of the finding of the master, while he does not expressly pass on the question, is that this fund was not brought into court by counsel for complainants, and that counsel is not entitled to compensation as upon a per cent. basis for the fund which the receivers had in their possession. He finds that he is entitled to \$10,000 for his services as counsel for complainants. There is no ground whatever for differing with the special master as to the conclusion which he has reached on this subject. No fund was brought into court by the aid of complainants' counsel in any fair sense, except as to the betterments claim, for which he has been compensated. Two gentlemen of the ablest character were appointed as receivers, who were thoroughly competent to manage this business in every respect. One of them was ex-Senator Brown, a man of national reputation for ability; the other, Major Stahlman, a railroad man of large experience and great ability. These gentlemen had able clerical assistance, in their office as receivers, to aid in winding up the affairs of the company. The receivers, with the aid of this clerical force, reduced the outstanding obligations of the company to cash, according to the testimony of Major Stahlman, without the slightest difficulty. If the applicant, Mr. Brown, was right in his assumption that by his efforts this fund was brought into court, there would be reasonable ground for the payment of additional compensation; but I am forced to agree with the special master in the conclusion that he has evidently reached on this subject, and which he must necessarily have reached in order to have found as he did.

For compensation as counsel for the receivers Mr. Brown claims \$20,000. The special master found for him \$10,000, to be credited with the sum of \$2,500 on account of retainers which he had received from the company in much of the litigation before its dissolution. The evidence heard by the special master on this question, as well as on the question of Mr. Brown's compensation as complainants' solicitor, is exceedingly voluminous. The evidence as reported to the court makes a volume of 850-odd pages of closely typewritten matter. Twenty-eight members of the bar were examined as witnesses. Sixteen of this number were witnesses on behalf of Mr. Brown, and twelve for the adverse side. They differ widely in their testimony as to the amount to which Mr. Brown is entitled. Some of them testify to the full amount claimed by him, both as counsel for the complainants and the receivers,—\$55,000 in all. Some of them—a number of them—testified to a lesser amount. Most of those offered by the receivers and shareholders testified to an amount approximating that found by the special master. Many gentlemen of high character and standing at the bar were examined on both sides. One principal witness on behalf of the receivers and shareholders was the ex-chief justice of the supreme court of this state, Hon. Logan E. Bleckley. Judge Bleckley was carried, by the examination and cross-examination of counsel, through every branch of the litigation to which the receivers were parties in winding up the affairs of the company, and testified in reference to nearly every case—probably

as to every important one—against the receivers. He gave his evidence in detail and with particularity. His testimony, in round numbers, taking the services of Mr. Brown as complainants' solicitor and for the receivers together, fixes about the amount reported in Mr. Brown's favor by the special master. He gives something more, perhaps, as complainants' solicitor, and something less as receivers' counsel, but the aggregate varies very little from the amount the master reported. Ex-Judges H. B. Tompkins, George Hillyer, and W. R. Hammond were also sworn as witnesses; the former on behalf of Mr. Brown, the two latter on behalf of the receivers and shareholders. They vary materially as to the value of Mr. Brown's services, as do the other members of the bar who testified for the respective parties. Of course, all these gentlemen have testified honestly, and it is simply a difference between lawyers as to the value of services rendered by Mr. Brown. Some reconciliation in the testimony of all these witnesses may be effected by an examination of the hypothetical cases put to them by counsel. For example, upon the matter of Mr. Brown's compensation as complainants' solicitor, the question put by his counsel to the witnesses assumed that by his efforts the entire fund was brought into court and conserved for the benefit of the creditors and shareholders, amounting to \$700,000, and the answers of the witnesses to this, who were offered in his behalf, vary from \$20,000 to \$35,000. When the opposing theory or hypothesis, which assumed the fund to be in no danger, etc., was put to them by counsel for the receivers and shareholders, they usually reduced this amount very largely. But, even reconciling the testimony somewhat in this way, there is still decided conflict left as to the amount which Mr. Brown should be allowed as fair compensation for his services. The special master has allowed him the amount stated, and the question now is, what weight shall be attached to his report? This subject has been discussed in the argument before the court. It is claimed, as I understand it, on behalf of Mr. Brown, that the report of the master is only advisory to the court; and, on the other hand, that it is such a report as should be given the highest weight, and only set aside when clearly and manifestly erroneous. There are references to masters in which there may be both classes of findings, according to the decisions of the supreme court. There are references which are made by the court for the purpose of obtaining data, or for an accounting, which are merely advisory. There are references, on the other hand, the report in which should be interfered with with great reluctance. The latter class of references are by consent. Now, in the present case, counsel in open court agreed to a reference of this matter to a special master. There was some little discussion as to who should be the special master, but both parties acquiesced in the appointment of Mr. John T. Pendleton, who was subsequently named by the court as special master in the order of reference. Besides this, it appears from the testimony that the agreement between Mr. Brown and the receivers was that this compensation should be fixed by a master in chancery, under the supervision of the court. An order to this effect was entered on the minutes of the receivers at the time he was employed.

In the case of *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, the second headnote is in these words:

"When the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, both of fact and of law, and such reference is entered as a rule of court, it is the submission of the controversy to a special tribunal, selected by the parties, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law; and its determinations are not subject to be set aside and disregarded at the discretion of the court."

The last case I find on this subject in the supreme court reports is the case of *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237. In the opinion of the court, by Mr. Justice Brown, the following language is used:

"As the case was referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, we think that his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Rev. St. § 643, or in an admiralty cause appealed to this court. In neither of these is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable. *Wiscart v. D'Auchy*, 3 Dall. 321; *Bond v. Brown*, 12 How. 254; *Graham v. Bayne*, 18 How. 60, 62; *Norris v. Jackson*, 9 Wall. 125; *Insurance Co. v. Folsom*, 18 Wall. 237, 249; *The Abbottsford*, 98 U. S. 440.

"The question of the conclusiveness of findings by a master in chancery under a similar order was directly passed upon in *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355, in which a distinction is drawn between the findings of a master under the usual order to take and report testimony, and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet, where the parties select and agree upon a special tribunal for the settlement of the controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the finding of a subordinate court. 'Its findings,' said the court, 'like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.' As the reference in this case was by consent to find the facts, we think the rule in *Kimberly v. Arms* applies; and, as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive. To same effect are *Crawford v. Neal*, 144 U. S. 585, 596, 12 Sup. Ct. 759; *Furrer v. Ferris*, 145 U. S. 132, 12 Sup. Ct. 821."

The case at bar was not referred to Mr. Pendleton by the court for the purpose of merely taking testimony and reporting that testimony to the court, but, by the terms of the order, the amount of compensation to be paid to Mr. Brown was referred to his determination. It is true that there was no written stipulation consenting to a reference to a master, but the intention clearly was and the consent was that the special master should hear evidence, investigate the matter fully, and fix the amount, subject to the supervision of the court. If the court should undertake to fix any

other amount than that reported by the special master, it would result in trying the case all over again on the testimony taken by the special master. The amount found by the special master is abundantly sustained by the evidence. It is certainly true that under the evidence he might have found otherwise, but he has decided to give greater weight to the testimony which approximates and favors the amount reported. As before stated, nearly all of the witnesses who were examined before the special master had hypothetical cases put to them. Counsel on either side assumed in their questions a certain amount and character of service as rendered by Mr. Brown. The witnesses were examined and cross-examined in this way. The special master heard all these questions, observed the character of the hypothetical cases put before the witnesses, and noticed how far these hypothetical cases were supported by the real facts in the case. That the special master is able, faithful, and diligent there can be no question. That he was without bias and partiality I think is equally clear. How, then, can the court, in a reference of this sort, whether strictly by consent or merely acquiesced in, undertake to interfere, in the absence of any evidence of bias or clear mistake, with the amount of the report?

There is but one ground on which I feel justified in interfering with the report of the special master. In disposing of the matter of Mr. Brown's compensation as counsel for the receivers, he states thus:

"I find that Mr. Brown did a very considerable amount of work as solicitor for the receivers, and I would fix his compensation for services on this part of the application at \$10,000, but for the fact that he had been paid large sums as retainers by the Western & Atlantic Railroad prior to the receivership, and that a good deal of work had been done by him, in the preparation and in the trial of said cases, before the receivership, which preparation and trial of cases prior to the receivership in many instances made the work actually done by him as receivers' solicitor very light, and in other cases much less than it would have required if the cases had been disposed of without the benefit of the work he had done prior to the receivership, and on account of which he had been paid retainers. I have carefully considered the testimony on the subject of these retainers, the cases in which paid, and the amount paid, and find that they ought to diminish the amount of his compensation in the sum of \$2,500."

While the soundness of the principle or rule upon which the master comes to this conclusion is not questioned, the correctness of its application to the facts of this case is questioned. There has been serious doubt in my mind all along, since the argument of this case was commenced before the court, as to the justice of making this deduction. In the first place, in view of the amount of the retainers and character of the cases, and the fact that by the dissolution of the corporation and the unconstitutionality of the Martin act, as held by the supreme court of the state, by which a large number of these cases fell, and had no longer any legal status in court, it is not right to make this deduction. In the second place, the effect of it is to reduce the finding in favor of Mr. Brown as counsel for the receivers below the amount it seems to me he is clearly entitled to, under a fair view of the evidence of

the services and the character and duration of the services rendered. To my mind, this part of the finding is manifestly and clearly erroneous, and may be so held in line and in harmony with the foregoing decisions and under the correct rule of law on the subject. I think, therefore, that Mr. Brown is entitled to \$10,000 as receivers' counsel, without this deduction. With this change he will receive \$10,000 for filing the bill and \$10,000 as receivers' counsel, making \$20,000 in all for his services in this litigation, without considering the amounts, received by him in the betterments cases and as retainers before the dissolution of the company. With the change suggested, the report is so fully sustained by the evidence that I would not be justified, in my view of the law, in changing it further. Therefore, with the credits which the special master reports should be made on the amount allowed to Mr. Brown, namely, \$2,500 on the sum allowed him as complainants' solicitor, and \$2,500 on the sum as receivers' counsel, he should receive from the funds now in the hands of the receiver \$15,000 in the aggregate for his services to the complainants and to the receivers during this litigation. An order may be taken to this effect. The exceptions will be overruled and the report confirmed, with the modifications suggested.

In re NELSON.

(District Court, D. Washington, N. D. August 27, 1895.)

1. TERRITORIAL STATUTES — SUSPENSION AND REPEAL BY ACT OF CONGRESS — EFFECT OF ADMISSION OF STATE—INCEST.

The act of congress of March 3, 1887, for the punishment of bigamy and similar offenses, including incest, in the territories, did not, by implication, repeal the territorial statute of Washington relating to the crime of incest. It merely superseded it until the territory was admitted as a state, whereupon the act of congress ceased to operate, and the territorial statute, by virtue of the state constitution, became the law of the state.

2. INCEST—VALIDITY OF STATUTE.

The statute of the state of Washington, defining the crime of incest, is not invalid because of the omission of the word "knowingly," or any equivalent expression making knowledge of relationship an element of the crime.

3. HABEAS CORPUS BY FEDERAL COURTS—REVIEWING STATE DECISIONS.

The writ of habeas corpus cannot properly issue from the federal courts to review alleged errors of state courts in administering the criminal laws of the state. Even if a conviction is unlawful, the accused must apply to the state supreme court; and his alleged poverty, and inability to bear the expense of procuring a hearing therein, is no ground for invoking the power of a federal court.

This was a petition for a writ of habeas corpus.

F. W. Wiestling, for petitioner.

W. W. Wilshire, for respondent.

HANFORD, District Judge. The petitioner, being in the custody of the sheriff of King county, after conviction and sentence in

the superior court of the state of Washington, for said county, of the crime of incest, has applied to this court to be discharged, on the ground that the statute of the territory of Washington under which he was prosecuted, was abrogated by the act of congress of March 3, 1887 (1 Supp. Rev. St., 2d Ed., 568), commonly known as the "Edmunds-Tucker Act," which provided, among other things, for the punishment of bigamy and similar offenses, including the crime of incest, when committed within any of the territories, and, the state of Washington having failed to enact any statute providing for the punishment of such offenses prior to the commission of the crime charged against him, there was no law in force in this state under which he could be punished; and he alleges, therefore, that he is restrained of his liberty without due process of law, contrary to the provisions of the constitution of the United States. The statute of Washington territory upon which the information against the petitioner is founded was enacted long prior to the act of congress referred to, and remained unrepealed by any enactment of the legislative assembly of the territory at the date of the adoption of the constitution of the state of Washington; and there is no ground whatever for assuming that it does not constitute a part of the laws of the territory, continued in force by the provisions of the enabling act under which the territory was admitted into the Union as a state, and by the constitution of the state, other than the allegations of the petitioner that the act of congress covering the same subject had the effect to annul the legislative enactment. The sixth and eleventh sections of the act of congress referred to expressly disapprove and annul certain specified statutes of Utah territory, and other sections place limitations upon the legislative powers of the territorial government of Utah; but otherwise there is in the act no expressed intention to repeal or annul territorial statutes theretofore enacted, nor to restrict the legislatures in the several territories in the exercise of their powers. Conceding that, during the continuance of the territorial government, such offenses could be prosecuted only under the act of congress,—that being a complete law, covering the entire subject, and enacted by the highest authority,—still it did not have the effect to repeal or annul a territorial statute not inconsistent with its provisions. The territorial government was created by congress, and, while it existed, was entirely subordinate to congress. Congress had the power to annul any statute enacted by the legislative assembly, and to make laws and provide for their execution within the territory. The national government was supreme, and the territorial government subordinate thereto. In the exercise of its superior powers, congress enacted the law under consideration, but by its terms it appears to have been intended to supersede, rather than to repeal, the territorial statute; and when the territory of Washington became transformed into the state of Washington the act of congress ceased to have force within its boundaries, and from that time there was no superior law in operation to obstruct proceedings under the local statute. The question

in this case is similar to questions which have arisen as to the effect of repealing the last national bankrupt law, which, while in force, superseded or suspended the insolvent laws existing in most of the states and territories at the time of its passage. "The passage of such law by congress does not repeal state laws, and on repeal of the federal law the state law is revived, and need not be re-enacted." 2 Am. & Eng. Enc. Law, p. 87; *Perry v. Langley*, Fed. Cas. 11,006; *Com. v. O'Hara*, 6 Am. Law Reg. (N. S.) 765. In the leading case of *Sturges v. Crowninshield*, 4 Wheat. 122, Chief Justice Marshall gave a clear expression to this idea, saying a state insolvent law "can only be suspended by the enactment of the general bankrupt law. The repeal of that law cannot, it is true, confer the power on the states, but it removes a disability to its exercise which was created by the act of congress." I have read the able opinion of the supreme court of Wyoming, by Judge Potter, in the case *In re Murphy*, 40 Pac. 398; and, while not intending to disagree with that court, I prefer to base my decision distinctly on the ground that by the admission of Washington into the Union as a state the act of congress ceased to have force therein, and, when that obstacle to the execution of the territorial statute was removed, it was left in full vigor, and was, by the constitution, adopted as a law of the state.

It has been further argued in behalf of the petitioner that the statute of Washington territory is invalid because of the omission of the word "knowingly," or any equivalent word or phrase to make knowledge of relationship an element of the crime. I find by comparison, however, that the statute of Washington territory is in this respect not unlike other statutes which have been upheld in numerous prosecutions, and there is really no merit in the argument. *Bish. Stat. Crimes*, §§ 727, 729.

I deem it proper, in conclusion, to say that the writ of habeas corpus cannot properly take the place of a writ of error, or be so used as to enable the federal court to assume the functions of an appellate tribunal to review the decisions of the courts of a state having jurisdiction to hear and determine all questions involved in cases in which persons are accused of violating laws of the state. The petitioner in this case, even if his conviction were unlawful, should have applied to the supreme court of the state to reverse the judgment against him. He has assigned, as one of the reasons for invoking the power of this court, his poverty, and inability to bear the expense incident to a hearing in the supreme court. But it will not do for every poor person who may be convicted of crime to transfer his case into the federal court, and it is unnecessary, for the courts of the state are able to administer justice to the poor as well as the rich; and certainly there is no ground for censuring the supreme court of this state for lack of patience in consideration of cases of poor convicts. It is the judgment of the court that the petitioner be remanded.

NEW YORK AIR-BRAKE CO. et al. v. WESTINGHOUSE AIR-BRAKE CO.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

1. PATENTS—INFRINGEMENT—AIR BRAKES.

The Westinghouse air-brake patent, No. 360,070, *held* infringed, as to claims 1, 2, and 4; affirming decree for preliminary injunction. 65 Fed. 99.

2. SAME.

A decree granting a preliminary injunction against infringement of claim 1 of the Westinghouse air-brake patent, No. 376,837, reversed, on the ground that the question of infringement was too doubtful to be resolved in favor of complainant on a motion for a preliminary injunction.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a bill by the Westinghouse Air-Brake Company against the New York Air-Brake Company and others for infringement of letters patent Nos. 360,070 and 376,837, granted to George Westinghouse, Jr., March 29, 1887, and January 24, 1888, respectively, for improvements in air-brake mechanism. The circuit court granted a preliminary injunction to restrain infringement of claims 1, 2, and 4 of the former patent, and claim 1 of the latter. The opinion of Judge Lacombe in the court below is reported in 65 Fed. 99. Defendant appealed from the interlocutory order so granted.

J. E. Maynadier and F. P. Fish, for appellants.

Kerr & Curtis, J. Snowden Bell, George H. Christy, and Frederic H. Betts, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges, and TOWNSEND, District Judge.

PER CURIAM. We agree with the court below that the defendant's apparatus is an infringement of the first, second, and fourth claims of patent No. 360,070, and deem it unnecessary to add anything to the opinion of Judge Lacombe. The question whether the apparatus is an infringement of the first claim of patent No. 376,837 is too doubtful to be resolved in favor of the complainant upon a motion for a preliminary injunction, and should be reserved for disposition upon the final hearing of the cause. So far as the order appealed from allows an injunction for the infringement of this claim, it should be reversed; otherwise, it is affirmed. Ordered accordingly.

KENNEDY v. SOLAR REFINING CO. et al.

(Circuit Court, N. D. Ohio, W. D. September 28, 1895.)

No. 1,058.

1. JURISDICTION OF FEDERAL COURTS — DIVERSE CITIZENSHIP — DEFECTIVE AVERMENTS—WAIVER.

Where the jurisdiction depends upon the diverse citizenship of corporations, defective averments in regard thereto are waived by the filing of an answer, and the taking of testimony by both parties.

2. PROCESS PATENTS—INFRINGEMENT OF COMBINATION.

A process patent involving a combination of elements is not infringed unless every element is employed.

3. SAME—LIMITATION BY ALTERATION OF SPECIFICATION.

Where, in compliance with a suggestion of the examiner, an applicant for a process patent alters his specifications so as to state specifically the mode of using his ingredients, he cannot thereafter, unless he is a pioneer inventor, invoke the doctrine of equivalents to cover processes which do not use all the features so described.

4. SAME—EVIDENCE—PROOF OF EXPERIMENTS.

Experiments to determine the results of a process involving the use of chemicals, in order to be satisfactory, should either be performed in the presence of the court, or the evidence should be entirely satisfactory that the materials used were genuine and pure, and that the process was followed.

5. SAME—PLEADING—NOTICE OF PRIOR PATENTS.

It is not necessary for defendants, in their answer, to give notice of prior patents which they intend to rely on, not as anticipations, but merely as showing the prior state of the art.

6. SAME—PROCESS FOR DESULPHURIZING OILS.

The Kennedy patent, No. 370,950, for a process for desulphurizing and purifying petroleum oils, *held* void because it does not accomplish the result sought; and, assuming its validity, *held* not infringed.

This was a bill by Daniel M. Kennedy against the Solar Refining Company and Standard Oil Company for alleged infringement of a patent for the process of desulphurizing and purifying petroleum oils.

T. E. McDonald, for complainant.

John H. Doyle and Wm. Bakewell, for defendants.

RICKS, District Judge. This is a bill filed by the complainant, claiming a patent for a new and useful process for desulphurizing and purifying petroleum oils, which patent is dated October 4, 1887, being patent No. 370,950. The defendant corporations have filed a joint answer denying the validity of complainant's patent and denying infringement. A replication was duly filed, and the case was prepared for hearing. A large amount of testimony was taken by both parties.

The defendants, notwithstanding their answer, in their brief, contend that the court has no jurisdiction of the case because of the inartificial pleading in the complainant's bill with reference to the allegations of diverse citizenship. The bill avers that the complainant is a citizen of the dominion of Canada, and "brings this his bill into court against the Solar Refining Company, which is a corporation created and existing in due form of law within the said Northern district of Ohio, and the Standard Oil Company, also a corporation created and existing in due form of law in the said state of Ohio." These averments as to the citizenship of the defendants are wholly insufficient to confer jurisdiction upon the court, and if a demurrer had been interposed the same would have been sustained. But the defendants having answered, and all parties having gone to great expense in the taking of testimony, it is now too late for the defendants to make this contention. If the objection related

to the want of jurisdiction because of the subject-matter, the court would pass upon such question at any time, without reference to the state of the pleadings. But an objection on account of diverse citizenship may be waived by answer, and the court is of the opinion that in this case the defendants have made such waiver, and it is now too late to make the contention relied upon in their brief.

The next contention made by the defendants is that the complainant has joined as defendants two separate corporations, charging both of them with the infringement of the patent in suit, and has not therein alleged, and does not pretend, and has made no attempt to prove, that they are, in any sense, joint infringers, or that either of them had any connection with, or had taken any part in, the alleged infringement of said patent, with the other. This contention is disposed of by the views which the court shall hereafter state with reference to the validity of this patent and the allegation of infringement, so that it is not necessary to give this contention any further consideration at this time.

The patent sued upon is what is known as a "process patent," and it is described in the patent as a process to desulphurize and purify petroleum (hydrocarbon) oils. The patentee claims his process to be as follows:

"I take of sulphate of copper (blue vitriol), caustic soda, and chloride of sodium (common salt) about equal quantities, and dissolve the same together in water. I prefer to first dissolve the copper and chloride of sodium in water, and then the soda, and mix the two together, when the copper will be precipitated as oxide of copper. This solution, with its precipitate, is then put in the still with the oil, and when the oil boils the precipitate (oxide of copper) dissolves, and combines with the sulphur of the oil, forming sulphide of copper, which, with the greater portion of the solution remaining in the oil, settles to the bottom when the oil is cool, and can be drawn off. The oil then, which still contains a trace of the soda, copper, and salt held in combination mechanically, is distilled, which will cause the ingredients to separate and settle out of the oil. Instead of distilling the oil to remove the trace of the soda, copper, and salt, they may be washed out with water, sulphuric acid, and soda. This will cause the oil to be left pure and free from sulphur, so that in burning in a lamp the oil will not cloud the chimney of the lamp, nor crust the lamp wick, nor produce an offensive odor, and will give a bright and clear light. The proportion of the solution to be used with the oil which I have found to answer best is as follows: One pound of each,—sulphate of copper (blue vitriol), caustic soda, and chloride of sodium (common salt),—dissolved in about two gallons of water, for every forty gallons of oil to be treated. Having thus fully described my invention, I claim as new, and desire to secure by letters patent: (1) The process of combining the sulphur in the oil with the metallic matter contained in a solution of about equal quantities of sulphate of copper (blue vitriol), caustic soda, and chloride of sodium (common salt), and then separating such combined metallic matter and sulphur from the oil, substantially as and for the purposes herein specified. (2) In the process herein described of desulphurizing and purifying petroleum (hydrocarbon) oils, first preparing a solution of sulphate of copper, caustic soda, and chloride of sodium, in or about the proportions specified, in water, then mixing said solution with the oil, and heating the whole in a still, and subsequently separating from the oil the combined metallic matter of the solution and sulphur in the oil, as set forth."

A process patent, when involving a combination of different elements, is similar to a patent for a combination of mechanical devices. No infringement of the latter can be sustained unless every one of

the constituent elements is employed. In the case of *Prouty v. Rugles*, 16 Pet. 336, Chief Justice Taney said:

"The use of any two of these parts only, or of two combined with a third which is substantially different, in form or manner of its arrangement and connection with the others, is, therefore, not the thing patented. It is not the same combination if it substantially differs from it in any of its parts."

The same principle is announced in the case of *Vance v. Campbell*, 1 Black, 427, and *Rowell v. Lindsay*, 113 U. S. 97, 5 Sup. Ct. 507; so that it is now well established that a claim for the combination of three elements is not infringed by the use of two only, though the third is useless, for the patentee must stand by his claim. *Royer v. Belting Co.*, 28 Fed. 850. And similarly, in analogy to the law governing the infringement of combination patents, it is held that the infringement of a patented art consists only in the performance of all the acts of which it is composed, or their equivalents, in the manner and in the order in which they are claimed in the patent. 3 Rob. Pat. § 925. A process patent is described by Mr. Justice Bradley, in the case of *Cochrane v. Deener*, 94 U. S. 780, as follows:

"A process is a mode of treatment of certain materials to produce a given result. It is an act or series of acts performed upon the subject-matter to be transformed and reduced to a different state or thing. * * * In the language of the patent law, it is an art."

The application of this rule of infringement of a combination of mechanical devices to a process patent is well illustrated by the decision of the supreme court of the United States in the case of *Klein v. Russell*, 19 Wall. 433. In that case the original patent described a process for the treatment of leather by the use of fat liquor, applied when heated near the boiling point. A reissue patent sought to recover the process by the use of the fat liquor whether hot or cold, but the supreme court held that, if the reissue patent was to be construed to cover the fat liquor whether heated or not, the reissue was void. The same rule was applied in *Arnold v. Phelps*, 20 Fed. 315, which was a process for treating coffee berries. The plaintiff cannot complain of this construction of the law, for he has limited his patent by his specification and claims to the particular process described. Not only did he limit it by the process described in his claim and in his specifications as set out in the patent, but by his proceedings in the patent office he made this limitation still more explicit. The application was filed on the 10th of March, 1887. On the 18th of May, following, the patent office examiner advised him that the process of removing the chemicals and sulphur combined therewith from the oil was insufficiently described. The examiner said:

"The gist of the invention is the employment of a metallic salt (formed in this case by the action of the alkali on the salt of copper), which salt forms an insoluble sulphide with the sulphur present in the oil. The use of such salts in general is shown in U. S. patent No. 290,324, and English patent No. 1,211."

This action showed clearly that the patent office understood the process proposed to be patented by Kennedy to consist, not in the use of metallic copper, nor of oxide of copper, but of a special compound formed by the action of the alkali and the blue vitriol (sulphate of

copper), so that the presence of the alkali (soda) with the sulphate of copper is absolutely required. The applicant then alters his specification, stating specifically the mode of using the alkalies (caustic soda and common salt), and adds the following comment on the action of the patent office:

"As to the merits of the case, the references fail to show oil purified—that is, the sulphur removed therefrom—by first treating the oil with sulphate of copper, caustic soda, and chloride of sodium, and then separating the metallic matter therefrom, as covered by applicant's claims."

The patentee was thus limited to the use of caustic soda and common salt, with blue vitriol. The legal effect of these proceedings is that the patentee cannot now claim any broader construction of his patent than that which was thus stated as the gist of his invention by the patent office, and to which he assented. In *Roemer v. Peddie*, 132 U. S. 313, 10 Sup. Ct. 98, the supreme court say:

"This court have often held that when a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions for the purpose of obtaining his patent, he cannot after he has obtained it, claim that it shall be construed as if such limitations and restrictions were not contained in it;" citing many cases.

In the case of *Smith v. Gas Co.*, 42 Fed. 145, the court says:

"The above citations from Mr. Smith's written communications to the commissioner, upon the faith of which the office acted, cannot now be excluded from consideration. They, in effect, restricted his application to a process in which hydrocarbon is decomposed by means of heated natural gas."

Having thus restricted his patent to the precise process described, it becomes important to ascertain the state of the art at the time the application for the patent was made. For this purpose the defendants offered in evidence a large number of prior patents granted for similar purposes. The complainant contends that these patents are not proper evidence, and cannot be considered by the court, because the defendants did not give notice in their answer that they relied upon such patents. Such notice is necessary only when the defendant relies upon such patents as anticipating the plaintiff's invention. When prior use is claimed, the statute requires that the plaintiff shall be given notice in the answer of the name of the patentee, and the number of the patent under which such anticipation is claimed. But, merely for the purpose of showing the state of the art, proof may be offered without any prior notice in the pleadings. For the purpose, therefore, of enabling the court to construe the patent in suit, and ascertain its proper scope and limitations, the proof of the prior state of the art is perfectly competent. In *Vance v. Campbell*, 1 Black, 427, the court says:

"Several exceptions were taken to the admissibility of evidence offered by the defendants, but it was competent and relevant, as showing the state of the art at the date of plaintiff's invention. No notice was necessary in order to justify the admission of evidence for this purpose."

In *Eachus v. Broomall*, 115 U. S. 429, 6 Sup. Ct. 229, Justice Matthews said:

"A comparison of the two patents requires an interpretation of the original patent in the light of the state of the art at the date when the application for

it was filed. And we have the material for ascertaining its meaning in that view by means of the evidence on that point contained in the record, which, although objected to on the ground that no prior knowledge or use of the invention claimed had been specifically set up in the answer as a defense, was nevertheless admissible for the purpose of defining the limits of the grant in the original patent, and the scope of invention described in its specification."

Of the same effect is the decision of the supreme court in the case of *Brown v. Piper*, 91 U. S. 37.

The effect of the limitations of the patent in suit by the prior state of the art is that unless the patentee is a pioneer, and has invented something new in the art, and not a mere improvement over what has been done before, or described in prior patents, he cannot invoke the doctrine of equivalents, to bring within the scope of his patent devices or processes which do not embody or make use of all the features expressly described and covered by his claims. Kennedy's patent is for a process in which sulphate of copper is used in solution. He could not have obtained a patent for the use of copper alone in extracting sulphur from oil, for many prior patents covered such a claim. He cannot now contend that his patent covers the use of copper in any form, metallic or as a salt, without the combination he specifies in his patent. In that specification he claims to use sulphate of copper (blue vitriol), with caustic soda and common salt, in about equal quantities, dissolved in water. His first claim covers the combination of sulphur in the oil with the metallic matter contained in the solution above named. He claims that his process converts the sulphate of copper into an oxide, whereas Prof. Chandler, of the Columbia College (an expert of high character and standing), has demonstrated that it is converted into hydroxide. The solution is an important part of his process, for dry oxide of copper will not purify the oil. Prof. Chandler, in his testimony, says he tried the experiment, and demonstrated that it would not. The use of dry oxide of copper, without caustic soda and salt, is, therefore, not the Kennedy process. The solution of the ingredients named, in the proportions stated, is therefore an important and essential step in the patented process, and any process which does not include it is not an infringement. Kennedy does not claim that he was the discoverer of the fact that copper has a strong affinity for sulphur. Mr. Schultz, a witness for the complainant, says:

"I also said there was an affinity between sulphur and the oxide of copper. This is common knowledge, and has been, I would not say for one hundred years, but ever since chemistry has been brought to a scientific basis,—for twenty-five years, anyhow."

Mr. Alexander, also a witness for the complainant, says:

"It is a law of nature that the oxide of copper combines with sulphur to form sulphide of copper, that being a law of nature."

Mr. English, a witness for the defendants, says:

"I used sulphate of copper twenty-eight years ago, and I used a pole in the agitator. That was in London, Canada."

Prof. Chandler, the expert for the defendants, says:

"I find from the prior state of the art, as I have described it, bearing upon the alleged invention, that the art of purifying, desulphurizing, and deodoriz-

ing hydrocarbons, liquid or gaseous, dates from the beginning of the century, and a great variety of processes have been devised and employed for this purpose. It was discovered at the very beginning that, in order to successfully remove the sulphur from hydrocarbons, liquid or gaseous, it was desirable to make use of some metal possessing a strong affinity for sulphur. These metals were applied sometimes in the metallic state, but more frequently in the form of oxides, hydrated oxides, or salts. In looking over the various processes I have described in my last answer, and numbered one to forty-five, I find that each and every one of the agents which enter into the composition of the Kennedy solution has been previously employed."

Prof. Chandler then gives various instances in which sulphate of copper was a part of the patented process, viz.: Laming & Evans, British patent, 1850; John Leslie, British patent, 1860; Baggs & Simpson, British patent, 1863; Arthur Wall, British patent, 1864; John Rowsell, United States patent, 1884,—and many others who make use of metallic salts, leaving the selection of the particular salt to persons skilled in the art. Also, it was a matter of common knowledge that oxide of copper, and the hydroxide of copper precipitated by the combination of sulphate of copper and caustic soda, but called "oxide" in the Kennedy patent, were used before that time by Edward Heard, in British patent, in 1806, the Laming & Evans British patent of 1850, and the other patents cited in Prof. Chandler's testimony.

Mr. Kennedy showed, by his testimony in reference to the use of copper, not only that he was in no sense an inventor or discoverer of the use of copper as a purifier or desulphurizer, but in his further testimony he very clearly shows that he does not know what he claims to have discovered or invented, and that in fact no inventive act was performed by him. For instance, the following occurs in his testimony:

"Q. Have any of these various works in which you made experiments you have referred to adopted the process? A. Not in whole; in part. Q. In what part? A. They are using caustic soda. Q. In what way do these persons use a part of your process,—use caustic soda? A. They use it with litharge. I consider that a part of my process. I consider the use of any ingredients mentioned in my patent, whether alone or mixed together, as being the use of my invention to that extent. Well, it is my invention, of course. It was me that invented that, and they adopted it. They adopted the litharge and caustic soda, but it does not do the work perfectly, like mine. I consider that the use of my invention, to that extent. Not the litharge, but the caustic soda, is a part of my invention. It is covered by my Canadian patent. Q. But not by the United States patent? A. The caustic soda is not necessary with the copper. It can be used. * * * The copper will work with the caustic soda, or without it. * * * Caustic soda is not necessary. You can use salt. If you use salt, it is not necessary to use caustic soda."

In his later testimony he says:

"Having sulphate of copper and caustic soda, I can't tell the real effect of adding salt. I just put these things together, and found they did the work. I don't know that there is any advantage of having both, but that is the way I discovered it. I put it in at the time I did it. I supposed it was necessary, but I do not know but what either of them would do. If I should drop any, I think I would drop the soda."

This is hardly proper testimony upon which to base the claim that the patentee invented the use of caustic soda, and that the use of

that alone, as well as the use of copper alone, is protected by his patent.

Again, it appears clear from the testimony that caustic soda was used long before Kennedy's patent. Henry Tomlinson, complainant's witness, says:

"Caustic soda has always been used in refining oils, since I was in the business,—fourteen or fifteen years. It has been used in solution; it has been mixed with litharge (oxide of lead); it has been poured into the oil."

Robert Scott, complainant's witness, says:

"Prior to Mr. Kennedy's experiments, soda has been used in the purification or desulphurization of petroleum."

Royal Burgess says:

"I am acquainted with the use of caustic soda in connection with Canadian oil for about twenty years. It is notorious and public, and everybody that knows anything about oil knows, that caustic soda is used in manufacturing, treating, and deodorizing."

Prof. Chandler says:

"Caustic soda has been frequently employed as an agent for purifying, deodorizing, and desulphurizing hydrocarbons, gaseous and liquid. So used by Edward Heard, British patent, 1806; S. W. Pugh, England, 1858;" and other patents, a long list of which is given in his testimony.

The use of common salt was a matter of common knowledge long before the invention claimed by the complainant. It has frequently been employed as an agent for purifying and desulphurizing hydrocarbon gases and oils, or as a component in a mixture for that purpose. So used by Stephen White, English patent, 1856; S. W. Pugh, English patent, 1858; William Maltby, English patent, 1859; and others. Illustrations from various patents offered in evidence by the defendants show that the uses of copper, caustic soda, and salt were common, and within the knowledge of those who had any interest in chemistry or patented processes, long prior to the time of the complainant's patent. In 1855 Benjamin Fulwood used oxide of copper in purifying oily, bituminous, and other matters. In 1855 Richard A. Tilghman stirred into the oil oxide of copper or oxide of lead sufficient to combine with the sulphur; and states that, after stirring, the sulphuret of lead or copper is allowed to settle at the bottom, the fatty body is then drawn off, to be distilled in the usual manner; and states that the metallic lead or copper, or peroxide of manganese, may be used; and speaks of the strong affinity which copper has for sulphur or phosphorus. Caustic soda and common salt were also used, as Prof. Chandler claims. In 1856 Stephen White used common salt and neutral chromate of potash. In 1858 Pugh used caustic soda, caustic potash, and chloride of sodium (common salt). In 1867 Orazio Luga, for deodorizing petroleum, used chloride of sodium (common salt), and caustic soda.

A few of the patents cited in evidence only are here referred to, as showing the state of the art at the time of the complainant's alleged invention. From these references it is clear that the state of the art at the time of the alleged invention shows that the affinity of all metallic salts and oxides for sulphur was well known; that

the use of copper in purifying, desulphurizing, and deodorizing oils and gases was a matter of common knowledge, and has been since 1806; that the combination of sulphate of copper with caustic soda, with the resulting reaction and precipitate, was well known; that the oxide of copper, however produced, was used and well known as a proper form in which to exhibit the copper to the oil or gas for the purpose of combining with the sulphur; that both chloride of sodium and caustic soda were well-known agents for the same purpose. In view of these facts, we cannot concede the complainant's contention to claim either that he has in any manner invented or discovered the affinity of copper, in any form, for sulphur, or that he has in any manner discovered the affinity of oxide of copper for the sulphur in hydrocarbon oils or gases, or that he was in any manner the pioneer in the use of copper salts or copper oxides in the desulphurization of sulphur-bearing oils or gases, or that he was in any manner the inventor or pioneer in the use of caustic soda for any of these purposes. Availing himself of this common knowledge, he describes a process which involves four distinct steps: He first prepares the chemicals, by mixing them in equal proportions in water, and putting this solution in with the oil. He next heats the whole until near the boiling point, and then allows it to cool. He then permits the chemicals to settle, and separates them. He next removes the traces of soda, copper, and salt left in the oil, either by distillation, or by the ordinary Pennsylvania process. Having proceeded in this way, he claims that the oil will be left free from sulphur at the end of the third step in the process, and free also from traces of metallic matter at the end of the fourth step. But it is contended by the defendants that, if this process is followed as the plaintiff has described, the result will not follow as claimed in the patent. In other words, the defendants contend that the utter want of utility is such that no patentable novelty exists. In support of this contention, it is urged that the patent granted in 1887 has never been in practical use, although it was offered to a great many refiners, both in Canada and America. While it is true that the extensive use and sale by the public of a new device is evidence of its utility, and suggestive of its novelty, the reverse of the rule is also true; but this may be explained by the inability of the patentee to introduce it, for want of means, or because of powerful competition and rivalry, or for other reasons. But it does appear from the evidence that this invention was offered to a large number of refiners, but none of them has ever adopted it, or made a barrel of oil from it. The proof shows that it was offered to the Crystal Refining Company, at Toledo; the Eagle Consolidated Refining Company, of Lima; the Cleveland Refining Company, and Scofield, Shurmer & Teagle, of Cleveland,—all of which are rival institutions to these defendants. It is not to be presumed, therefore, that they declined the use of the process from any desire to favor the defendants. The failure to adopt this process is clearly shown to have been because of its want of utility. Various experiments were made in the several refineries, and the process was rejected because the results of such experiments were unsatisfactory. Complainant undertakes to explain the failure

of these different experiments, and does so in part; but other witnesses, disinterested, say that the experiments were unsatisfactory, though Mr. Kennedy was given a fair opportunity to put them in operation. Mr. Royal B. Burgess, who was the superintendent of the Imperial Works at Petrolia, in Canada, when the complainant made the experiments there, says that the whole work was done under the complainant's superintendence and direction; that the result was not as good as the old Canadian process of putting oxide of lead and caustic soda into the oil after treating it. He says the oil treated by Kennedy was neither desulphurized nor deodorized, would not "stand the doctor," was off color, clouded the chimney, smoked, crusted the wick, and gave offensive odors. In this he was corroborated by the testimony of William English, of the same works. In the experiments at the Crystal Works, in Toledo, Mr. Kennedy himself gave evidence that the process would not do what he claimed for it. In his letter to Neilson, dated Petrolia, September 13, 1891, he says:

"I think I told you it was necessary to have steam in the still to keep down the temperature during distillation. If you had steam in, once it gets sweet, it will not develop sulphur any more, and what remains in the still will be perfectly sweet, as, with steam in it, the temperature will not get up high enough to develop any sulphur to the end of the run. I think you had very good success in getting a little over sweet, the way you tried it. There is no use to try it without steam."

This was written only 6 months before the institution of this suit, and 3½ years after the date of his patent, and after he had experimented in a great many refineries in both Canada and the United States; and the result of these experiments was, to use his own language, "there is no use to try it without steam." This was very important testimony, and is a step in the process not hinted at in the specifications in his patent, or in either of his claims. His failure to make this a part of his process in his claims is fatal to it. In the case of *O'Reilly v. Morse*, 15 How. 62, Chief Justice Taney says:

"Whoever discovers that a certain useful result will be produced in any art, machine, manufacture, or composition of matter by the use of certain means is entitled to a patent for it, provided he specifies the means he uses in a manner so full and exact that any one skilled in the science to which it appertains can, by using the means he specifies, without any addition or subtraction therefrom, produce precisely the result he describes. And if this cannot be done by the means he describes the patent is void."

It is not necessary here to review in detail the testimony concerning the experiments made by Kennedy at the works of the Eagle Consolidated Refining Company, the Cleveland Refining Company, Scofield, Shurmer & Teagle, John McWilliams Refinery, and the Petrolia Crude Oil & Tanking Company. But evidence of its inutility is not only to be found from the testimony of these unsuccessful experiments made in so many different places, covering a long period of time, but we have the testimony of Prof. Chandler, the defendants' expert, who made three sets of experiments for the purpose of determining whether the result claimed would follow the process described in the patent. He purchased his own materials, labeled them, made a record of the experiments, and in his evidence produced

the result; offering the materials used in his experiments in evidence, and proposing to repeat the experiment in the presence of complainant and his counsel, if they desired. As the result of the first experiment, he found the product was not free from sulphur, not pure, had an offensive odor, would not "stand the doctor," clouded the chimney, incrustated the wick, and produced an offensive odor in burning; in fact, did not accomplish any of the things claimed for it in the patent. The result of the second experiment was that both the products resulting therefrom were offensive, not free from sulphur, not pure, would not "stand the doctor"; when burned, clouded the chimney, incrustated the wick, and emitted offensive odors. In the third experiment, Prof. Chandler, to get a comparative result, took a part of the same distillate produced by him from Lima crude, and gave it the ordinary Pennsylvania treatment of sulphuric acid and caustic soda, and with the same result, exactly, as when he used the complainant's process; one being no better and no worse than the other, neither having removed the sulphur. In connection with his testimony, he offered an exhibit of the lamps, wicks, and globes used, to show that the oil, as the result of this process, was not free from sulphur. This testimony of Prof. Chandler's was taken in June, 1893. No effort has been made to contradict it by the experiments made by any competent experts. It is true that the complainant did make some experiments by two experts who came to the office of complainant's solicitor, as the result of an advertisement in a New York paper. They were employed by him to make the experiments to demonstrate that the process described in the patent would produce the result claimed. These men were young and of little experience. They testify themselves that the materials with which they made the experiments were furnished them by the complainant's solicitor; that they did not know where they were procured, or whether they were pure and genuine; and that the tests were made under the direction of complainant's solicitor. The results are testified to by them, but the material with which they made their experiments was not offered in evidence, and no means afforded of verifying the correctness of their conclusions. This testimony is not satisfactory to the court. There are many suspicious circumstances surrounding these and other experiments made by these and other witnesses. No means of verifying them are left open, and no offer is made to repeat them in the presence of defendants' counsel or their expert. So many processes are known by which oils can be purified and deodorized. These experts were produced, and sweetened oil was offered in evidence as the result of their experiment. Now, an experiment, to be satisfactory to the court, ought either to be performed in its presence, or else the evidence ought to be entirely satisfactory that the materials used were genuine and pure, and that the process followed was as stated. So far as the experiments made by Prof. Chandler are concerned, they are satisfactory. The materials offered were produced in evidence, and, as before stated, the professor offered to repeat the experiments in the presence of the complainant's solicitor, or his experts, or in any other way that might be deemed satisfactory to complainant

or his counsel. But as to the experiments made on behalf of the complainant, as before stated, the proof is not so satisfactory, and, taken together with all the testimony in the case, establishes to the satisfaction of the court that the process described in the complainant's patent will not produce the result claimed. To sustain this conclusion of the court as to the unsatisfactory character of these experiments, the testimony shows that, by the Canadian process, oil that will "stand the doctor" may be produced. Archibald McDonald and William Holgate, two witnesses in the case, both swear positively that the caustic soda used in the chemical mixture put into the oil was the doctor, viz. plumbate of soda, which is composed of caustic soda and litharge (or oxide of lead) mixed together. So that by using the old and well-known Canadian mixture of litharge and caustic soda, by which all their oil is made to "stand the doctor," together with copper compound in inordinate quantities, complainant got a little oil by distillation that stood the test of litharge and soda, when applied to it. The testimony of these witnesses is uncontradicted. No one denies the use of the plumbate of soda, instead of caustic soda, in these experiments. Complainant refuses to give any explanation of their story. But Prof. Chandler testifies that he made the same experiments, following just what the witnesses say Kennedy used, and he got no oil that would "stand the doctor." He also made experiments, and substituted plumbate of soda for caustic soda, and some fractions of oil, caught in samples, did "stand the doctor." After the testimony of the witnesses was taken as to the experiments at Petrolia, Prof. Chandler read that testimony, and then made experiments to determine whether the results testified to by them could have been reached by the process claimed in the patent. He was convinced that the results they did reach were brought about by the substitution of plumbate of soda for caustic soda in making up the Canadian mixture by which the oil was tried. His experiments completely confirmed him in this conclusion. He says:

"There is no other explanation to reconcile the results alleged to have been obtained with those which have followed my own investigations and experiments on the subject. It was the testimony of these witnesses that led me to make the experiment with plumbate of soda (the doctor), as some of them stated the plumbate of soda was the material used, in the still with the oil."

After carefully examining the testimony with reference to the complainant's experiments, and those of Prof. Chandler on behalf of the defendants, I have come to the conclusion that the patentee did not describe in his specifications, or state in his claims, a process which would produce the result contended for by him. I therefore find that there is not sufficient proof of novelty to sustain the patent, and that the same is invalid.

The proof of infringement is also deficient. The burden of making out the charge of infringement rests, of course, upon the complainant. This is well settled by repeated adjudications of the courts, and does not require the citation of authority. Complainant's witnesses substantially admit that the defendants do not use either caustic soda or common salt in their process. They do use a

copper scale, some sort of metallic copper, but not a sulphate of copper. The complainant claims that his process produces oxide of copper. Prof. Chandler testifies distinctly that it produces hydroxide of copper. Complainant cannot now claim that these are equivalents, because there is no proof in the record to show it. That they are not to be regarded as the same thing, in a patented process, we refer to the case of *Hills v. Gaslight Co.*, 9 Jur. (N. S.) 140. In that case the plaintiff claimed as his invention "the purifying of gas from sulphuretted hydrogen, etc., by passing it through the precipitated or hydrated oxides of iron, from whatever source obtained." The defendants in that case used for the purification of their gas a natural product or substance found in Ireland, called "bog ocre." It was held that the use of bog ocre, so long as the same was used in its native state or condition, was not an infringement of complainant's patent. The patent calls for the ingredients in fixed proportions, viz. 1 pound each of sulphate of copper, caustic soda, and common salt, dissolved in 2 gallons of water, for every 40 gallons of oil to be treated. It is to be noted that in Kennedy's experiments no regard was paid to the proportion of these ingredients. Now, in a process patent, the proportions, if fixed, must be substantially used in the infringing process, to make the user liable. *Tyler v. Boston*, 7 Wall. 327. As before stated, the proof of infringement in this case is very unsatisfactory. A hard, metallic substance was produced by the complainant's witnesses as the dry oxide of copper used by the defendants. It is a solid compound of iron oxide and copper oxide, and, to mix it with the oil to be treated, it must first be ground to powder, and only a small part of the copper can be utilized. Kennedy himself says in his testimony that not more than one-fifth of it can be so used. Kennedy dissolves his chemicals in water, in order to cause them to mix with the oil. The substance which it is alleged the defendants use cannot be dissolved. There is no claim that the proof shows the use of any soda or salt by the defendants. The solution in water is an essential step in the Kennedy process, and obviously cannot be used by the defendants. The next step of Kennedy's treatment is thus described in his patent:

"This solution [of blue vitriol, caustic soda, and salt in water], with its precipitate, is then put in the still with the oil, and when the oil boils the precipitate (oxide of copper) dissolves, and combines with the sulphur of the oil, forming sulphide of copper, which, with the greater portion of the solution remaining in the oil, settles to the bottom when the oil is cool, and can be drawn off."

It cannot be claimed that this boiling of the oil is distillation, for it precedes distillation, which occurs after the oil has become cool and the precipitate settled. If distillation was meant, the oil would have passed out of the still in vapor, so that there would be no oil left in the still for the greater portion of the solution to remain in and settle to the bottom. Again, the boiling point of water is so much lower than the boiling point of the oil that the water would all be evaporated before the oil was distilled. Therefore it would be impossible to draw off the solution from the oil. It is evident, therefore, that the oil is to be heated, and the solution and combined

chemicals drawn off, before the distillation of the oil takes place. The last step is the removal from the oil of a trace of the soda, copper, and salt, which is effected by washing with water, sulphuric acid, and soda. This trace, it will be noted, must be held in combination mechanically, which shows that the ingredients had not united with the sulphur of the oil, or they would have been precipitated. As before stated, there is absolutely no proof that the defendants used any one of these several steps of treatment. There can, therefore, be no infringement by the defendants of the patent in suit, as they do not use the ingredients in the same proportion, and the oil is not treated in the same way. It will be observed, from the reading of the bill, that the defendants are not called upon by interrogatories for any disclosure of the process used by them in curing their oils. The complainant has therefore chosen to rely entirely upon his own witnesses to show infringement. Many of these witnesses were men formerly in the employ of the defendants. They described the process used to the best of their knowledge, and they are, no doubt, truthful in their statements; but they are not intelligent,—are not able to give any connected and satisfactory account of the process used. For instance, all these witnesses concur in the statement that some hard, metallic substance was used, after being burned and ground. One witness (Henry Miller) produces a piece of this compound, which he says he got from the floor of the mill of the defendants, where they were dumping the sacks in which the material came. Another witness (Huntz), also called by the complainant, when shown this compound, declares that it is nothing like that used by the defendants; that he never saw anything like it about their works; that it was not like it in any way, and not like it in weight. This kind of testimony may be sufficient to create a suspicion that the defendants are using, to some extent, some of the ingredients embraced in the complainant's patent and process, but it is not of a character to justify a court in finding infringement. A mere guess at a process used, or a description of a process, by an ignorant witness, without clearly showing the chemical combinations that are used, is not sufficient to overthrow the testimony of such a learned expert as Prof. Chandler, who, after reading the testimony of these witnesses, undertook to carry out the process they described, and testifies that it did not result, in any instance, in curing the oil so as to make it a marketable product. Thus, Mr. Kennedy himself, in commenting upon the testimony as to the defendants' process, says:

"That to dissolve the copper is the only good process that he knows of; the grinding it up is a cumbersome waste of material because in that state they cannot get the benefit of all the copper at all,—I don't believe, one-fifth of the copper. You can't get it fine enough. There is a heavy waste in burning this oxide of copper every time, which can only be repaired by adding new material—fresh copper—to it."

Kennedy's process, to repeat again, is to take equal parts of sulphate of copper, caustic soda, and common salt, dissolve in water, and put the solution into the still with the oil, heat the whole to the boiling point, let it cool, and draw off the chemicals, and at that

stage of the process the work of desulphurizing and sweetening the oil is complete; all that remains being to remove any trace of copper, soda, and salt remaining in the oil, by distillation, or the ordinary sulphuric acid treatment. Now, the process testified to by the complainant's witnesses as that which is used by the defendants is to take their ingredients, whatever they may be, burn them to a red heat in a furnace, then take them to a crusher, and crush them, then to another furnace, and burn them again, and then to a mill, and grind them, then to a bolter and sifter, and sift them to a fine powder, like flour; and this powder is applied by putting it into the oil, and pumping it into cylinders attached to the stills, through which the vapor must pass during distillation, and contact thus obtained with the vapor, in one case, and in the other case, after the oil is distilled, applying the compound to the distillate in a sweetening still, with a drag in motion to keep it stirred up, and distilling again in the presence of the compound. There is no similarity in these treatments, and the latter cannot, in any manner, be claimed to be an infringement of the former. But the complainant's experts insist that the two processes are chemically the same, Mr. Alexander claiming that "the essence of the patent, in both cases, consists in the law of nature that the oxide of copper combines with sulphur to form sulphide of copper," and Mr. Schultz claiming that, "chemically speaking, there is no difference between the two processes. Both use oxide of copper, and have used it to produce the same result. They manufacture oxide of copper, then they mix this with sour oil, apply heat so that the sulphur in the oil will combine with the oxide of copper. After that, they separate the oil from the residue." The claim on behalf of the complainant is, then, that the two processes produce the same result; that the burning of the copper scales by the defendants in the open air forms oxide of copper. Kennedy produces the same result by dissolving the sulphate of copper, caustic soda, and salt. But both Alexander and Schultz ignore the claim of the Kennedy patent that the desulphurizing agents form a mixture, by aqueous solution of these three ingredients, which, when applied to the oil, and the whole heated, will complete the desulphurization. They ignore the method of application, the quantities of the ingredients used, and the important fact that the testimony shows that the defendants do not use the ingredients named in the patent in any combination whatever, and do not apply them in the same way, or in any other way. Considering all this testimony, Prof. Chandler says:

"I understand the witnesses for complainant to testify that distillation is always an essential feature of the process of purification employed by the defendants. It is a fact that the oil undergoing purification, as testified to by complainant's witnesses, is, in the vapor form, in the presence of defendants' compound; the compound being in the still, or in the cylinders connected with the still. In the patent in suit there is no suggestion of treating the oil while it is in vapor form, or of the oil being, in vapor form, in contact with the purifying solution. On the contrary, it is clear that the oil is to be in liquid form while it is in contact with the purifying solution, and the solution is to be drawn off before the oil is subjected to any further treatment. In one case, the further treatment is simply treatment with acid; in the other case, it is distilling. The inference I draw from the description in Kennedy's patent is that the alleged purifying material is to be drawn off (line 30) and

the oil then distilled (line 31); that it is not the intention of the inventor to distill the oil until after the solution containing the chemicals shall have been withdrawn. This is consistent with the theory of the process in the patent, for he says that the purification takes place when the oil is brought to a boiling temperature; that the sulphur combines with the copper, and settles to the bottom with the greater part of the solution. There is no object, therefore, in leaving the solution in contact with the oil during the process of distillation, but serious objections to it, especially the danger and difficulty of distilling oil in contact with water and a sediment of the character of the precipitate contained in the Kennedy solution. First, the danger of boiling over, on account of the difficulty of regulating the distillation in such mixture; second, the danger of precipitate caking on the bottom, burning out the still. It is evident, therefore, that the intention of the Kennedy patent is not that the oil should be distilled in contact with the solution, but that the purifying solution should be withdrawn from the still before distillation is undertaken. This is also shown by the statement beginning on line 35,—that, instead of distilling the oil to remove the traces of soda, copper, and salt, they may be washed out with water, sulphuric acid, and soda."

In view of this important testimony, the language of Judge Dyer in *Rowell v. Lindsay*, 6 Fed. 290, has direct application:

"It is a settled rule of law that, where a patent is for a combination of known parts, it is not infringed by the use of any number of the parts less than the whole; for the patent, in every such case, is for that identical combination, and nothing else, and a combination of any less number of parts is a different thing. The combination is an entirety. Unless it is maintained as such, the whole invention fails. If one of the elements is given up, the thing claimed disappears. The different parts may perform more or less important functions, but each and all are essential to make the thing which the patentee has claimed as his invention."

It appears clear from this testimony that the proof as to infringement is wholly wanting. There is nothing to show that the defendants use an aqueous solution, of equal parts or unequal parts, of copper, soda, or salt, and nothing to show that they apply the ingredients in such solution to the oil; nothing to show that they heat the oil and the solution to the boiling point, and then allow the whole to cool, and the chemicals to settle, and draw them off; nothing to show that they distill and remove the trace of metallic matter held in the vessel mechanically. But it does appear from the testimony of the complainant's witnesses that the defendants do not use either the soda or salt in their process for desulphurizing petroleum. It is shown affirmatively from complainant's witnesses that the defendants keep the oil in their stills continually agitated, and that if this agitation ceases the oil begins to smell badly. This is sufficient to show that the defendants' process is entirely different from that of the complainant. For these reasons, the court reaches the conclusion that there is no proof of infringement, and that the bill must therefore be dismissed.

I have given this case very careful consideration. I recognize the fact that the complainant has labored under some difficulties in prosecuting his suit. I have repeatedly extended the time for him to deposit money to secure the costs in the case, and given him every indulgence and every opportunity to present all his testimony, and to procure it in the most expeditious and economical manner. But I am impressed with the fact that he has wholly failed to make out his

case, and that the conclusion reached by the court is abundantly justified by the evidence in the case. A decree may therefore be prepared, dismissing the bill, as before stated.

OHIO RAKE CO. v. DAYTON FARM IMPLEMENT CO.

(Circuit Court, S. D. Ohio, W. D. July 22, 1895.)

No. 4,587.

1. PATENTS—NOVELTY AND UTILITY—Disk HARROWS.

An arrangement of the two gangs of disks in a disk harrow, having outwardly curved disks, whereby one gang is placed in advance of the other, and the innermost disk of the rear gang travels between the tracks of the two inside disks of the other gang, so as to leave no ridge between the gangs, and cultivate the ground evenly, which result had never before been attained, *held* a novel and useful invention.

2. SAME—INFRINGEMENT.

A claim for a disk harrow, having the ends of the two gangs of disks overlapping, with the innermost disk of one gang "working between the innermost two of the other, substantially as herein described," is not restricted so as to require that such disk should revolve bodily between the other two, but is infringed by a harrow in which the innermost disk of the rear gang follows between the tracks of the inner two disks of the other, though not so near as to have any part of it between them.

3. SAME—HARROWS.

The Dorsey patent, No. 344,950, for an improvement in disk seeders and cultivators, *held* not anticipated, valid, and infringed.

4. SAME.

The Little patent, No. 418,199, for an improvement in disk harrows, and relating especially to the construction of a hinge for coupling the gangs of disks to the main frame, is void, as involving merely mechanical skill.

This was a bill by the Ohio Rake Company against the Dayton Farm Implement Company for alleged infringement of two patents relating to disk harrows.

Joseph G. Parkinson, for complainant.

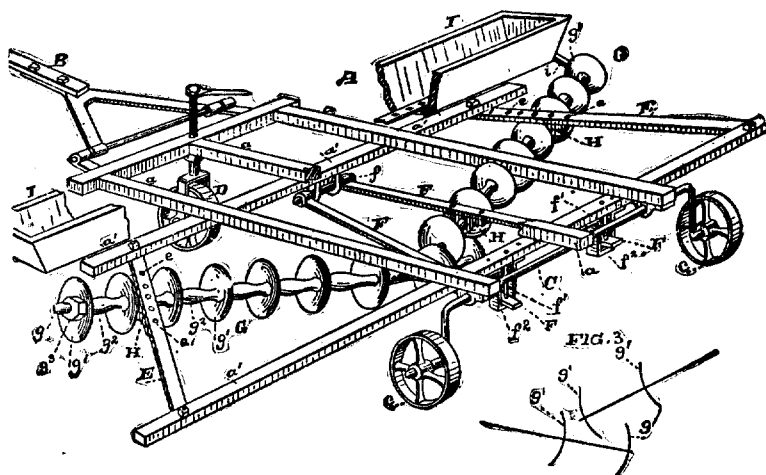
Stem & Allen, for defendant.

SAGE, District Judge. This is a suit on two patents, owned by complainant,—No. 344,950, issued July 6, 1886, to Basil C. Dorsey, for an improvement in disk seeders and cultivators; and No. 418,199, issued December 31, 1889, to P. E. Little, for an improvement in harrows. The Dorsey patent relates to a construction of disk harrows wherein two gangs of disks are pivoted to the main beam, one in advance of the other, and one gang arranged to overlap the other. The Little patent relates to a particular construction of hinge for coupling the gangs of disks to the main frame of the harrow. The only claim alleged to be infringed in the Dorsey patent is the first, which reads as follows:

"The disk gangs, G. the disks or cutters of which are cupped or concaved outwardly to throw the dirt from the center, said gangs having their inner or adjacent ends overlapping, with the innermost cutter or disk of one working between the innermost two of the other, substantially as herein described."

The defenses are (1) noninfringement; (2) lack of novelty, if the claim is to be broadly construed. Counsel for defendant call attention to diagram in Fig. 3 of the letters patent, to which the patentee in his specification refers as "a diagram showing the overlapping feature of the disk gangs," and contends that the two gangs of disks, as shown in the diagram, in addition to merely overlapping, bear a peculiar relation to each other, in that the innermost cutter of one gang is located bodily between the innermost two cutters of the other gang. He also calls attention to his claim that the construction of the harrow shown is such that no change of angle of the gangs to the line of draft can alter this peculiar relation of the innermost disks, which determines the place of the one actually and bodily between the other two.

FIG. 1.



The Dorsey patent is for an improvement in "disk seeders and cultivators." The invention consists of a frame upon the under side of which are adjustably secured at an angle to each other two shafts carrying disks. These disks are concave or cupped outwardly, and held in position by intervening spool-like castings surrounding the shaft, the whole construction being called a "disk gang." These gangs are so placed that they overlap at their inner ends, the innermost disk of one gang tracking between the innermost two of the other. In operation, as the machine is drawn across a field, the disks enter the soil, and, partly sliding therein, turn it over, and thoroughly pulverize it, their convex faces, inclined to the path of travel, tending to raise and throw from them in a shower the earth they encounter. This is claimed to be a great improvement—First, over the old method of cultivating by first plowing and then harrowing the soil; second, over all previous methods of using rolling disks to cut and pulverize it. Many devices have been invented and patented for accomplishing this result by the use of rolling disks. Among the first was to use disks dished or saucer-shaped. The

next step was to provide two shafts and sets of wheels or gangs, placed at an angle to each other, the tendency of one gang to make the machine go in one direction being counteracted by the tendency of the other in the opposite direction, so that the machine could be drawn straight across the field. Sometimes one gang was set in front of the other, but generally they were placed abreast, and so connected with the frame as to yield to the inequalities in the surface of the ground. But then, if the disks were cupped outwardly, there would be a strip of untilled land between the two gangs, and, if they were cupped inwardly, a ridge would be thrown up between them, which could not be leveled by the next passage of the machine without lapping more than half its width, and doing more than one-half its work the second time. The next improvement was to make the frames carrying the disk-gangs overlap a little, but this did not remove the difficulty. It only resulted in making the ridge narrower. Then—and this was as early as 1876—it was attempted to remedy this defect by abandoning the end to end arrangement of the gangs, and placing them tandem instead of abreast. The result was to reduce by one-half the width of the strip harrowed, without reducing appreciably the draft of the machine; so that arrangement was abandoned, and the gangs continued to be constructed abreast, with their disks cupped towards the center, which involved the objectionable ridge in the middle.

It is claimed that no remedy that was not fatal to the practical success of the machine was provided by any of the numerous inventors working in the art until Dorsey, by his patented machine, presented a simple and effective one. He, it is claimed, discovered that by placing the gangs at proper counterbalancing angles and approximately abreast, so as to work over an area as wide as their aggregate space, but with one gang slightly ahead of the other, and the ends overlapping just enough to enable the innermost disk of one gang to do its work between the innermost two disks of the other, the ground would be equally and evenly tilled, without leaving any ridge or uncultivated strip. The invention is described in the specification as follows:

"The disks are concaved or cupped outwardly, so that they throw the dirt from the center. The inner or adjacent ends of the disk gangs, it will be specially observed, overlap; the end disk of one gang operating between the end two of the other gang. This is an important feature of my invention, as it effects a result which, so far as I am aware, has never been done by a disk cultivator. Generally, the disk gangs abut as near as possible. If the disks are cupped outwardly, the innermost of each gang, throwing from the center, leaves a strip of uncultivated ground, while, if they are cupped inwardly, they throw up a ridge in the center, by reason of not being adapted, on account of their shape, to be brought close together; but by overlapping them, as I have shown, and cupping them outwardly, neither of these results follows, but the center is cultivated equally with the sides."

The court is of opinion that upon the record the complainant's device is novel and useful, and that it is patentable. That it is patentable seems to be conceded on behalf of the defense, which rests upon the proposition that the claim is not to be broadly construed, and is good only for the particular construction described and claimed; that is to say, to cover only a harrow showing two gangs of disks, not merely overlapping, but so adjusted that the innermost

cutter of one gang is located bodily between the innermost two cutters of the other gang. It is claimed for the defendant that the alleged infringing harrow is not of this particular construction; that, while the disk gangs overlap, so that in operation the cut or track of the innermost disk of one gang is between the cuts and tracks of the innermost two disks of the other gang, the innermost disk of one gang is not located between the innermost two disks of the other gang.

The defendant's machine is provided with two diagonally arranged disk gangs, the disks being cupped or concaved outwardly to throw the dirt from center. The inner ends of the gangs overlap. The innermost disks of the rear gang work between the innermost two of the other gang. As it is expressed in the brief for defendant: "In operation, the cut or track of the innermost disk of one gang is between the cuts or tracks of the innermost two disks of the other gang, but the innermost disk of one gang is not located between the innermost two disks of the other gang." Now, say counsel, if the words, "the innermost cutter or disk of one working between the innermost two of the other," are merely words of description of the operation of the harrow, if they are merely for further explanation, as contended for complainant, and the claim is to read as if these words were omitted, then defendant's harrow infringes; but if these words are words of limitation, and are intended to limit the structure to the peculiar one shown in the drawings, in which the innermost cutter of one gang is bodily located between the innermost two disks of the other gang, then defendant's machine does not infringe; and this entirely irrespective of the question whether Dorsey was the first to invent, and therefore entitled to a patent for, an overlapping disk harrow, broadly considered.

The defendant's contention is that the limit of Dorsey's patent is to a disk harrow in which the innermost cutter of one gang is located bodily between the innermost two disks of the other gang. Counsel call attention to the fact that the application as originally filed contained three claims intended to cover the overlapping features of Dorsey's harrow, as follows:

(1) "The disk gangs, G, overlapping at their inner or adjacent ends substantially as herein described."

(2) "The disk gangs, G, the disks or cutters of which are cupped or concaved outwardly, to throw the dirt from the center; said gangs having their inner and adjacent ends overlapping, substantially as herein described."

(3) "The disk gangs G, the disks or cutters of which are cupped or concaved outwardly, to throw the dirt from the center; said gangs having their inner or adjacent ends overlapping, with the innermost cutter or disk of one working between the innermost two of the other, substantially as herein described."

These claims were objected to in view of patent to Nishwitz, December 7, 1869, for revolving harrows. Claims 1 and 2 were then erased by Dorsey, but he insisted that, as to the third claim, it was not met by Nishwitz's patent, because that patent "does not describe or show the gangs so arranged that the innermost cutter or disk of one gang works between the innermost two of the other gang. This claim, which specifies the location of the parts so clearly, should receive favorable action." Thereupon the patent was al-

lowed with original claim 3, which became claim 1. I do not think that the complainant's patent is subject to the limitation sought to be placed upon it. The language relating to the operation of the disk gangs is, "With the innermost cutter or disk of one working between the innermost two of the other, substantially as herein described." That refers, in its true construction, to the placing of the first disk mentioned so that it works between the paths in which the other two work. It is a perversion to construe it as referring to the transverse distance between the axes of the disks, or the distance which one will travel in advance of the other. The defendant's machine is practically a copy of the patented machine in respect to the subject-matter of this claim, and, if the claim is valid, is an infringement.

Various patents are introduced in anticipation of the patent sued upon. The first to which defendant's expert refers is the Nishwitz patent of 1869. That has nothing in common with the patent in suit, except the concaved disks, and they are concaved outwardly, instead of inwardly. The gang frames overlap, but the innermost disk of one does not work or track between the innermost disks of the other, and the object of the Dorsey invention is in no respect attained.

In the patent to J. F. Pond of May 9, 1871, two series of cutters focus to each other, but do not overlap. Neither is set in advance of the other, and therefore they cannot overlap. The cutters are plain, flat disks, not cupped, having no capacity to throw the dirt in any way except by the mere angle of their planes to the line of travel. There is no anticipation in this device.

In the patent to F. Bramer, June 24, 1873, there are two disk gangs, but the disks are cupped outwardly and the gangs do not overlap each other, although the beams do overlap. The same may be said of the patent to S. G. Randall, March 18, 1873. Bramer's patent (185,209) of December 12, 1876, shows two gangs arranged one in front of the other, to give a double harrowing over one path of the machine, the inventor's invention being that one gang operating on the soil should move the dirt in one direction and the following gang should move it in the reversed direction. The Bramer patent of July 2, 1878, is not an anticipation. It has a double gang disk harrow in which the gangs do not overlap, and in which the disks are cupped outwardly.

In the Naramore patent of April 19, 1881, there are no disks at all, but mere quadrants, which are really cutting teeth, strung on shafts. There is nothing here in anticipation of the complainant's patent; nor is there in the patent issued to Wilson on the 30th of December, 1884, for revolving harrow, which shows two gangs, separated from each other endwise, and having disks cupped inwardly. The two gangs converge to a focus, rendering overlapping impossible. My conclusion is that the complainant's patent is valid, and that the defendant infringes.

The Little patent relates to hinges for gang frames of disk harrows, and, as stated by the patentee in his specification, "it consists in a peculiar construction of the hinge which connects the gang beam to the frame bar, whereby the united pivot serves both as the

pivot for the vertical play of the gang beam and for its angular adjustment." The hinge is a combination of the following elements: A plate having upturned ears, and rigidly secured to the gang beam; two angle brackets secured to the frame bar, from which depend two flanges, which lie by the side of the upturned ears, one of the flanges having an eye through it and the other a horizontal slot, and a movable bolt which passes through the slot, the two ears, and the eye, and is held there by a split cotter passing through its end or otherwise. The two angle brackets may be made in one, thus making a channel bracket; or in their place may be substituted simply a flat plate having the two depending flanges. The object of this hinge is to allow the gang beam to swing horizontally for the variation of its inclination to the line of draft, and also to swing or tilt vertically so as to follow the undulations of the ground.

The claims alleged to be infringed are:

"(1) The combination, substantially as hereinbefore set forth, with the double-jointed hinge, one member of which has an eye at one side and guide slot at the other, and the other member of which carries ears, of the removable pin or bolt passing through said guide slot, ears, and eyes to unite the members together and serve as a pivot pin.

"(2) The combination, substantially as hereinbefore set forth, of the plate, F, having ears, the lug, h, provided with an eye, the flange, i, provided with a horizontal guide slot, ears, and eye."

Except as to its alleged novelty with respect to the eye and slot, there is nothing new about the Little hinge. It was common to use substantially this kind of joint, even in disk harrows, prior to the date of the Little invention, and for the same purposes; but usually the horizontal swing of the disk beam and the gang was accomplished by providing one pair of ears with a vertical shank, which could operate in one or the other of the beams.

Patent No. 138,301, issued April 29, 1873, to Augustus C. Tower, for improvements in machines for pulverizing soil; patent No. 146,224, to Edwin Bayliss, January 6, 1874, for improvement in wheel harrows; patent No. 413,539, issued October 22, 1889, to William H. Nauman, for disk harrow; and patent No. 312,722, issued February 24, 1885, to E. Fowler Stoddard, for wheel harrow,—are relied upon as anticipations of the Little invention. It is only necessary to refer to the feature of the Stoddard patent, which relates to a hinge joint for the purpose sought to be attained by the Little joint. The construction of the joint of the Stoddard patent is as follows:

"To the under side of the main beam, at each end, where the joint is to be, a plate is bolted, having at its front and rear a pendent ear. One of the ears is narrow, and the other is wide, and represents a segment of a circle of which the short ear is the center. A spindle engages these two ears. The end which engages the segmental ears is at liberty to move horizontally through the spindle as a center of the sweeping motion. To the top of each beam which carries disks a plate is bolted at an intermediate point in the length of the beam. This plate is united to the spindle, and is incapable of any motion with reference to the spindle except the pivotal motion on a horizontal axis. The two plates are therefore articulated to each other by means of the spindle, and a universal hinge joint is formed. The spindle, as a spindle, forms the axis on which the tipping motion takes place, and the sweep of the spindle in the segment of the upper plate provides the vertical axis on which the adjustment for obliquity takes place."

Fig. 2.

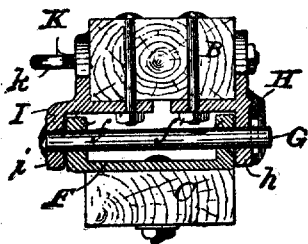


Fig. 3.

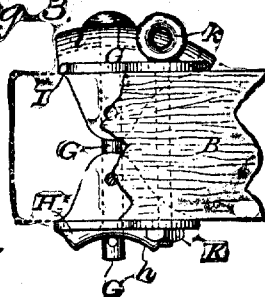


Fig. 1.

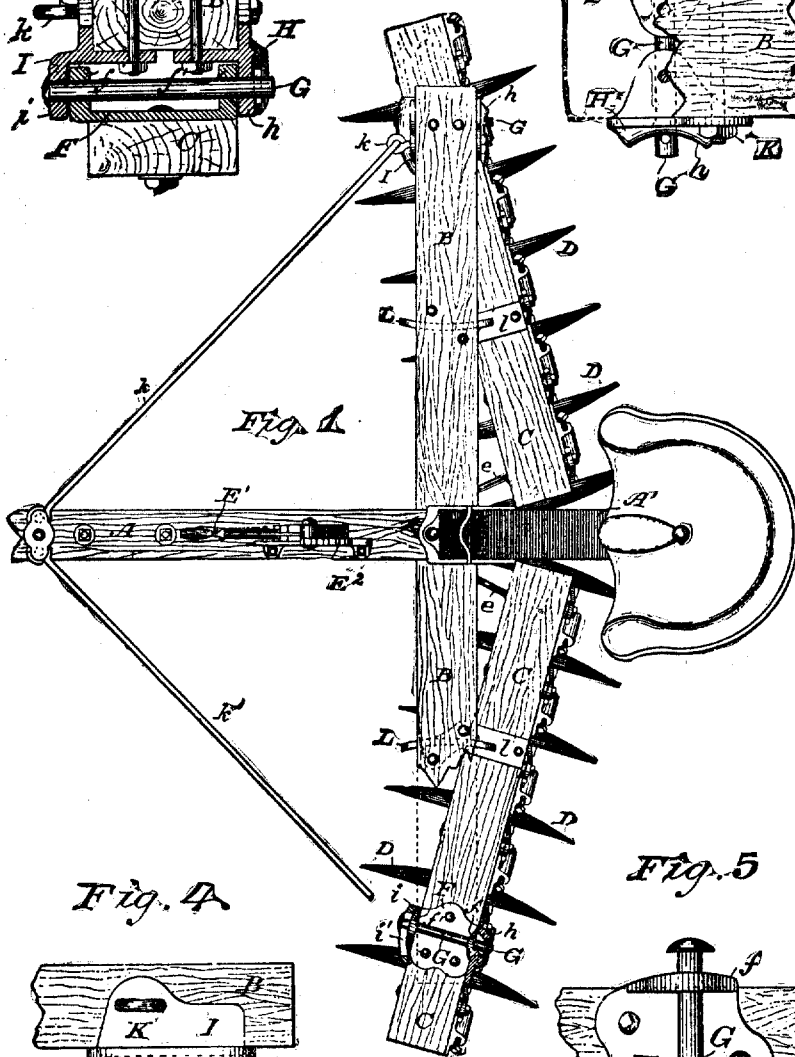


Fig. 4.

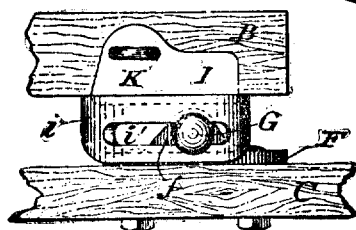
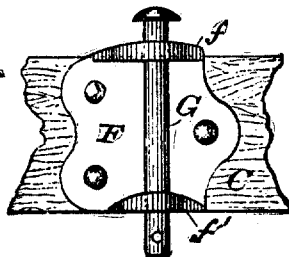


Fig. 5.



This description, which is taken from the testimony of the defendant's expert in a former case, described the Little hinge, with only the difference that in the Little hinge the spindle is not united to the plate which is bolted to the gang beam, although the plate is so connected to the spindle that it "is incapable of any motion with reference to the spindle except the pivotal motion on a horizontal axis."

In the hinge joint of the Little patented device, the lower plate carries the spindle as in the Stoddard patent, except that in the patent the spindle is formed integrally with the spindle plate, while in the Little patent the spindle plate has a hole to receive the spindle. In the Little patent the upper plate has a narrow ear for one end of the spindle, and the segmentally recessed wide ear for the other end of the spindle. The performance of the parts in furnishing a universal hinge joint is the same in the two devices. In the Little device the segment-carrying plate—that is, the upper plate—is formed in two pieces. In the Stoddard patent it is formed in one, which the expert for the defendant, from whose testimony in the former case the above statement is taken, justly characterizes as "a mere formal expedient to avoid the necessity for cores in forming the casting."

The expert seeks in this case to break the force of this view of the two patents by claiming that, while the Little hinge infringes the Stoddard patent, it is yet a patentable improvement over Stoddard. As he expresses it: "It was a case of Little's saddle on Stoddard's horse, the ownership of the saddle conferring no special rights to ride the horse." The answer to this is that the change made by Little from the spindle fixed on the lower plate to the loose pivot pin, and from the section plate to the slotted plate, involved only mechanical skill, and not invention. The court therefore holds the Little patent invalid.

Let the decree be prepared, in accordance with this opinion, against the defendant for the infringement of the Dorsey patent, and for an injunction and account, and dismissing the bill as to the Little patent.

MULLER v. LODGE & DAVIS MACHINE TOOL CO.

(Circuit Court, S. D. Ohio, W. D. July 22, 1895.)

No. 4,633.

PATENTS—LIMITATION OF CLAIM—INFRINGEMENT OF COMBINATION—TOOL HOLDERS FOR LATHES.

The patent No. 272,304, for a tool holder for lathes, is limited as to claims 2 and 4 by the language thereof, and especially, by the use of reference letters, to the particular devices described; and the combination is not infringed by a device which is without some of the parts named, or any equivalent thereof.

This was a suit by Conrad Muller against the Lodge & Davis Machine Tool Company for infringement of a patent for a tool holder for lathes.

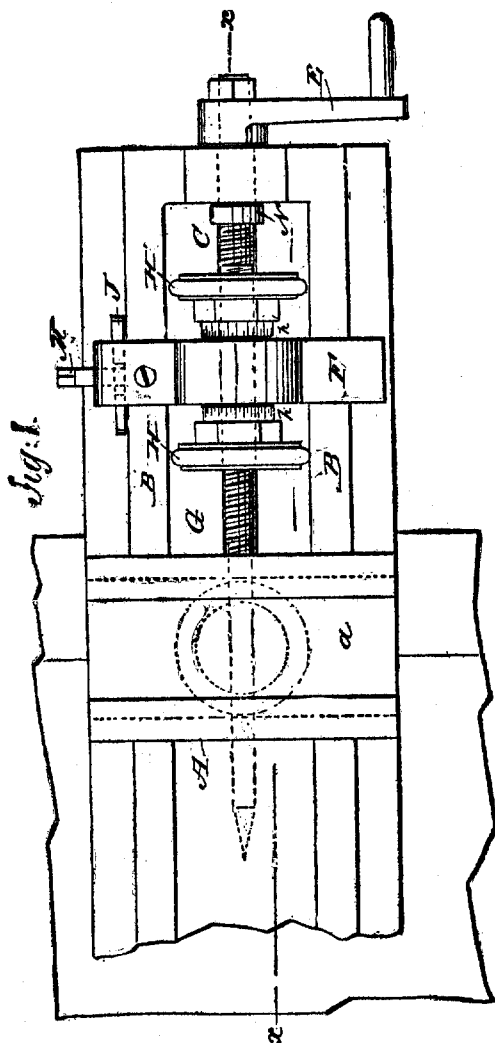
George M. Finckel, for complainant.

George J. Murray and Wright & Wright, for defendant.

SAGE, District Judge. Suit for infringement of patent No. 272,304, dated February 13, 1883, for tool holder for lathes.

Infringement is alleged of claims 1, 2, and 4, but counsel for complainant state in their brief that claim 1 may be ignored, and that it will suffice for the purposes of this suit to rely upon claims 2 and 4, which are as follows:

(2) "In a lathe, the combination with the slide or block, A, and the screw spindle, C, of the cross piece, F, the screw, G, and the nut, H, H', thereon, substantially as herein shown and described, and for the purpose set forth."



(4) "In a lathe, the combination with the slide or block, A, and the screw spindle, C, of the cross piece, F, the screw, G, the nuts, H, H', and a device for locking the cross piece, F, in position on the tracks, substantially as herein shown and described, and for the purpose set forth."

The defenses are noninfringement and anticipation by reason of prior public and common use of the device within this country prior to complainant's invention, and more than two years prior to the application for the patent upon which this suit is brought. Also lack of patentable novelty. This last defense, it is stated, is insisted upon merely for the purpose of limiting claims 1, 2, and 4 of the patent to the specific elements set forth therein. As to claims 2 and 4, which are the only ones relied upon, the elements which go to make them up are mentioned specifically and by reference letters, which fact operates to restrict the claims to the particular devices described. *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 58 Fed. 773; *Weir v. Morden*, 125 U. S. 105, 8 Sup. Ct. 869; *Hendy v. Iron Works*, 127 U. S. 375, 8 Sup. Ct. 1275. The first claim is defective in that it omits the crosspiece, which is necessary to the structure.

The defendant's device has not the swivel screw of complainant's patent, but instead a longitudinally movable screw, which is not threaded its entire length to receive nuts that would so clamp the bridge between them as to permit any adjustment within the limits of the lost motion of the main spindle. It has neither the nut, H, nor the nut, H', nor has it any equivalent of this device that could be employed to accomplish the result aimed at and attained by the patented device. It has instead a stop gauge. The defendant's device could not, therefore, work the same as complainant's, as is admitted by complainant's expert in answer to questions 243 and 279 in his deposition. The defendant therefore does not infringe. The claims being limited to the specific device described, and the defenses of anticipation and lack of novelty having been avowedly made for the purpose of so limiting the claims, it is not necessary to consider them. The bill will be dismissed, at the costs of the complainant.

CALIFORNIA FIG SYRUP CO. v. PUTNAM et al.

(Circuit Court of Appeals, First Circuit. July 26, 1895.)

No. 131.

TRADE-MARKS—DECEPTIVE LABELS—INFRINGEMENT—EQUITABLE RELIEF—66
FED. 750, AFFIRMED.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the California Fig Syrup Company against Kate Gardner Putnam and others to restrain the infringement of a trade-mark. The circuit court dismissed the bill for want of equity (66 Fed. 750), and the complainant appeals.

R. A. Bakewell, Paul Bakewell, Warren & Brandeis, and Louis D. Brandeis, for appellant.

Fish, Richardson & Storrow, Frederick P. Fish, and James J. Storrow, Jr., for appellees.

Before PUTNAM, Circuit Judge, and NELSON and ALDRICH, District Judges.

PER CURIAM. We agree with the reasoning and the conclusions of the circuit court in this cause, but we do not wish to be understood to approve all the cases cited in its opinion. It is sufficient to refer to *Medicine Co. v. Wood*, 108 U. S. 218, 2 Sup. Ct. 436, and to the underlying principles of *Church v. Proctor*, 13 C. C. A. 426, 66 Fed. 240, decided by this court February 2, 1895, as supporting the line of reasoning found in that opinion. The decree of the circuit court is affirmed.

THE MARY H. PACKER.

EASTON & A. R. CO. v. NEW ENGLAND TRANSP. CO.

(Circuit Court of Appeals, Second Circuit. February 9, 1894.)

TOWAGE—LOSS OF COAL BARGE—EVIDENCE.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by the New England Transportation Company against the steam tug *Mary H. Packer*, the Eastern & Amboy Railroad Company, claimant, to recover damages resulting from the sinking of libelant's coal box N. E. T. Co. No. 42 while in tow of the *Packer*. The district court rendered a decree for libelant in the sum of \$2,988.80, with interest and costs. The claimant appealed.

On the 18th of December, 1891, the tug, which had been engaged in towing fleets of coal barges, etc., between Perth Amboy and New York, had in tow a fleet of several tiers of boats, the libelant's coal box No. 42, loaded with coal, being the outside boat on the port side of the first tier. The tow left the oil dock near Port Johnson in the Kills early in the morning of the 18th for New York, and shortly afterwards libelant's boat sank. The evidence of libelant's witnesses was substantially to the effect that the tug and tow had reached a point in the Kill von Kull near the New Jersey shore, about opposite New Brighton, Staten Island, and abreast of the beacon opposite Constable Hook; that the tow was carried very close to the beacon, and that, when just about abreast of it, a shock was felt upon libelant's boat, and shortly afterwards she began to sink; that the tug was hailed, the towing line cast off from the injured barge, and the whole tow allowed to drift westward with the tide some distance, until the boat sank. The testimony in behalf of the claimant tended to show that the boat was unseaworthy, and was leaking at the time

of starting out in the morning; that the tow never got as far as the beacon in question, and did not go near enough to touch any of the rocks known to exist there; and that the sinking was due alone to her alleged unseaworthy condition. The following opinion was delivered by Brown, District Judge, in the court below:

"The contradictory statements of Wilkins, together with the denials of material facts stated by him, lead me to reject his evidence altogether. The diver's testimony negatives the existence of any large stones upon the bottom near where the libellant's boat finally sank, such as could account for the damage done in carrying away a part of her bottom. No reasonable explanation seems possible, except that which is confirmed by the direct testimony of the libellant's witnesses, viz. that box No. 42 was run upon some obstruction in the Kills near the beacon, where it is well known there are rocks which might produce just such damage as this, if the beacon was approached too near. It is possible that the water, after the strong northwest wind blowing during the night, may have been lower than usual, as one of the witnesses testifies; and, inasmuch as the eddy begins at the beacon, and the tow must have been at least 120 feet wide, the fact that after the injury the tow drifted up the Kills with the flood tide is not inconsistent with the finding that the port side of the tow was so near the northerly shore of the Kills opposite the beacon that the after-part of the libellant's boat, which was loaded deeper by the stern, struck and broke her bottom while passing over one or more of those rocks. As no other reasonable account of the accident can be found, I must hold that this was the cause of it, and that the pilot of the tug is mistaken as to his distance from the line of the beacon. Decree for the libellant, with costs."

Goodrich, Deady & Goodrich, for appellant.
Stewart & Macklin, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. Decree affirmed, with interest and costs, on opinion of district judge.

THE WILLIAM M. HOAG.

THE THREE SISTERS.

THE RESOLUTE.

YOUNG et al. v. BONNER et al. (two cases). DOWSETT v. SAME. WILSON et al. v. SAME.

(District Court, D. Oregon. September 24, 1895.)

Nos. 3,940, 3,941, 3,732, and 3,937.

1. MARITIME LIENS—SEAMEN'S WAGES—VESSEL IN HANDS OF RECEIVER.

A seaman may acquire a lien for wages by reason of services rendered while employed by a receiver who has charge of the vessel, and is employing it in navigation under the orders of the court.

2. SAME—LIEN IN FAVOR OF MASTER—STATE STATUTES.

Where the state statute gives a lien for wages without excepting masters from its benefits, the federal courts will uphold the lien in the case of a master employed upon a vessel engaged in plying between points on a river at which are stationed agents clothed with authority to conduct the vessel's business, thus leaving the master merely the ordinary duties of navigation; for in such case the reason for the admiralty rule giving the master no lien does not exist.

3. SAME—STATE STATUTES—LIMITATIONS.

Where a state statute creates a lien which the federal courts will enforce, but provides that the same shall be barred within one year, this limitation, being a part of the remedy, is ineffectual and void, since the state courts can have no jurisdiction in such cases.

4. SAME—ASSIGNABILITY.

A lien for seamen's wages will be enforced in the hands of an assignee thereof when there is no reason to question the fairness of the assignment. *The New Idea*, 60 Fed. 294, followed.

W. W. Cotton, for libelants, in *Young et al. v. The William M. Hoag and The Three Sisters*.

C. F. Lord, for libellant, in *Dowsett v. The Resolute*.

Thomas O'Day, for libelants, in *Wilson et al. v. The Resolute*.

W. T. Muir and J. R. Bryson, for claimants.

BELLINGER, District Judge. The most important question in these cases, and one that is common to them all, is the question whether a seaman can acquire a lien on a vessel by reason of services rendered while employed by a receiver who has charge of such vessel, and is employing it in navigation under the orders of the court appointing him. It is argued against the lien that no lien can attach to property in the custody of the law, and therefore no lien can attach to property in a receiver's hands; that to authorize a lien the employment must be made or authorized by, and the service must be for the benefit, actual or constructive, of, the owner; that the relation of the owner to the transaction must be of such a character that a right of action in personam can be maintained against him to recover the debt sought to be enforced as a lien against his property, and that it is against the policy of the law to allow admiralty to interfere with the operation of a vessel by a court having jurisdiction to operate it through a receiver. The holding in *The Esteban de Antunano*, 31 Fed. 920, and in *The Augustine Kobbe*, 37 Fed. 702, is that, when a vessel is in the custody of the law by an officer having her in possession under process, the authority of her owners and of their agents, the master and ship's husband, to thereafter affect the ship by any conduct or contract to result in a lien on the ship, is ended. In *Parker v. The Little Acme*, 43 Fed. 925, it is held that when a sheriff having possession of a vessel by virtue of a writ of execution ran the boat a few days without the knowledge or consent of the owner no lien would exist in favor of one who acted as master and pilot during the time, but such person must look to the sheriff for his compensation. In *The Young America*, 30 Fed. 790, the general and well-understood rule was applied that when a vessel is arrested in admiralty the law requires that she be safely kept by the marshal, and that such officer has no authority to create or permit charges upon the property beyond such as are necessary for its due care and preservation. These cases are relied upon by

the claimants as embodying principles necessarily decisive of the cases on trial. The rule of these cases is against a lien as a result of an unauthorized employment of a vessel by an officer having her in charge. The cases are those of legal custody for safe-keeping or for sale under process. The employment of a vessel in such a case by the officer is not authorized. But when the custody is for the purpose of operating the property, of navigating a vessel by a court having jurisdiction, there is no reason to distinguish it from any other authorized employment. The receiver stands in the relation of owner. The expenses of his administration of property managed by him is always paid out of the assets in his hands, and constitute a first charge upon it. The court appointing a receiver may encumber the property in its custody by the issue of receiver's certificates, or may otherwise apply it in its operation. The owner's control is, therefore, not necessary in such a case to the creation of an obligation enforceable against his property. The objection urged in these cases has reference to the rights of the owner; but the owner's rights are subordinate to the authorized contracts and obligations of the receiver in any case, so that the enforcement of a claim for wages by a proceeding in rem does not prejudice the owner in any right which he otherwise has.

Does the fact that the wages are earned in an employment by a receiver take the case out of the general rule which confers jurisdiction upon the admiralty courts for any reason? It is urged that the court appointing the receiver is competent to protect the mariners' rights, and that by taking jurisdiction a court of admiralty interferes in the administration of the receivership. Maritime liens grow out of the necessities of commerce, and when they are for services they depend upon the character of the employment, and these are not affected by the fact of a receivership. The character of the ownership or control of a vessel cannot in any case affect its liability nor lessen the necessity for that credit which the law of maritime liens supplies, nor render less meritorious the services which that law compensates. Whether the court appointing the receiver might have provided for the payment of these claims, or had the power to do so, is not material. It has not done so, and the property is no longer in its custody. The right is a subsisting one under the law, and this court cannot properly refuse to enforce it.

Objection is made to the claims of Young and Raabe on the ground that the services rendered by them were as masters, and that for such services a lien does not exist. Such is the general rule in admiralty. The state statute, however, provides for a lien without exception as to masters of vessels. I cannot extend the admiralty exception to a case like this created by the state statute, unless the case is within the reason that authorizes such exception. The services in this case were upon a vessel plying between points in the river, at which agents were stationed by the receiver, who were clothed with authority to conduct the business of the vessel; thus leaving to the master merely the ordinary duties of navigation. The master was not a representative of the ship, authorized to create liens, and is, therefore, not within the reason of the rule that leaves him no lien. Nor do I think that such lien is barred by the limitations of the state

statute. That statute provides as follows: "All actions against a boat or vessel under the provisions of this title shall be commenced within one year after the cause of action shall have accrued." Hill's Ann. Laws Or. § 3706. This limitation applies to the procedure provided for by the state statute. It relates to the remedial provisions of the statute. It does not qualify the right of lien, nor constitute a condition of the lien. The statute provides for actions to enforce the liens it creates, and it limits the time within which such actions shall be brought. All these provisions which undertake to confer upon the state courts this right to bring actions to enforce the lien thus created are void. *The Hine v. Trevor*, 4 Wall. 555. And the limitation of such actions is therefore necessarily ineffectual and void.

It is contended that the assignee of the fireman's claim for wages for services on the *Resolute* cannot enforce the assigned claim; that the lien of a claim for mariners' wages is a personal privilege in the mariner, and for the mariner's protection, and is not assignable. The authorities are not in harmony upon this point. The assignment of a shipwright's lien for repairs is upheld in *Park v. Hull* of the *Edgar Baxter*, 37 Fed. 219, and that of a mariner's lien for wages is upheld in *The New Idea*, 60 Fed. 294. I am of the opinion that the lien of mariners for wages should stand upon the same footing with those of other laborers upon vessels and of material men. When the services are rendered, and the right is perfected, the assignability of a thing enhances its value, and a nonassignable character given to a mariner's lien is more likely to injure than protect the owner. When the services are rendered, and the right is perfected, there is no more reason to deny the mariner's right to dispose of this property than there is of any other belonging to him. The law guards him against imposition without imposing disabilities upon him in the enjoyment of his property and rights. Unless the assignee is a speculator, or there is other reason to question or suspect the fairness of the transaction, the lien for wages in the hands of the assignee should be enforced.

The exceptions to the libels are overruled.

BOLDEN v. JENSEN et al.

(District Court, D. Washington, N. D. August 27, 1895.)

IMPRISONMENT FOR DEBT—ACTION FOR UNLIQUIDATED DAMAGES—ADMIRALTY PROCESS.

The statute abolishing imprisonment "for debt" on process from the federal courts in states where imprisonment for debt has been abolished (Rev. St. § 990), and the amended forty-seventh admiralty rule, which abolishes imprisonment "for debt," under admiralty process, in like cases, are inapplicable to cases involving demands for unliquidated damages, and hence do not affect the power of the federal courts, sitting in admiralty, to issue a warrant of arrest as process for compelling defendants to respond to a claim for damages for personal injuries and cruelty inflicted on a seaman. *Hanson v. Fowle*, Fed. Cas. No. 6,042, followed. *The Carolina*, 14 Fed. 424, *Chiesa v. Conover*, 36 Fed. 334, and *The Bremena*, 38 Fed. 144, disapproved.

This was a libel in personam by Louis Bolden, a citizen of the United States, against A. Jensen and I. M. McLean, the master and

owner of the Chilean ship *Atacama*, to recover damages for personal injury and cruelty inflicted on the libellant while serving on board said vessel as a seaman.

Pursuant to admiralty rule 2, promulgated by the supreme court, a simple warrant of arrest was issued, and the defendants were taken into custody, and admitted to bail. Upon entering a special appearance by counsel, for the purpose of the motion only, the defendants moved the court to quash the warrant of arrest, and to discharge them and exonerate their sureties, for the reason that said writ was improvidently issued, and the same is contrary to law and the admiralty rules. The court refused to entertain said motion unless the defendant would first enter a general appearance, which was done, and thereupon, after argument, said motion was submitted to the court for its decision thereon.

A. R. Coleman, for libellant.

W. F. Rupert and Thomas Fitzgerald, for defendants.

HANFORD, District Judge: The argument for the defendants upon this motion is founded upon section 990, Rev. St., which provides that "no person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where by the laws of such state, imprisonment for debt has been or shall be abolished," and the amended forty-seventh admiralty rule, which provides: "* * * And imprisonment for debt, on process issuing out of the admiralty court, is abolished in all cases where, by the laws of the state in which the court is held, imprisonment for debt has been or shall be hereafter abolished, upon similar or analogous process issuing from a state court,"—and the seventeenth section of article 1 of the constitution of this state, which declares that "there shall be no imprisonment for debt, except in cases of absconding debtors."

The statute and the rule refer only to imprisonment for debt, and do not affect the power of the court to issue a warrant of arrest as process for compelling defendants to respond to a claim for unliquidated damages, which is not a debt, any more than it restricts the power of the court to imprison defendants for nonpayment of fines or by way of punishment for contempt. The word "debt," when used in a statute, without some plain or explicit declaration making it applicable thereto, does not include taxes nor claims for unliquidated damages. The legal definition of the word is opposed to unliquidated damages, or a liability in the sense of an inchoate or contingent debt, or an obligation not enforceable by ordinary process. *Rap. & L. Law Dict.*; *Cooley, Tax'n*, p. 13; *Lane Co. v. Oregon*, 7 Wall. 71-81. In the case of *The Kentucky*, Fed Cas. No. 7,717, Mr. Justice Nelson, in discussing the admiralty rule above quoted, says that the rule was drawn with great care, and for the express purpose of conforming the practice in suits sounding in contract, in the district court, in admiralty, as to the arrest and imprisonment of the person of the defendant, to that of the state for like or analogous cases; and he interprets the rule thus:

"That is, if a defendant in the state court is exempt from personal arrest and imprisonment on all process, whether mesne or final, in cases sounding in contract, then the defendant in admiralty will, in all such cases, be in like manner exempt."

This exposition of the rule by one of its authors may well be regarded as authoritative and controlling. Counsel for the defendants have cited *The Carolina*, 14 Fed. 424, *Chiesa v. Conover*, 36 Fed. 334, *The Bremena*, 38 Fed. 144, in which courts entitled to very high respect have sustained his position on this motion, but apparently without giving consideration to the proper definition of the word "debt" as used in the statute and the admiralty rules under consideration. Notwithstanding these authorities, my judgment is not in accord with the defendants' contention. On the contrary, I prefer to follow the decision made, in this circuit, by Judge Deady, in the case of *Hanson v. Fowle*, Fed. Cas. No. 6,042, in which the subject is learnedly and exhaustively treated. The motion is denied.

BURRILL et al. v. CROSSMAN et al.

(Circuit Court of Appeals, Second Circuit. July 30, 1895.)

1. SHIPPING—CHARTER PARTY—CESSER OF CHARTERER'S LIABILITY.

A charter party provided that the vessel should be discharged at a specified rate per day; that for each day of detention a specified demurrage should be paid; that bills of lading should be signed as presented, without prejudice to the charter; that the vessel should have an absolute lien upon the cargo for freight and demurrage; and that the charterers' liability should cease when the vessel was loaded, and bills of lading signed. The charterers presented, and the master signed, bills of lading providing for paying freight, but making no reference to the provisions of the charter in regard to demurrage, and these bills were at once transferred. The discharge of the cargo was delayed, without fault of the consignees, and the owners filed a libel against the charterers for the stipulated demurrage. *Held*, that the provision in the charter for cesser of the charterers' liability applied only so far as the lien provided by the charter was commensurate with the charterers' original liability, and they, having, under the clause providing for signing bills of lading, presented bills which imposed no liability on the transferees for the demurrage stipulated in the charter, remained liable to the owners for such demurrage.

2. SAME—DEMURRAGE—FIXED TIME FOR DISCHARGE.

Held, further, that, the charter, by stipulating the rate of discharge, having fixed definitely the time for its completion, the charterers were liable for delay beyond that time, though caused by the acts of the public enemy, and without fault of the charterers or consignees.

3. SAME.

Where the charter party provides that demurrage should be payable "for each day of detention by default of the charterers or their agents," the word "default" means an omission or neglect to perform the contract.

4. ADMIRALTY—PLEADING—DENIAL OF ANTICIPATORY AVERMENT.

A denial in the answer of an anticipatory averment in the libel, that the agents of the libelants were without authority to make a certain agreement, is equivalent to an averment that they had such authority, and raises an issue as to its existence.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by William Burrill and others, owners of the bark *Kate Burrill*, against William H. Crossman and others, to recover demurrage under a charter party. Libelants appeal.

Geo. A. Black, for appellants.

Wheeler & Cortis, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. Leave was granted to the appellants by this court to make new allegations in their libel, and, the appellees having answered, the appellants have filed exceptions to several of the articles of the answer, upon the ground that the same are insufficient, in law, to constitute a defense. While there is no formal rule which sanctions this practice, the rules for appeals in admiralty only permitting new allegations in pleading and new proof, and while there are objections to a practice which may require an appellate tribunal to decide a cause in fragments, inasmuch as no objection has been made on the part of the appellees, and the exceptions raise important questions of law, the determination of which may relieve the parties from the delay and expense of introducing the proofs, we proceed to examine the exceptions, but without intending to commit the court, when the question may hereafter arise, as to the propriety of the practice. We shall not, however, consider the first exception, which relates merely to a matter of form, and does not involve substance.

The libel was filed by the owners of the bark Kate Burrill to recover of the charterers 53 days' demurrage for her detention at Rio de Janeiro in unloading a cargo of lumber. The charter party was for a voyage from Pensacola, Fla., to Rio de Janeiro, Brazil. It provided that the vessel should be consigned to charterers' agents at port of discharge, and be discharged at the rate of 20,000 feet (of lumber) per day,—lay days to commence from the time the vessel should be ready to discharge the cargo, and written notice thereof given to the charterers or their agents,—and that, for each day of detention by default of the charterers or their agents, \$59.46 should be paid; vessel to discharge at safe anchorage ground in Rio Bay, designated by charterers or their agents. It also contained the following clause:

"The bills of lading to be signed as presented, without prejudice to this charter. Any difference in freight to be settled before the vessel's departure from port of loading. If in vessel's favor, in cash, less insurance. If in charterers' favor, by captain's draft upon his consignees, payable ten days after arrival of vessel at port of discharge. Vessel to have absolute lien upon the cargo for all freight, dead freight, and demurrage; charterers' responsibility to cease when the vessel is loaded, and bills of lading are signed."

The libel alleges that the vessel arrived at Rio de Janeiro, having on board 514,256 feet of lumber, September 4, 1893, and duly gave notice to the agents of the charterers that she was ready to discharge, and the vessel was in fact ready to discharge at that time; that the charterers designated an anchorage as required by the charter, and on the 5th day of September, 1893, the vessel hauled to the anchorage, and on the 6th day of September commenced the discharge of her cargo. It then alleges that for various periods of time between that date and the 28th day of November, 1893, aggregating 53 days, the discharge of the vessel was suspended by the consignees, and that during all the time of suspension the vessel was ready and willing to discharge.

The answer alleges that, when the vessel was laden, bills of lading of similar tenor for the whole of the cargo were duly signed by the master of the vessel, which bills of lading were duly transferred to parties who became consignees of the cargo, and that

thereupon all liability of the charterers to the owners of the vessel, under the charter party, ceased, and it became the duty of the master and owner of the vessel, upon the failure of the consignees to discharge her pursuant to the terms of the charter party, to notify said consignees of the amount of demurrage claimed by reason of said failure, and to hold said cargo until the same should have been paid. The answer further alleges that when the vessel arrived at Rio de Janeiro the consignees of the cargo used all reasonable diligence in and about receiving the cargo shipped upon the said vessel, and removing the same therefrom; that the libelants were prevented from discharging the cargo, and the respondents were prevented from receiving the same, any sooner than was done, by reason of the act of the public enemy, to wit, certain vessels of war which were then in the harbor of Rio de Janeiro, and were engaged in firing upon the forts in said harbor, and making war upon the government of Brazil; that the firing between said vessels of war and the said forts made it impossible to discharge the said cargo, or to receive it from the said vessel, any sooner than it was discharged or received; and that the detention alleged in the libel was caused by said acts of the public enemy, and not by any default of the respondents. It also alleges that the master of the vessel and the agents of the libelants acquiesced in the delay, and recognized the necessity therefor, and that when the cargo was delivered the agents of the libelants accepted and received from said consignees a sum mentioned, in full satisfaction and payment of all claim and demand under said charter party, and an account was made and stated between them and the consignees respecting all claims under the charter party aforesaid, and the balance due upon said accounting was paid by the said consignees to the said agents, and accepted and received by them in full satisfaction thereof. The answer sets forth a copy of one of the bills of lading. The bill of lading shows a shipment of cargo by the charterers, and provides for the delivery of the cargo upon the order of the charterers, or to their assigns, "they paying freight for the said lumber as per charter party."

The second exception to the answer is to that part which relies upon the defense that the liability of the charterers was to cease upon the loading of the cargo, and signing of bills of lading. The question thus presented has been considered in the court below, and we concur in the opinion of the learned district judge in respect to it. That opinion (65 Fed. 104) so fully and satisfactorily discusses the question that we quote it, and deem it unnecessary to enlarge upon it. Judge Brown said:

"The provisions of the charter party are, in form, contradictory. One clause declares that for every detention by default in receiving or discharging the cargo by said parties of the second part, or agent (the respondents), the demurrage, as above specified, shall be paid by them. The other clause declares that their responsibility shall cease when the vessel is loaded, and bills of lading are signed. A previous clause also provided that the cargo should be discharged at the port of destination at the rate of 20,000 per day.

"The general intent of these provisions, taken together, manifestly, is that the ship shall be paid, not only freight, but demurrage, for detention beyond the stipulated time in discharging. The various clauses of the charter

In this regard should be interpreted consistently, so far as possible, with this general purpose, as well as with its further presumed purpose to relieve the charterers from the responsibilities attending a discharge of cargo to purchasers in distant ports, where the ship, by means of the other provisions of the charter, having secured to her a lien upon the cargo for both freight and demurrage, has it in her power to enforce payment of her claims by means of that lien, without a resort to the charterers. In the cases of *Clink v. Radford* [1891] 1 Q. B. 625, and *Hansen v. Harrold* [1894] 1 Q. B. 612, the relation of these clauses to each other have been recently carefully considered in the English court of appeal; and the rule laid down is that these different clauses are to be applied and construed with reference to each other, and to the purposes above stated, and that, where 'the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply, in so far as the lien which, by the charter party, the charterers are enabled to create, is not equivalent to the liability of the charterers,' and that, 'where the provisions of the charter party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter party, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability.'

"This is substantially the construction that was given by this court to the cesser clause in the case of *Hatton v. De Belaunzaran*, 26 Fed. 780, where, notwithstanding the cesser clause, the charterer was held liable to pay demurrage because, under the right to effect a subcharter, he had required the ship to take a cargo of salt, not of sufficient value at the port of discharge to pay anything more than the freight stipulated for in the subcharter.

"In the present case the respondents, as charterers, had the right to require the master to sign bills of lading as presented, without prejudice to the charter. This does not mean that the bill of lading itself, or the consignee under it, should be subject to all the obligations of the charter. It means only that the charterers' obligations to the ship and owners should not be affected by the terms of the bill of lading thus signed on the charterers' requirement. *Gledstanes v. Allen*, 12 C. B. 202.

"The bill of lading for the lumber in question provided for 'paying freight for said lumber as per charter party dated 7th March, 1893, and average accustomed.' A bill of lading in this form imposed upon the indorsee of the bill of lading who received the goods under it none of the stipulations of the charter, except such as pertained to the payment of freight. *Chappel v. Comfort*, 10 C. B. (N. S.) 802; *Smith v. Sieveking*, 4 El. & Bl. 945; *Fry v. Mercantile Bank*, L. R. 1 C. P. 689; *Dayton v. Parke*, 142 N. Y. 391, 400, 37 N. E. 642. It was no notice to him of any other provisions of the charter, such as that he must discharge a certain quantity of lumber per day, or, in default thereof, pay a specified price per day for any further detention of the vessel. Under this bill of lading, the vendee was entitled to take the goods within a reasonable time, according to the circumstances, on arrival, and under the ordinary rules of law as to liability to damages for detention, such as apply in the absence of any specific agreement. This is a very different liability from that of a specific agreement that assumes all risks of detention, from whatever cause, and agrees upon a specified rate of damages.

"Had the bill of lading provided for the payment of freight and 'all other conditions as per charter party,' the latter provision would have been construed ejusdem generis, as imposing upon the consignee the payment of something more than freight, and would have included the obligations referred to in the charter party respecting the rate of delivery, and the payment of the demurrage specified, though not necessarily including independent provisions of the charter party relating to different subjects. *Russell v. Niemann*, 17 C. B. (N. S.) 162; *Serrano v. Campbell*, 25 Q. B. Div. 501; *Id.*, [1891] 1 Q. B. 283; *Wegener v. Smith*, 15 C. B. 283; *Porteus v. Watney*, 3 Q. B. Div. 534.

"What the respondents, therefore, in this case, virtually required the master to do, was to give a bill of lading for this lumber that required the master to deliver it to the indorsee of the bill of lading without the payment of any charter demurrage at all, such as the respondents had agreed should be paid, but which bound the consignee to pay for such demurrage only as might arise through his own fault. Whether this was done inadvertently

or by design, is immaterial, as respects the ship. For the ship could only claim of the vendee according to the bill of lading. The *H. G. Johnson*, 48 Fed. 696. The bill of lading required the ship to deliver the cargo contrary to that provision of the charter which provided that the ship should have a lien on the cargo for the charter demurrage. The cesser clause and the lien clauses were dependent provisions; each was a consideration for the other; and when the charterers required the ship to forego the benefit of her lien on the cargo for the charter demurrage, by presenting, and taking from the master, under the bill of lading clause in the charter, a bill of lading which did not admit of a lien for charter demurrage on this cargo, the charterers could not claim the benefit of the cesser clause as a release of the previous general clause of the charter, which made them answerable for demurrage. The decisions above quoted sustain this construction, which will be followed by me, as a just and reasonable construction of these several clauses."

The third exception to the answer is to that part which sets up the defense that the detention of the vessel beyond the charter period of discharging was caused by the acts of the public enemy, and not by the default of the charterers. The provision in the charter that the cargo was to be discharged at the rate of a specified quantity per day is the equivalent of the one frequently incorporated into such instruments, conditioned for the discharge of the cargo within a specified time.

"When the time is definitely fixed, or is described so as to be calculable beforehand, there is an absolute obligation on the charterer to have the work completed within that period, whatever circumstances occur. He is answerable, although the completion may have become impossible, owing to causes which have arisen without any fault or omission on his part. Thus, he bears the risk of delay arising from the crowded state of the place at which the ship is to load or discharge (*Randall v. Lynch*, 2 Camp. 352); or from frost (*Barret v. Dutton*, 4 Camp. 333), or bad weather (*Thills v. Byers*, 1 Q. B. Div. 244), preventing access to the vessel; or from acts of the government of the place, prohibiting export, or preventing communication with the ship (*Barker v. Hodgson*, 3 Maule & S. 267; *Blight v. Page*, 3 Bos. & P. 295, note). And it is immaterial that the shipowner also is prevented from doing his part of the work within the agreed time, unless he is in fault. The charterer takes the risk." *Carv. Carr. by Sea*, §§ 610, 611.

The doctrine thus stated has been frequently declared in the adjudications. Thus, in *Davis v. Wallace*, 3 Cliff. 131, Fed. Cas. No. 3,657, it was said:

"The settled rule is that, where the contract of affreightment expressly stipulates that a given number of days shall be allowed for the discharge of the cargo, that such a limitation is an express stipulation that the vessel shall in no event be detained longer for that purpose, and that, if so detained, it shall be considered as the delay of the freighter, even where it was not occasioned by his fault, but was inevitable. Where the contract is that the ship shall be unladen within a certain number of days, it is no defense to an action for demurrage that the overdelay was occasioned by the crowded state of the docks, or by port regulations or government restraints. Detention of the vessel, for loading or discharging, longer than the time allowed by the contract, entitles the owner to the stipulated demurrage, although it was impossible to complete the work within that time, by natural causes."

To the same effect are the following authorities: *Cargo ex Argos*, L. R. 5 P. C. 161; *Waugh v. Morris*, L. R. 8 Q. B. 202; *Davies v. McVeagh*, 4 Exch. Div. 265; *Postlethwaite v. Freeland*, 5 App. Cas. 617; *Leer v. Yates*, 3 Taunt. 387; *Grant v. Coverdale*, 9 App. Cas. 470; *Budgett v. Binnington*, 25 Q. B. Div. 320.

The appellees cite several decisions holding that, where a failure to perform is caused by *vis major*, demurrage is not recoverable. *Ford*

v. Cotesworth, L. R. 4 Q. B. 127; Id., L. R. 5 Q. B. 544; Cunningham v. Dunn, 3 C. P. Div. 443; Riley v. Cargo of Iron Pipes, 40 Fed. 605; The J. E. Owen, 54 Fed. 185; Dahl v. Nelson, 6 App. Cas. 38; Carsanago v. Wheeler, 16 Fed. 248; The Spartan, 25 Fed. 44. It suffices to say that these were cases in which no specified time was fixed by the contract, within which the vessel should be discharged, but the contract provided for a discharge with customary dispatch, or for a discharge after a precedent condition, such as the arrival of the ship in a proper discharging berth. Undoubtedly, when the contract is silent on the subject of demurrage, it is only recoverable when made to appear that she was not discharged with customary diligence because of some fault or negligence on the part of the consignee, and in such a case the defense of vis major is a perfect answer to the action.

It is contended for the appellees that the charterers are not liable in the present case because, by the language of the charter party, demurrage is payable only "for each day of detention by default of the charterers or their agents"; that default means negligence, or willful omission; and that the facts alleged in the answer sufficiently excuse the charterers. In one sense, any failure is a default, whether it arises from the omission to perform a contract, or from a neglect of duty. In many reported cases the omission to pay a debt or to perform a contract is spoken of as a default. We think it was used in that sense in the present contract. In 1,600 Tons of Nitrate of Soda v. McLeod, 10 C. C. A. 115, 61 Fed. 849, it was decided by the circuit court of appeals for the Ninth circuit that a charter party which made the charterer liable for demurrage only when caused by his default did not relieve him from liability for delay caused by omission to perform his covenants, even though he was not guilty of negligence. The clause in the charter party in that case was expressed identically as in the present charter party.

The fourth exception is to that part of the answer which sets up payment of £515. 6s. 5d. to the agents of the libelants, when the cargo was delivered, in full satisfaction of all claims and demands under the charter party. The argument advanced to sustain this exception is that the answer does not aver that the agents of the libelants to whom the payment was made had authority to accept a sum which did not include the full claim for demurrage. It suffices, to meet this argument, and to dispose of the exception, that the 13th article of the libel states, by way of an anticipatory averment, that the agents had no authority to enter into any accord and satisfaction with the charterers, or to receive the sum paid for any purpose, except as a payment for freight, and the answer denies this statement. This denial is the equivalent of an affirmative averment. Upon the allegations in the libel and answer, the question whether there was an accord and satisfaction, made by those having authority to represent the libelants therefor, is a question of fact, to be determined upon a view of all the incidents of the transaction when the proofs are before the court.

We conclude that the second and third exceptions should be sustained, and the other exceptions overruled.

Ordered accordingly.

MISSOURI PAC. RY. CO. v. MEEH.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 611.

FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—CORPORATION OF SEVERAL STATES.

A corporation formed by the consolidation of corporations of three different states, pursuant to the laws thereof, is, within each of such states, a corporation of that state; and the federal courts there held have no jurisdiction of a suit against it by a citizen of the state, on the ground of diverse citizenship.

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action for personal injuries by George Meeh against the Missouri Pacific Railway Company. A demurrer to certain parts of the answer was sustained, and, upon trial before a jury, there was judgment for the plaintiff. Defendant brings error. Reversed.

B. P. Waggener, for plaintiff in error.

Thomas P. Fenlon (Thomas P. Fenlon, Jr., on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The question for consideration in this case is whether a citizen and resident of the state of Kansas can maintain in the circuit court of the United States for the district of Kansas a suit against a railroad company for personal injuries sustained within the state of Kansas in consequence of the negligent conduct of the said railroad company, it appearing that, when the injuries were so sustained, said railroad company was duly incorporated under the laws of Kansas, and was operating a line of railroad in that state, and that it was also duly incorporated under the laws of the states of Missouri and Nebraska. The question arises in this wise: George Meeh, the defendant in error, sued the Missouri Pacific Railway Company, the plaintiff in error, in the circuit court of the United States for the district of Kansas, alleging that he was a citizen and resident of the state of Kansas, that the defendant company was a citizen and resident of the state of Missouri, and that he (the plaintiff) had sustained certain personal injuries, to his damage in the sum of \$10,000, in consequence of the negligent operation by the defendant company of one of its trains near the town of Admire, in Lyon county, Kan. At the return term, on April 7, 1894, the defendant company appeared, and filed an answer to the complaint, which alleged, among other things, that it was a railway corporation "duly chartered, incorporated, and organized under and by virtue of the laws of the states of Kansas, Nebraska, and Missouri, and, as such corporation, operates a line of railway into and through the counties of Lyon and Leavenworth, in the state of Kansas." Later, on June 8, 1894, it filed a plea to the jurisdiction, alleging that the plaintiff was "a resident, citizen, and inhabitant of the state of Kan-

sas, and the said defendant, the Missouri Pacific Railway Company, was a corporation made up by the consolidation of three or more separate and distinct corporations, one incorporated under the laws of the state of Missouri, another under the laws of the state of Kansas, and another under the laws of the state of Nebraska, and that its articles of incorporation have been duly filed with the secretary of state of the state of Kansas, and it was at the date of the institution of this suit, and still is, a corporation incorporated under the laws of each of the states of Missouri, Kansas, and Nebraska, and the requisite diverse citizenship does not exist to give this court jurisdiction, and there is no federal question involved." No action appears to have been taken on this plea. Later, on June 11, 1894, the defendant company filed an amended answer to the complaint, the second and third paragraphs whereof were as follows:

"Second. For further answer, defendant says that this court has no jurisdiction to hear, try, and determine the matters herein; that at the commencement of this action, and prior to the alleged injuries complained of by the plaintiff, the plaintiff was, and ever since has been, a citizen, resident, and inhabitant of the state of Kansas; that at the commencement of this suit the defendant was, and ever since has been, a corporation chartered and incorporated under the laws of each the states of Missouri, Kansas, and Nebraska; that the said Missouri Pacific Railway Company was originally incorporated under the laws of the state of Missouri, but subsequently, and before the institution of this action, the said company, as so incorporated under the laws of Missouri, was duly and legally consolidated under the laws of Kansas with certain railway companies duly and legally incorporated under the laws of the state of Kansas, and subsequently such consolidated company was also consolidated under the laws of Nebraska with certain corporations incorporated under the laws of Nebraska, and such consolidated company then and there took the name of the Missouri Pacific Railway Company, the defendant herein; that the said defendant as consolidated had and has but one board of directors, and operates its system of railroad into and through the states of Missouri, Kansas, and Nebraska; and said defendant at the commencement of this suit was, and ever since has been, a resident citizen and inhabitant of the state of Kansas.

"Third. Defendant further says that this court has no jurisdiction to hear, try, and determine the question in controversy; that the state of Missouri is not included in or a part of the district of Kansas."

The plaintiff demurred to the second and third paragraphs of the amended answer, for the reason that the same were not sufficient in law, and the circuit court sustained the demurrer. Subsequently there was a trial before a jury, and a verdict was returned and a judgment entered in favor of the plaintiff.

Preliminary to a discussion of the main question in the case, noted above, we will notice two points urged by counsel for the defendant in error.

It is insisted that the jurisdictional question was waived, and does not arise upon the present record, because the defendant company filed a plea to the merits before filing a plea in abatement to the jurisdiction of the court. This point is not well taken, and must be overruled. It is true that it was once held that an objection to the jurisdiction of the court upon the ground of citizenship, in actions at law, should be made by a plea in abatement, and that, if a plea to the merits or the general issue was filed, it was a waiver of the plea in abatement, and that a plea of the latter character came too

late and was of no avail if filed after or in connection with a plea to the merits. *De Sobry v. Nicholson*, 3 Wall. 420; *D'Wolf v. Ra-
baud*, 1 Pet. 476; *Smith v. Kernochen*, 7 How. 198, 216; *Sheppard
v. Graves*, 14 How. 505, 510; *Wickliffe v. Owings*, 17 How. 47; *Con-
ard v. Insurance Co.*, 1 Pet. 386, 450. But this rule was abolished by sec-
tion 5 of the act of March 3, 1875 (18 Stat. p. 472, c. 137), which makes
it the duty of the federal circuit courts to dismiss a suit at any time,
or to remand it to the state court if it was originally removed
therefrom, when it appears "to the satisfaction of the court * * *
that such suit does not really and substantially involve a dispute or
controversy properly within the jurisdiction of said circuit court, or
that the parties to said suit have been improperly or collusively made
or joined either as plaintiffs or defendants for the purpose of cre-
ating a case cognizable" by the federal courts. By virtue of this
statute, the time within which an objection to the jurisdiction may
be taken is not limited as heretofore. The right to make such an ob-
jection is not waived by filing a plea to the merits, but the objection
may be taken at any time after the suit is brought, in any appro-
priate manner, either by motion or plea; and it is the duty of the
federal courts at all times either to dismiss or to remand a cause for
want of jurisdiction apparent on the face of the record. *Nashua
& L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 373, 10 Sup.
Ct. 1004; *Railway Co. v. Swan*, 111 U. S. 379, 4 Sup. Ct. 510; *Barth
v. Coler*, 9 C. C. A. 81, 19 U. S. App. 646, and 60 Fed. 466.

It is further insisted in behalf of the defendant in error that, when
the demurrer to the second paragraph of the answer was sustained,
the answer simply alleged that the Missouri Pacific Railway Com-
pany was a corporation duly incorporated under the laws of Kansas
"at the commencement of the suit," and that this averment in the
answer did not meet the general allegation of the complaint that
the defendant company "was a citizen and resident of the state
of Missouri." We need not stop to decide whether this view is
sound or unsound, because the second paragraph of the answer con-
taining the plea to the jurisdiction was immediately amended by
leave of court so as to state that the Missouri Pacific Railway Com-
pany was a Kansas corporation, operating a line of road in that state,
when the alleged injuries were sustained, as well as when the suit was
commenced; and the case went to trial on the amended special plea
alleging this fact, which was neither denied by the reply nor the suf-
ficiency thereof challenged by demurrer. The case was obviously
tried by the circuit court, and the demurrer to the second and third
paragraphs of the answer was obviously sustained, on the ground
that the fact that the defendant company had been incorporated in
Missouri as well as in Kansas entitled a citizen of Kansas to sue it
in the federal circuit court of that state for an act of negligence
there committed. We must, accordingly, consider and decide whether
that view is tenable.

At this day it must be regarded as settled beyond doubt or contro-
versy that two states of this Union cannot by their joint action create
a corporation which will be regarded as a single corporate entity, and,
for jurisdictional purposes, a citizen of each state which joined in

creating it. One state may create a corporation of a given name, and the legislature of an adjoining state may declare that the same legal entity shall be or become a corporation of that state as well, and be entitled to exercise within its borders, by the same board of directors and officers, all of its corporate functions. Nevertheless, the result of such legislation is not to create a single corporation, but two corporations of the same name, having a different paternity. This was decided in *Railroad Co. v. Wheeler*, 1 Black, 286, 297, where Mr. Chief Justice Taney, speaking for the supreme court, said:

"It is true that a corporation by the name and style of the plaintiffs appears to have been chartered by the states of Indiana and Ohio, clothed with the same capacities and powers, and intended to accomplish the same objects; and it is spoken of in the laws of the states as one corporate body, exercising the same powers and fulfilling the same duties in both states. Yet it has no legal existence in either state, except by the law of the state; and neither state could confer on it a corporate existence in the other, nor add to or diminish the powers to be there exercised. It may, indeed, be composed of and represent, under the corporate name, the same natural persons. But the legal entity or person, which exists by force of law, can have no existence beyond the limits of the state or sovereignty which brings it into life, and induces it with its faculties and powers. The president and directors of the Ohio and Mississippi Railroad Company is, therefore, a distinct and separate corporate body in Indiana from the corporate body of the same name in Ohio, and they cannot be joined in a suit as one and the same plaintiff, nor maintain a suit in that character against a citizen of Ohio or Indiana in a circuit court of the United States."

The doctrine of this case was afterwards reaffirmed in *Railway Co. v. Whitton*, 13 Wall. 270, 283, where Mr. Justice Field used the following language, speaking of a corporation that had been duly incorporated under the laws of Illinois and Wisconsin:

"But it is said—and here the objection to the jurisdiction arises—that the defendant is also a corporation under the laws of Illinois, and therefore is also a citizen of the same state with the plaintiff. The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and as such a citizen, of Wisconsin, by the laws of that state. It is not there a corporation or a citizen of any other state. Being there sued, it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere. Nor is there anything against this view, but, on the contrary, much to support it, in the case of *Railroad Company v. Wheeler* [supra]."

These cases have since been referred to, and the doctrine enunciated therein has been approved, in *Muller v. Dows*, 94 U. S. 444, 447; in *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 298, 6 Sup. Ct. 1094; and in *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 376, 377, 10 Sup. Ct. 1004. They have also been cited and followed by the supreme courts of Michigan and Illinois in *Chicago & N. W. R. Co. v. Auditor General*, 53 Mich. 91, 18 N. W. 586; in *Racine & M. R. Co. v. Farmers' Loan & Trust Co.*, 49 Ill. 331, 348; and by Judge Caldwell on the circuit in *Fitzgerald v. Railway Co.*, 45 Fed. 812.

Chief Justice Cooley remarked in *Chicago & N. W. R. Co. v. Auditor General*, supra, that:

"It is impossible to conceive of one joint act performed simultaneously by two sovereign states which shall bring a single corporation into being, except it be by compact or treaty. There may be separate consent given for the

consolidation of corporations separately created; but, when the two unite, they severally bring to the new entity the powers and privileges already possessed, and the consolidated company simply exercises in each jurisdiction the powers the corporation there chartered had possessed, and succeeds there to its privileges."

And in the case of *Quincy Bridge Co. v. Adams Co.*, 88 Ill. 615, 619, Mr. Justice Breese said, speaking of a corporation that had been incorporated both by the states of Illinois and Missouri:

"The states of Illinois and Missouri have no power to unite in passing any legislative act. It is impossible, in the very nature of their organizations, that they can do so. They cannot so fuse themselves into a single sovereignty, and, as such, create a body politic which shall be a corporation of the two states, without being a corporation of each state or of either state. As argued by appellee, the only possible status of a company acting under charters from two states is that it is an association incorporated in and by each of the states; and, when acting as a corporation in either of the states, it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits. We do not and cannot understand that appellant derives any of its corporate powers from the legislature of the state of Missouri, but wholly and entirely from the general assembly of this state."

Assuming, then, that there are three distinct legal entities known as the Missouri Pacific Railway Company,—one a corporation of Missouri, another a corporation of Kansas, and another a corporation of Nebraska,—we turn to consider whether, on the state of facts disclosed by this record, the circuit court of the United States for the district of Kansas had jurisdiction of the case at bar. We think that this question was practically decided in the cases heretofore cited. Thus, in *Railway Co. v. Whitton*, 13 Wall. 270, 283, the plaintiff, who was a citizen of Illinois, sued the railway company, which had been incorporated by the states of Wisconsin and Illinois, in the courts of Wisconsin, for a negligent act committed in Wisconsin. Subsequently the plaintiff removed the case to the circuit court of the United States for the district of Wisconsin, and the question arose whether the latter court had jurisdiction. It will be noticed that in the paragraph of the opinion above quoted Mr. Justice Field said:

"The defendant is a corporation, and as such a citizen, of Wisconsin, by the laws of that state. It is not there a corporation or a citizen of any other state. Being there sued, it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere."

So, in the case of *Railroad Co. v. Wheeler*, 1 Black, 286, the plaintiff company described itself as a corporation created and existing under the laws of the states of Indiana and Ohio, having its principal office in Cincinnati, Ohio. It sued Wheeler, describing him as a citizen of Indiana, in the circuit court of the United States for the district of Indiana; but the supreme court held that the action could not be maintained, saying in substance that in the character in which the company had sued, as a corporation of Indiana and Ohio, it could not maintain a suit against a citizen of Ohio or Indiana in a circuit court of the United States. The decisions in *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S. 356, 365, 10 Sup. Ct. 1004, and in *Muller v. Dows*, 94 U. S. 444, 447, do not conflict with the prior decisions of the supreme court of the United States, for in the former of these

cases the New Hampshire corporation, the Nashua Railroad, which had been created a corporation of the state of Massachusetts, sued the Massachusetts corporation in the circuit court of the United States for the district of Massachusetts, to adjust certain differences that had arisen, growing out of a contract in which the two companies had dealt with each other as separate legal entities; and it was held that the suit could be maintained. So, in *Muller v. Dows*, two citizens of New York and a citizen of Missouri united in bringing a suit against two railroad corporations in the district of Iowa. Both of the defendant corporations were incorporated under the laws of Iowa, but one of them, by consolidation proceedings, had also become a corporation of the state of Missouri. This fact was supposed to destroy the jurisdiction of the court. But the supreme court held otherwise, saying that the consolidated company "in the state of Iowa [where sued] * * * was an Iowa corporation existing under the laws of that state alone." The rule, we think, that may fairly be extracted from these cases, is this: That whenever a corporation of one state, by legislative sanction, becomes also a corporation of another state, either by the process of consolidation or otherwise, whatever acts it subsequently does or performs in the latter state it does and performs as a domestic, and not as a foreign, corporation. It derives all of its powers to act as a corporation in the state of its adoption from local laws. If it is there sued for an act done within the state, it is sued and must answer as a domestic, and not as a foreign, corporation. The same thought was expressed by Mr. Justice Breese in the passage quoted from *Quincy Bridge Co. v. Adams Co.*, *supra*, when he said:

"The only possible status of a company acting under charters from two states is that it is an association incorporated in and by each of the states; and, when acting as a corporation in either of the states, it acts under the authority of the charter of the state in which it is then acting, and that only, the legislation of the other state having no operation beyond its territorial limits."

Nor is there anything new or strange in the view that a foreign corporation, when created a corporation by the laws of some other state, must thereafter act in the latter state and be there dealt with as a domestic corporation. It was long ago said in *Paul v. Virginia*, 8 Wall. 168, 181, that a "corporation, being the mere creation of a local law, can have no legal existence beyond the limits of the sovereignty where created. * * * The recognition of its existence even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of those states,—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. Having no absolute right of recognition in other states, but depending for such recognition and the enforcement of its contracts upon their assent, it follows, as a matter of course, that such assent may be granted upon such terms and conditions as those states may think proper to impose. They may exclude the foreign corporation entirely; they may restrict its business to particular localities, or they may exact such security for the performance of its contracts with their citizens as in their judgment will best promote the public interest. The whole matter rests in their discretion." Instead of

merely licensing a foreign corporation to operate a railroad or to transact any other business within its borders, a state may, for reasons of its own, adopt the foreign corporation by creating it a domestic corporation with the same franchises and powers that it exercises in the state which originally created it, or with powers that are less or more extensive. When a state pursues the latter course, and adopts the foreign corporation as one of its own creation, it follows, we think, that all of its subsequent acts and transactions within the state of its adoption are the acts of a domestic corporation, that the franchises and powers there exercised were conferred by local laws, and that process served upon its officers or agents within the state is served upon the domestic corporation rather than upon the foreign corporation of the same name.

It follows from what has been said that the parties to the suit at bar must be regarded as citizens and residents of the same state. The averments contained in the amended answer are sufficient to show that the Missouri Pacific Railway Company, which figured as the defendant in the circuit court and as the plaintiff in error here, is in reality a domestic corporation of the state of Kansas. The injuries complained of were inflicted upon a citizen of the state of Kansas while the defendant company was operating its road in that state. Under these circumstances, we hold that the circuit court of the United States for the district of Kansas had no jurisdiction of the case, and that, upon the state of facts disclosed by the present record, the suit should have been dismissed. The judgment of the circuit court is accordingly reversed, and the case is remanded to that court for a new trial.

McALEESE v. GOODWIN.¹

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 600.

USURY—EVIDENCE.

Upon a suit for the foreclosure of a mortgage, to which the defense pleaded was usury, in taking 12 per cent. interest,—10 per cent. being the legal rate,—it appeared that the mortgagor applied to a bank, of which the mortgagee and one M. were proprietors, for the loan; that the bank declined to make it, and the mortgagor then asked M. to procure it for him; that M. presented the application to the mortgagee, who agreed to make the loan, and sent the money to M., who took from the mortgagor notes bearing 10 per cent. interest, and also retained 2 per cent. himself, the mortgagee never receiving more than 10 per cent. The mortgagee testified that M. was not his agent to make the loan; and, although the mortgagor also testified that M. was not his agent, it appeared that M. had rendered to him certain services, in renting property and collecting rents, and M. testified that he retained the 2 per cent. as compensation for these services and for procuring the loan. *Held*, that the mortgagor had not so far overcome the written evidence of the notes, and the legal presumption that the parties had not violated the law, as to justify a reversal of a decree in favor of the mortgagee.

Appeal from the Circuit Court of the United States for the District of Nebraska.

¹ Rehearing pending.

T. J. Mahoney (C. J. Smyth, on the brief), for appellant.

Ralph W. Breckenridge and C. S. Olmstead (Homer Goodwin, per se, filed brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree of foreclosure of two mortgages made by Daniel McAleese, appellant, to Homer Goodwin, the appellee. The answer to the bill for foreclosure alleged that one Mancourt was the agent of the appellee, and that the appellee, through him, made a usurious agreement to take, and actually received, 12 per cent. interest, in violation of the provision of the statute of Nebraska which limits the legal rate of interest to 10 per cent. The court below found that the defense of usury was not sustained, and entered a decree for the appellee.

The evidence was undisputed that the mortgages and the notes they secured were not usurious on their face, and that the mortgagee never agreed to take, and never did take, any unlawful interest himself, and that he never knew that any such interest was taken by any one, or was paid by the mortgagor to any one. The mortgagor lived in the state of Nebraska. One Mancourt was his banker at Sidney, in that state. Goodwin, the mortgagee, was a resident of Sandusky, Ohio, and a partner of Mancourt in this bank. The mortgagor applied to this Mancourt for the loans that were secured by these mortgages, and the latter informed him that the bank could not make them. He then asked Mancourt to procure them for him, and Mancourt then wrote to the appellee, and presented to him the applications of the appellant for these loans; sent him a description of the security, and an abstract of the title, which the mortgagor had procured; recommended the loans, and asked him if he would make them. The appellee consented to do so, and sent the money for the loans to Mancourt, to be paid to the appellant. Mancourt received the mortgages, and paid over the money, except that he retained for himself an amount equal to interest at the rate of 2 per cent. per annum on the loan. The notes bore 10 per cent. interest. The mortgagor testified that Mancourt kept the 2 per cent. in pursuance of an agreement he made with him, that he should pay interest at the rate of 12 per cent. per annum on these loans, but that the notes should draw but 10 per cent., because a higher rate was illegal, under the laws of Nebraska. He also testified that Mancourt was not his agent to procure the loans, but was the agent of the appellee to make them. He, however, admitted that Mancourt was his banker, and that he had collected some rents for him about the time the first loan was made. On the other hand, Mancourt and the appellee both testified that the former was never the agent of the latter to make these or any loans, except those made by the bank, and that these were not made by that institution. Mancourt testifies that he never made any agreement to take, and never collected or took, more than 10 per cent. interest on these loans; that the appellant employed him to collect some of his rents, to procure tenants

for some of his houses, to advise him about his business, and to procure these loans for him; and that the amounts which the appellant now charges constituted usurious interest on these loans were retained by him for his services in collecting these rents, obtaining these tenants, and procuring these loans. A large amount of correspondence between Mancourt and the appellee appears in this record, which does not tend to prove that the former had any authority to loan any money of the latter upon his own judgment, but that he did present applications to the appellee for loans, and after the specific investments were accepted by him the appellee sent the money to Mancourt to pay for them.

This brief summary of the evidence is sufficient to show that the decree below ought not to be reversed. It is a settled rule of practice in equity in the national courts that "where the court below has considered conflicting evidence, and made its finding and decree thereon, they must be taken as presumptively correct, and unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand." *Warren v. Burt*, 7 C. C. A. 105, 110, 58 Fed. 101, 106, and cases there cited; *Gunn v. Black*, 8 C. C. A. 534, 538, 60 Fed. 151, 155; *Latta v. Granger*, 68 Fed. 69, 71. Where the notes bear lawful interest upon their face, it is necessary to overcome this written evidence, and the legal presumption that the parties to them have not violated the law, in order to establish the charge of usury, and this requires strong proof. *Bank v. Waggener*, 9 Pet. 378, 379; *Hotel Co. v. Wade*, 97 U. S. 23; *Call v. Palmer*, 116 U. S. 98, 101, 102, 6 Sup. Ct. 301. The burden of making this proof rested upon the appellant in this case, *Olmsted v. Security Co.*, 11 Neb. 487, 9 N. W. 650. His defense of usury must fail, unless he established by a preponderance of proof that Mancourt was the agent of the appellant, and that the usurious agreement was made. In view of the rules of evidence to which we have referred, of the undisputed fact that the mortgagee never took more than lawful interest himself, and never had knowledge that the mortgagor had paid more, and in view of the conflicting evidence as to the agency of Mancourt, and as to the purposes for which, and the agreement with the appellant under which, he kept the moneys he retained, we are unwilling to hold that there was any obvious error of law, or any serious mistake of fact, in the general finding of the court below that the defense of usury was not sustained by this evidence. The decree below must be affirmed, with costs, and it is so ordered.

CENTRAL TRUST CO. OF NEW YORK v. RICHMOND & D. R. CO.
(DODGEN, Intervener).

(Circuit Court, N. D. Georgia. May 30, 1895.)

No. 551.

EQUITY PRACTICE—REOPENING CASE BEFORE MASTER.

After a master in chancery had prepared a draft of his report, and submitted it to the parties, to afford them an opportunity to except before

him prior to its filing, one of the parties petitioned the master to reopen the case, and give him an opportunity to put in certain material testimony which he had inadvertently omitted to offer, which petition was granted. *Held*, that the action of the master in reopening the case would not be disturbed by the court, it not appearing that he had abused his discretion.

J. T. Pendleton, for intervener.
Jackson & Leftwich, for defendant.

NEWMAN, District Judge. The practice in this district, following what is believed to be the correct chancery practice, is for the master in chancery to prepare a draft of his report, and notify counsel of the same, to which they must except before him, prior to the filing of the report regularly by the master in the clerk's office, in order to have their exceptions considered by the court after the same has been filed. On the filing of a draft of the special master's report in this case, counsel for the intervener called the attention of the special master to the fact that by inadvertence they had failed to put in certain testimony which was material to their case. The special master, after hearing the matter, determined to reopen the case, and hear the evidence. The question submitted here is whether the court will overrule the master's action in reopening the case for the admission of additional testimony. At that stage of the case the question of reopening it for hearing further evidence was a matter for the special master, and the court ought not to interfere with his discretion, unless it has been abused. The petition to the special master to reopen this case was sworn to by the two counsel for the intervener, and in the petition they state that the omission of the testimony which they now desire to introduce was inadvertent, caused by the long duration of the case and the manner in which it was tried, in connection with several other cases, and this, they claim, confused them as to what testimony was really in. I am unable to see that the discretion which the special master certainly ought to have in such matters has been abused. He still had the case within his control. He had prepared a draft of this report, and given counsel notice of the same, but it had not been regularly filed in the court, so as to take it out of his power to act in the matter. He believed that under the facts it was his duty to reopen the case, and the court will not interfere with him in so doing.

TRAVELERS' INS. CO. OF HARTFORD v. HENDERSON.

(Circuit Court of Appeals, Eighth Circuit. August 5, 1895.)

No. 527.

1. INSURANCE—REPRESENTATIONS OF AGENT.

When a policy of insurance describes the class of risks thereby insured, and the assured has a fair opportunity to read the instrument, the company issuing the same will not be bound by representations made by its agent, in good faith and without any intent to deceive or to defraud, that the policy covers certain risks that are not in fact within its provisions. In construing the provisions of a written agreement, and in determining

its legal effect, the parties thereto act at arm's length, if the agreement is couched in plain language, and no fraud or deceit is practiced.

2. REFORMATION OF CONTRACT—MISTAKE.

The T. Ins. Co. issued an accident policy to one H., by the terms of which death resulting from intentional injuries inflicted by another person was excepted from its benefits. After H. had been killed by an assassin, the beneficiary in the policy brought suit to have it reformed by striking out the exception. Upon the trial, the subagent of the insurance company who solicited the insurance testified that, when he issued the policy, he knew that H. was engaged in a dangerous business, and was likely to be assassinated, and wanted the policy to protect his family in that event, and that he told H. the policy issued to him would cover the case of his being assassinated. It appeared, however, from the cross-examination of the same witness, that he did not intend to make, on behalf of the company, any different contract from that contained in its usual form of policy, and that his representations to H. were due to ignorance of the terms of the policy or misunderstanding of their effect. *Held*, that the evidence was insufficient to justify the reformation of the contract.

Appeal from the Circuit Court of the United States for the District of Wyoming.

Charles N. Potter and Timothy F. Burke, for appellant.

A. C. Campbell and R. W. Breckons, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a suit which was commenced by the appellee, Fannie L. Henderson, against the appellant, the Travelers' Insurance Company of Hartford, Conn., in the circuit court of the United States for the district of Wyoming, to reform an accident policy of insurance. The policy in question was solicited and written at Cheyenne, Wyo., by an agent of the defendant company at that place. The material provisions of the policy were as follows:

"Accident Policy. The Travelers' Insurance Company of Hartford, Conn., in consideration of the warranties in the application for this policy and of fifty dollars, does hereby insure (subject to conditions on back hereof, not waivable by agents) George B. Henderson, of Cheyenne, county of Laramie, state of Wyoming, under classification preferred (being a manager of Wyoming Cattle-Ranch Company, not riding on range by occupation), for the term of twelve months from noon of January 7, 1889, in the sum of fifty dollars per week, against loss of time not exceeding 26 consecutive weeks, resulting from bodily injuries effected during the term of this insurance, through external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to his occupation above stated; or, if loss of one entire hand or foot shall result from such injuries alone within ninety days, will pay the insured one-third the principal sum herein named, in lieu of said weekly indemnity, and, upon such payment being made, this policy shall cease and be surrendered to said company; or in event of the loss of two entire hands or feet, or one entire hand and one entire foot, or the entire sight of both eyes, solely through the injuries aforesaid, within ninety days, will pay the insured the full principal sum aforesaid, provided he survives said ninety days; or, if death shall result from such injuries alone within ninety days, will pay ten thousand dollars to Fannie L. Henderson, if surviving; in event of her prior death, to the legal representatives or assigns of the insured. * * * Agreement and conditions under which this policy is issued and accepted: * * * (4) This insurance does not cover disappearances; nor suicide, sane or insane; nor injuries of which there is no visible mark upon the body; nor accident; nor death; nor loss of limb or of sight; nor

disability resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: Disease or bodily infirmity; * * * medical or surgical treatment (amputations necessitated solely by injuries made within ninety days of the occurrence of accident excepted); intoxication or narcotics; taking poison, contact with poisonous substances, or inhaling gas; sunstroke or freezing; dueling or fighting; war or riot; violating law or the rules of a corporation; intentional injuries inflicted by the insured or any other person. * * *

The policy was delivered to George B. Henderson, the assured, on the day it was executed, to wit, January 7, 1889, and remained in force and in his possession for 21 months. At the expiration of the first year, the policy was renewed by the assured for another year by the payment of a premium of \$50. During the second year while the policy was in force, to wit, on October 7, 1890, the assured was instantly killed by "a gunshot wound intentionally inflicted by one John Tregoning."

The bill of complaint averred as a ground for relief that a mistake was made in reducing the oral agreement between the assured and the insurer to writing, "in this, to wit: That, by the agreement really made, it was agreed that in case the said George B. Henderson came to his death through intentional injuries inflicted upon him by some other person, without his consent, then, in such case, your orator should receive from said defendant the sum of ten thousand dollars"; whereas, by the terms of the policy as reduced to writing, it was provided that, "in case the said George B. Henderson came to his death through intentional injuries inflicted upon him by any other person, then, in such case, your orator should receive nothing." The circuit court found that a mistake had been made, as alleged, in reducing the oral agreement to writing. It accordingly ordered that the policy be reformed by expunging the clause, "This insurance does not cover * * * intentional injuries inflicted by the insured or any other person," and by inserting therein the following provision in lieu thereof: "Or if death shall result from injuries intentionally inflicted on the insured by some other person, without the consent of the insured, within ninety days, will pay ten thousand dollars to Fannie L. Henderson, if surviving; in the event of her prior death, to the legal representatives of the insured." 65 Fed. 438. To reverse such decree, the defendant company has prosecuted an appeal to this court.

The general question that arises on the appeal is whether the testimony shows that the parties to the contract of insurance acted under such a mutual mistake, either of law or fact, as a court of equity will undertake to rectify by altering the provisions of the contract. In the determination of this question, the testimony must be examined in the light of the well-established rule that a written agreement will not be altered or reformed on the ground of accident or mistake, unless the proof offered to establish the mistake is clear, satisfactory, and decisive.

Mr. Justice Story once said:

There cannot, at the present day, be any serious doubt that a court of equity has authority to reform a contract where there has been an omission of a material stipulation by mistake. * * * But a court of equity ought

to be extremely cautious in the exercise of such an authority, seeing that it trenches upon one of the most salutary rules of evidence, that parol evidence ought not to be admitted to vary a written instrument. It ought therefore, in all cases, to withhold its aid where the mistake is not made out by the clearest evidence according to the understanding of both parties, and upon testimony entirely exact and satisfactory. There is less danger where the instrument is to be reformed by reference to a preliminary written contract which it was designed to execute. But even here there is abundant room for caution, since the parties may have varied their intentions, or the clause may not have been originally understood by either party to go to the extent now required. And these considerations acquire additional force where circumstances have occurred in the intermediate time which give an intense importance to the asserted mistake." *Andrews v. Insurance Co.*, 3 Mason, 6, Fed. Cas. No. 374.

The same view was expressed by the supreme court in *Snell v. Insurance Co.*, 98 U. S. 85, 90, where it was said that parol proof to establish a mistake in a written contract "is to be received with great caution, and, where the mistake is denied, should never be made the foundation of a decree variant from the written contract, except it be of the clearest and most satisfactory character."¹

The rule referred to is so well settled that it may be safely asserted that a court of equity has no right to correct an alleged mistake in a written agreement, on the strength of testimony purely oral, if the testimony is to such extent uncertain, equivocal, or contradictory as to leave the fact of mistake open to doubt. Moreover, a court of equity ought to be especially cautious in altering the provisions of a written contract where it has been in force for a considerable period before an attempt is made to reform it, and the parties thereto have in the meantime had ample opportunity to become acquainted with its provisions, and an event has also occurred which renders a change in the terms of the contract of vital importance to the person who is seeking to reform the instrument.

With these preliminary observations, we turn to consider the mistake alleged in the case in hand and the testimony that was offered to establish it. The mistake consisted, as it seems, in embodying in the written policy a clause that the defendant company should not be liable for "intentional injuries inflicted by the insured or any other person," whereas, by the terms of the oral agreement antedating the policy, which the parties, as it is claimed, intended to reduce to writing, it was understood and agreed that the insurer should be liable for intentional injuries inflicted on the assured by a third person. The proof relied upon to establish the mistake consists principally of the testimony of Gideon M. Kepler, a subagent of the defendant company, who solicited the policy in question. We have examined the evidence of this witness with great care, and it may be conceded for the purpose of this decision that it tends to establish the following facts, to wit: That, prior to the issuance of the policy, said Kepler was aware, either from statements made to him by the assured or from public rumor, that the assured was engaged at the time in a very dangerous occupation, to wit, that of superintending a ranch in the northern part of Wyoming; that troubles existed in that

¹ See, also, *Coal Co. v. Doran*, 142 U. S. 417, 12 Sup. Ct. 239.

locality; that the assured had already been shot at from ambush on one occasion; and that he desired a policy of insurance to protect him against anything that might happen in the course of such occupation, including the risk of being assaulted or killed by an assassin. The witness admits, in substance, that he intended to deliver to the deceased a policy that would protect him against the aforesaid risks, and that he supposed he had done so when he delivered the policy in suit, and that he probably told the deceased "that if he was accidentally killed up there, or if any one killed him as he was going to or from the city of Cheyenne, the policy would cover him." While the witness testified to the foregoing effect on his direct examination in favor of the plaintiff, yet it sufficiently appears, we think, from statements made by him on his cross-examination, that he had no intention of making a different contract on behalf of the defendant company than that embodied in the printed forms of policy then in his possession and then in use by the defendant company, one of which was actually filled out and delivered to the assured in the form in which they are ordinarily issued by the company. He was asked the following questions, and answered them as follows:

"Q. Had you read the policies of insurance, these blank forms of policies in the Travelers', at the time you solicited this insurance of Mr. Henderson? A. Well, that I could not say. * * * Q. Now, did you intend that the contract that was to be consummated in a policy should cover any more than that which was indicated by the written application which you took? A. No. Q. Was what you said to Mr. Henderson in relation to what risks the policy assumed to cover merely an expression of opinion on your part as to what the policy actually did cover, rather than an agreement on your part as to what the policy should cover? Isn't that true, Mr. Kepler? A. Well, I don't know about that. I assured him that he would be covered as against anything that might happen [to] him. I remember of telling him that. I was honest in what I told him,—that, unless he died naturally or got into a fight with somebody, that it would cover him. Q. That was merely an expression of your opinion as to what the policy insured him against? A. Yes, sir. Q. And the same was your intention and understanding from what was said at the time the renewal receipt was given to him, wasn't it, Mr. Kepler? A. Yes, sir. * * * Q. So, when you say you intended the policy to insure him against anything that happened in that north country, you meant merely everything which could be insured against under the terms of the policy. That is your understanding, is it not, of your statement to him? A. Yes, sir. * * * Q. Had you read over one of these policies at the time you solicited this insurance? A. That I don't know. They had different forms of policies a little while before that. I don't know whether I read that policy over or not. I can't say. * * * Q. It wasn't your intention, was it, in making your agreement with Mr. Henderson, to make any other agreement than that shown in the policy as afterwards completed? A. No, sir; it wasn't."

And on his redirect examination he testified as follows:

"Q. Now, Mr. Burke has asked you whether you intended to insure Henderson against anything but what was covered by the terms of the policy, and to that question you answered, 'No.' Now, I will ask you, Mr. Kepler, whether or not, knowing as you say you do, that Henderson wanted a policy that would protect his wife in case he met death at the hands of another, intentionally inflicted, you would have delivered to him such a policy as he received? A. Yes; I would have delivered the policy, because I thought it covered that."

Viewing the testimony of this witness as a whole, and giving full credence to his statements, the only reasonable conclusion deducible

therefrom is that he intended to make such a contract as was evidenced by the company's printed form of policy then in use and in his possession; that he had no intention of exceeding his authority or violating his instructions; and that such representations as he may have made to the assured concerning the risks covered by the policy were due to ignorance of its terms or to a misunderstanding of their legal effect. Kepler nowhere asserts that he entered into an oral agreement with Henderson to insure him against injuries inflicted intentionally by a third person, although he does say in substance, in his direct examination, that he supposed the form of policy then in use by the defendant covered that class of risks, and that he made representations to that effect, doing so honestly and without any intention of deceiving the assured. Such being the character of the evidence relied upon by the plaintiff, we think that it was insufficient to warrant a reformation of the policy.

It is true, no doubt, that a court of equity has power to reform an executed written contract which was intended to embody the provisions of a previous oral or written agreement, but which, through a mutual mistake of fact or a mutual misunderstanding of its legal effect, fails to express the intentions of the parties. It was so decided in *Hunt v. Rousmanier*, 1 Pet. 1, 13, and the doctrine has been approved in subsequent decisions by other courts. *Oliver v. Insurance Co.*, 2 Curt. 277, 299, Fed. Cas. No. 10,498; *Pitcher v. Hennessey*, 48 N. Y. 415, 423; *Palmer v. Insurance Co.*, 54 Conn. 488, 502, 9 Atl. 248; *Maher v. Insurance Co.*, 67 N. Y. 283, 290, 291; *Avery v. Society*, 117 N. Y. 451, 460, 23 N. E. 3. But a court of equity will not reform a written agreement when, by so doing, it would impose on one of the parties obligations which he never intended nor agreed to assume. It is of the very essence of the rule that a mistake relied upon to secure the reformation of a written contract must be mutual, and that the contract as reformed must express the very terms of a previous agreement which the parties actually made and intended to reduce to writing. In the present case the proof shows that Kepler intended to make precisely such a contract as was embodied in the company's printed form of policy, and such a contract was in fact executed and delivered. He had no authority to make an agreement different from that expressed in the company's printed form of policy, nor was the company in the habit of insuring against other risks than those described in the policy that was actually issued, unless a higher rate of premium was paid than that paid by the assured. If Kepler acted under a mistake, it is evident that it consisted in failing to comprehend the class of risks that were covered by the policy; but a mistake of that kind, accompanied, though it may have been, by some misleading statements as to the risks covered by the policy, is surely not sufficient to warrant a reformation of the policy, especially where no fraud was practiced or intended to be practiced upon the assured. It frequently happens that knowledge of material facts communicated to the agent of an insurance company by the assured, either prior or subsequent to the issuance of a policy, has the effect of waiving particular provisions found therein or of estopping the company from claiming the benefit of such provisions; but where the

class of risks intended to be insured against is clearly described in the policy, and the assured has a full and fair opportunity to read the instrument, the company will not be bound by representations made by its agent, in good faith, that the policy covers risks that are not in fact within its provisions. *Association v. Kryder*, 5 Ind. App. 430, 31 N. E. 851; *Casualty Co. v. Teter* (Ind. Sup.) 36 N. E. 283. In construing the provisions of a written agreement and in determining its legal effect, the parties thereto act at arm's length if the agreement is couched in plain language and no fraud or deceit is practiced. It is the duty of a person, when he becomes a party to a written contract, to examine its provisions, and determine for himself what obligations and what liabilities it imposes, and, if need be, to seek legal advice on that subject. This duty is equally imperative when a policy of insurance is taken out; and courts of equity cannot undertake to reform such an instrument merely because the legal effect of its provisions was misunderstood by the assured, nor even on the ground that an agent of the insurer erroneously represented that the policy covered risks which the language of the instrument clearly shows that it did not cover, if the agent acted honestly, without artifice or any intent to defraud.

In accordance with these views, the decision of the circuit court of the United States for the district of Wyoming is reversed, and the cause is remanded to that court, with directions to dismiss the bill of complaint.

HINKLEY et al. v. CITY OF ARKANSAS CITY.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 619.

1. PRACTICE—FINDINGS OF FACT—OPINION OF COURT.

A statement of the grounds of decision in an opinion of the court upon deciding a case submitted without the intervention of a jury is not equivalent to a special finding of fact.

2. EVIDENCE—SEVERAL ISSUES.

Where there are several issues of fact in a case, a party cannot be precluded from giving evidence material upon any one of them because the decision upon another may be such as to preclude him from relying upon the facts which such evidence tends to prove.

3. SAME—TRIAL WITHOUT JURY—HARMLESS ERROR.

Where a case has been tried by the court without a jury, it is immaterial to consider whether there was error in the admission of evidence bearing solely upon a point which is shown by the opinion of the court not to have entered into the decision of the case.

4. MUNICIPAL CORPORATIONS—REFUNDING BONDS.

The power conferred on cities of the first, second, and third class to refund their indebtedness, by the act of March 8, 1879 (Laws Kan. 1879, c. 50, § 1), is a power which can only be exercised by means of an ordinance duly enacted. Purchasers of refunding bonds issued by such cities under said act must ascertain whether an ordinance authorizing the issuance of such bonds has been enacted, and cannot rely upon a recital contained therein that they have been legally issued, when no ordinance was in fact adopted. *National Bank of Commerce v. Town of Granada*, 54 Fed. 100, 10 U. S. App. 692, and 4 C. C. A. 225.

In Error to the Circuit Court of the United States for the District of Kansas.

This was a suit by the plaintiffs in error, Rufus H. Hinkley, George H. Richardson, and Henry St. John Smith, partners in business under the name of Swan & Barrett, against the defendant in error, the city of Arkansas City, a city of the second class of the state of Kansas, to recover the amount due on 170 coupons which were detached from certain refunding bonds that were issued, as the plaintiffs averred, by said city. The complaint, which was in the usual form, alleged, among other things, that before said bonds or coupons became due and payable they had been purchased for value by the plaintiffs, and that each of said bonds from which said coupons were detached contained the following recital: "This bond is one of the series of fifty-four bonds of like amount, tenor, and effect, executed and issued by the said city to compromise and refund its matured and maturing indebtedness heretofore legally created by said city, and in accordance with an act of the legislature of the state of Kansas entitled 'An act to enable counties, municipal corporations, the board of education of any city and school districts to refund their indebtedness,' approved March 8, 1879, and it is hereby certified that the total amount of this issue of bonds does not exceed the actual amount of the outstanding indebtedness of said city, and that all the requirements of the provisions of the foregoing act have been strictly complied with in issuing this bond." The material portions of the refunding act referred to in the foregoing recital are as follows:

"Be it enacted by the legislature of the state of Kansas: Section 1. That every county, every city of the first, second or third class, the board of education of any city, every township, and every school district, is hereby authorized and empowered to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever, upon such terms as can be agreed upon, and to issue new bonds with semi-annual interest coupons attached, in payment for any sums so compromised; which bonds shall be issued at not less than par, shall not be for a longer period than thirty years, shall not exceed in amount the actual amount of outstanding indebtedness and shall not draw a greater interest than six per cent. per annum.

"Sec. 2. Bonds issued under this act by any county shall be signed by the chairman of the board of county commissioners and attested by the county clerk under the seal of the county. Bonds issued by any city shall be signed by the mayor and attested by the city clerk under the seal of the city. * * *"
Laws Kan. 1879, pp. 80, 81, c. 50.

The defendant city pleaded, in substance, that the bonds and coupons in question were issued without authority of law, and that the same were void for the following reasons, to wit: That on or about July 1, 1887, an election was ordered in said city of Arkansas City, Kan., for the purpose of voting aid to and subscribing to the capital stock of the Grouse Creek Railway Company in the sum of \$54,000, said aid to consist of an issue of bonds to the amount of \$24,000 and an issue of warrants to the amount of \$30,000; that at the time said election was ordered aid had already been extended to said Grouse Creek Railway Company by other municipalities and townships of the county of Cowley, in which the defendant city was located, to the amount of \$50,000; that under the laws of Kansas then in force the county of Cowley and the townships and municipalities therein had no power to vote aid to said Grouse Creek Railway Company in excess of \$50,000, and that the defendant city was, therefore, without power to extend further aid to said railway company in the sum of \$54,000, as contemplated by said election; that, notwithstanding these facts, the mayor of said defendant city, one J. L. Huey, who was also the president of said Grouse Creek Railway Company, assumed to execute aid bonds in the sum of \$24,000 and aid warrants in the sum of \$30,000 in the name of said city and in favor of said railroad company, and subsequently endeavored to negotiate them, but that in point of fact they were never issued or put in circulation, and never became binding obligations of said city; that thereafter an agreement was made by and between said J. L. Huey, mayor, as aforesaid, and W. N. Coler & Company, a firm of brokers, who were alleged in the answer to be the agents and brokers of the above-

named plaintiffs, whereby said W. N. Coler & Company agreed in behalf of their principals to purchase refunding bonds to the amount of \$54,000, provided the same were issued in lieu of said aid bonds in the sum of \$24,000 and in lieu of said aid warrants in the sum of \$30,000 theretofore executed by said mayor; that, in pursuance of said agreement, said J. L. Huey did procure the issuance of pretended refunding bonds in the sum of \$54,000, being the bonds in controversy, and did thereupon deliver the same to W. N. Coler & Company, who were at the time the plaintiffs' agents. The answer further averred the fact to be "that no ordinance of the city council of the defendant city was at any time passed, authorizing the refunding or attempt to refund said pretended bonds and railroad aid warrants; and that in truth and in fact said pretended bonds and railroad aid warrants so attempted to be refunded were not the binding or valid obligations of defendant city,—all of which plaintiffs in this action at the time well knew." It was also averred by the defendant city "that no ordinance of any kind was ever passed at any time by the mayor and council of defendant city authorizing the issue of said pretended aid bonds and aid warrants, and that the same were so pretended to be issued as aforesaid without any notice to the voters of the defendant city, and without any authority of law so to do; and that the same are wholly void, and of no force and effect whatever." A reply was filed to the aforesaid plea or answer, denying all the allegations thereof, and the case went to trial before the court, a written stipulation having been filed, waiving a jury. The circuit court entered a judgment in favor of the defendant city. 61 Fed. 478. To reverse that judgment the record was removed to this court by a writ of error.

W. H. Rossington and Charles Blood Smith, for plaintiffs in error.

John A. Eaton and J. C. Pollock (J. Mack Love, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The case having been tried by the circuit court without the intervention of a jury, its findings on the issues raised by the pleadings having been general, and no instruction having been asked in the nature of a demurrer to the evidence, we are limited in our consideration of the case to such errors as have been assigned relative to the admission or exclusion of testimony. No other errors that may have been committed by the trial court in the progress of the case are before us for review. *Searcy Co. v. Thompson*, 13 C. C. A. 349, 66 Fed. 92. Two exceptions seem to have been taken by the plaintiffs to the admission of evidence offered by the defendant, one of which exceptions relates to the admission of the book of printed ordinances of the city of Arkansas City that were in force when the refunding bonds now in controversy were issued. The other of the exceptions relates to the admission of a book kept by the defendant city containing a record of its bonded indebtedness. Whether these exceptions, or either of them, were well taken, and are so far material as to warrant a reversal, are the only questions that we can consider.

Counsel for the plaintiffs have assumed that there is in the record a special finding of fact, and that it was specifically found by the circuit court that the plaintiffs were purchasers of the bonds in suit for value, before maturity, and without notice of defenses. On this assumption the question of the admissibility of the ordinance book mentioned above has been argued, but the assumption thus made is erroneous.

As we have before indicated, there is no special finding of fact contained in the record which we can notice, and it goes without saying that this court is without power to examine the testimony for the purpose of making a finding, either general or special. It is true that the record contains an opinion of the trial judge, delivered contemporaneously with the rendition of the judgment, in which he said, among other things, while discussing the case:

"Plaintiffs purchased these bonds from Spitzer & Company, who were innocent holders, and all their rights passed to plaintiffs. *Porter v. Steel Co.*, 122 U. S. 267, 7 Sup. Ct. 1206; *Scotland Co. v. Hill*, 132 U. S. 107, 10 Sup. Ct. 26. Plaintiffs are, therefore, entitled to all the protection which the law gives to holders of this class of securities who purchased them without notice and for value."

But this is not a special finding of fact which we can accept and be governed by, nor was it intended as such by the trial judge. In legal contemplation, a special finding of fact, as distinguished from a general finding, is one in which the trial judge states succinctly his ultimate conclusion on each material issue of fact raised by the pleadings. It is like a special verdict, or an agreed statement of facts. It must not be a mere recital of the testimony on which the ultimate finding is to be based, nor leave a part of the material issues of fact raised by the pleadings undecided. Moreover, a special finding of fact should be so framed as to indicate clearly that the trial court intended it not merely as an opinion containing a decision upon questions of law and fact, but as a special finding embodying his ultimate conclusions on mooted questions of fact only. *Burr v. Navigation Co.*, 1 Wall. 99, 102; *Adkins v. W. & J. Sloane*, 19 U. S. App. 573, 8 C. C. A. 656, and 60 Fed. 344; *Lehnen v. Dickson*, 148 U. S. 71, 13 Sup. Ct. 481. In the present case the only finding which we can notice is that contained in the judgment entry, which recites:

"This said cause comes duly on for hearing and decision by the court. Plaintiffs appear by Messrs. Rossington, Smith, and Dallas, their attorneys, and the defendants by Pollock and Love and John A. Eaton, and thereupon said plaintiffs move the court that it find the issues in favor of said plaintiffs, and render a judgment upon the evidence submitted in favor of said plaintiffs and against said defendant, which motion is by the court overruled, to which ruling plaintiffs duly except, and thereupon the court finds for said defendants and against said plaintiffs, to which finding the plaintiffs duly except. It is therefore by the court considered, ordered, and adjudged that plaintiffs take nothing from the defendant upon the several causes of action as set forth in the petition of the plaintiffs filed herein. * * *"

This must be regarded as a general finding in behalf of the defendant city, and the only finding which the record contains.

Starting, however, with the assumption that the plaintiffs were purchasers of the refunding bonds for value, before maturity, and without notice that they had not been authorized by ordinance, counsel contend that the admission of the ordinance book was erroneous, because the recital contained in the bonds estopped the city from asserting that its council had not authorized the alleged aid bonds and aid warrants to be refunded. The obvious answer to this contention is that, when the ordinance book was admitted, the defendant

was entitled to prove, if it could, all the facts alleged in its answer, namely, that the city council had never authorized the refunding of the alleged aid bonds and aid warrants, that the mayor had assumed to exercise that power without the sanction of the city council, and that the plaintiffs were well aware of these facts when they purchased the bonds. The admission of the ordinance book was one step in the direction of establishing the averments of its answer, which the city was entitled to take, because the book tended to show that no refunding ordinance had been adopted. And in passing upon the admissibility of the book when it was offered, it was not necessary to consider whether the city would ultimately succeed in proving the other facts alleged in its plea that were essential to make out a complete defense. When a defense pleaded is made up of several independent facts, a defendant cannot be compelled to prove all of said facts at once, but must of necessity be allowed to offer any competent evidence which has a direct tendency to establish any of the several facts which together constitute the defense. As no objection was made to the ordinance book on the ground that it was not properly authenticated, and as the sole objection to it seems to have been that the fact intended to be proven by the book was not relevant or material, because the plaintiffs were innocent purchasers, we must hold that the objection made was properly overruled, and that the book was properly admitted in evidence.

The other item of evidence which was objected to, namely, the book containing a record of bonded indebtedness, would seem to have been offered by the defendant solely for the purpose of showing that under the constitution and laws of Kansas it had exhausted its power to contract any further bonded indebtedness prior to the execution of the alleged aid bonds and aid warrants, and prior to the issuance of the refunding bonds in lieu thereof. The plaintiffs objected to the evidence on the ground that the book offered was "not the bonded record of the city," that it was "not a book provided by law to be kept," that it was "not a public record," and was, therefore, "incompetent, irrelevant, and immaterial." It appears from the testimony that there were two books in which the city had at different times kept an account of its bonded indebtedness,—one a new book, then in use; and the other an old book, formerly used. A controversy arose at the trial as to which of these books was the proper record, and whether the city clerk had produced the proper book in obedience to a subpoena therefor that had been issued by the plaintiffs. It would seem from what occurred in the course of this controversy that the plaintiffs' counsel did not object to proof of the bonded indebtedness of the defendant city, but that their insistence was that the fact should be proven, not orally, as at first attempted, but by the record of indebtedness kept by the city, and that the book actually produced, which seems to have been the new record into which certain entries found in the old record had recently been copied, was not the proper record to establish the amount of the bonded debt. We think it wholly unnecessary to decide at this time whether the objections urged against the admissibility of the book now in question were well founded or otherwise, because the case was tried by

the court without a jury, and the record shows conclusively that the admission of the book showing the amount of the bonded debt had no influence whatever on the judgment ultimately rendered. From the opinion of the circuit court, which is incorporated into the record, it appears that the judgment in favor of the defendant city was based solely on the ground that the refunding act of March 8, 1879, *supra*, conferred on the defendant city a power which could only be exercised by it by means of an ordinance or resolution passed by its council and approved by its mayor; that it was the duty of the bond purchaser to ascertain by proper inquiry whether such an ordinance or resolution had been enacted; and that it was beyond the power of the mayor and city clerk to issue refunding bonds without the sanction of the council, or to bind the city by estoppel to pay refunding bonds not authorized by the council, by a recital inserted therein that they had been duly and legally issued. The circuit court did not rest its judgment in favor of the defendant city on the ground that the limit of legal indebtedness had been reached before the bonds in suit were executed, but ignored that defense altogether; wherefore the admission of the evidence complained of did no harm. *Swan v. City of Arkansas City*, 61 Fed. 478. The decision of the trial judge on the points last mentioned was in accordance with the decision of this court in *National Bank of Commerce v. Town of Granada*, 10 U. S. App. 692, 4 C. C. A. 212, and 54 Fed. 100, and we fully concur therein. The result is that the record before us discloses no material error, and the judgment of the circuit court is therefore affirmed.

MISSISSIPPI RIVER LOGGING CO. v. ROBSON.

(Circuit Court of Appeals, Eighth Circuit. August 5, 1895.)

No. 540.

1. CONTRACTS—DISCHARGE—ACT OF GOD.

One R. owned and operated a sawmill on the Mississippi river, and also owned a tract of timber land near the headwaters of the F. and C. rivers, from which he was drawing and expected to draw for some years his supply of logs. The M. Co. was engaged in the business of driving logs on the F. and C. rivers, and preparing the same for transportation on the Mississippi, and had done this work for R. Differences having arisen between them, a contract was made, in August, 1882, between R. and the M. Co., which provided that, "for the purpose of settling all differences and providing for the future," the M. Co. agreed to take control of all logs delivered to it by R. on the F. and C. rivers, drive them to a certain boom, and prepare them for transportation on the Mississippi, for which R. agreed to pay, "annually, at the close of each season's business," certain agreed sums. No period was expressly fixed for the duration of the contract. A flood afterwards caused a change in the river banks, making it necessary to abandon the boom named in the contract and construct another. Subsequently the M. Co. notified R. that it elected to terminate the contract. R. sued to recover additional sums which he had been obliged to pay for the work agreed to be done by the R. Co. *Held*, that the change in the river banks was not such an act of God as to discharge the contract, since the possibility thereof should have been foreseen and provided against in the contract, and since its occurrence did not render the performance of the contract impossible.

2. SAME—MUTUALITY.

Held, further, that the contract did not lack mutuality because of the absence of any agreement by R. to furnish logs, since, by virtue of its expressed purpose of settling differences, it operated as a release of existing claims, which would constitute a sufficient consideration for the M. Co.'s agreement, and made the contract in part an executed one.

3. SAME—DURATION.

Held, further, that the contract, in view of its purpose to provide for the future and its other terms, could not be held to be terminable at the will of either party, but that, by a fair interpretation of its terms, it was to continue as long as R. was actively engaged in removing timber from the lands on the F. and C. rivers owned by him at the date of the contract.

4. EVIDENCE—BOOKS OF ACCOUNT.

For the purpose of showing the quantity of logs cut, R. offered certain books, kept in his business. It appeared that the logs, as cut, were measured by the camp scalers, and the measurements entered in these books; that from time to time inspectors visited the camps, and verified these books by remeasuring a portion of the logs; and that, upon the books so verified, payments were made by R. to the log cutters. The inspectors who revised the books identified them, and testified to their correctness. *Held*, that the books were admissible without producing the camp scalers who originally measured the logs.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This was a suit by John Robson, the defendant in error, against the Mississippi River Logging Company, the plaintiff in error, to recover damages for a breach of a written contract between said parties, that was entered into on August 23, 1882. A jury having been waived, the case comes before this court for review on a special finding of facts made by the Honorable O. P. Shiras, before whom the case was tried. The several special findings that are most material to the discussion of the several errors that have been assigned are as follows:

"(2) I find that, for a number of years prior to 1882, the defendant company was engaged in the business of running and driving logs and timber down the Flambeau and Chippewa rivers, in the state of Wisconsin, to the Mississippi river, including in such business logs and timber owned by the defendant and logs and timber owned by third parties.

"(3) I find that, prior to 1882, the general mode in which the said business was carried on was as follows: The logs and timber were placed by the owners thereof on the banks or in the water of the said Flambeau and Chippewa rivers and the tributaries thereof. The driving of the logs down the rivers was performed by the defendant corporation or by the Chippewa Lumber & Boom Company, which latter company was under the control and management of the defendant. When the logs reached Beef Slough boom, which was situated on the lower part of the Chippewa river, they were taken possession of by the Beef Slough Boom Company, and were run into the boom managed by said company, and the logs belonging to the different owners were separated from the common mass, and run into pockets. Having been thus assorted, they were then brailled and formed into rafts in proper condition to be taken in tow by the raft boats, which conveyed them to their several points of destination upon the Mississippi river.

"(4) I find that for a number of years prior to the year 1882 the plaintiff, John Robson, had been engaged in the lumber business upon the Mississippi river; that he had a sawmill at Lansing, upon that river, and that he brought the logs sawed at the mill from the lands tributary to the Flambeau and Chippewa rivers in Wisconsin; that he owned a quantity of timber lands tributary to these streams, from which he annually cut a number of logs, and that he also bought logs from other persons, or bought the right to cut logs from lands owned by other persons and tributary to the streams above named; that, for a number of years prior to 1882, all the logs cut or bought by the plaintiff in the regions tributary to the Flambeau and Chippewa rivers were

driven for him by the defendant company or by the Chippewa Lumber & Boom Company.

"(5) I find that certain differences and disputes in regard to the handling of said logs, and the prices to be paid therefor by plaintiff, having arisen thereupon on the 23d day of August, 1882, the plaintiff and defendant entered into a contract in writing, of the following tenor and effect.

"Articles of agreement made and entered into this 23d day of August, 1882, by and between the Mississippi River Logging Company, a corporation organized under the laws of Iowa, party of the first part, and John Robson, party of the second part, witnesseth: Whereas, the party of the second part owns a large quantity of pine lands tributary to the Chippewa and Flambeau rivers and their branches in Wisconsin, and now has a large quantity of saw logs and timber in said streams, and expects to cut annually hereafter, and deliver in said streams, a large quantity of saw logs and timber to be driven to market down said stream, to the Mississippi river; and whereas, the said party of the first part is engaged in the business of driving logs down said streams to Beef Slough, for other parties; and whereas, differences having arisen between the party of the second part and the Chippewa Lumber & Boom Company (which is controlled by the party of the first part) in respect to the running and driving of logs: Now, therefore, for the purpose of settling all said differences and providing for the future, it is mutually agreed as follows: First. Said party of the first part, in consideration of the premises and of the promises of the said party of the second part, hereinafter mentioned, agrees to take possession and control of all logs and timber which the party of the second part shall deliver in said Chippewa river at or below the east and west forks thereof, and all that shall be delivered in said Flambeau river at or below the north and south forks of said stream, and to drive the same, at its own cost, charges, and expense, down said streams to and into Beef Slough boom, not exceeding an average of twenty-five millions of feet annually; said logs to be driven each season with all reasonable dispatch, and with as much care and facility as it shall drive its own logs. The logs of the party of the second part now in said streams are to be driven by said first party under this agreement. Any charges to be paid the Chippewa Lumber and Boom Company, or any other company, person, or persons, on account of said logs or any of the same, between the aforesaid forks of said streams and said Beef Slough boom, are to be paid by the said party of the first part. Second. And the said party of the first part, in consideration of the premises, further undertakes and agrees that the charges of the said Beef Slough Boom Company shall not exceed sixty cents per thousand feet for booming, assorting, and delivering in pockets and watching the said logs of the said party of the second part at all the mills on the Chippewa river. Third. And the party of the first part, in consideration of the premises, further undertakes and agrees to brail and deliver to the said second party, in a proper and usual manner, his said logs ready to be taken in tow by boat after the same are turned out into pockets by said Beef Slough Boom Company, and to do the same with all reasonable dispatch. Fourth. And the said party of the second part, in consideration of the premises, promises and agrees to pay to the said party, annually, at the close of each season's business, for taking the care, control, and delivering said logs into Beef Slough boom, as agreed as aforesaid, the sum of two hundred and fifty dollars; and, for brailing and delivering said logs ready for the towboat, twenty-five cents per thousand feet. And said party of the second part also further agrees to return to the said party of the first part the brailing lines used in brailing said logs, unless the same shall have been three times so used. Fifth. In case the said party of the second part associates any person or persons with him as partner or partners in such lumbering business, this agreement is to stand, apply, and operate in respect to such partnership. But no logs are to be handled by said party of the first part under this agreement except such as shall be owned by said party of the second part, or by him and others as partners. The cost of scaling the said logs as the same are turned into said Beef Slough boom is to be paid equally by the parties hereto.

"Witness our hands and seals, this 23d day of August, 1882.

"Mississippi River Logging Co.

"F. Weyerhauser, Pt.

"John Robson."

"(6) I find that after the date of this contract, and up to April 4, 1889, both parties recognized their contract to be in full force, and the defendant company took charge of and handled all logs delivered to it by plaintiff in accordance with its provisions.

"(7) I find that on April 4, 1889, the defendant company notified the plaintiff, by a letter addressed to him, and received in due course of mail, that it would no longer be bound by said contract, the said letter reading as follows:

"Chippewa Falls, Wis., April 4th, 1889.

"Mr. John Robson, Winona, Minn.—Dear Sir: You will please to take notice that the Mississippi River Logging Company elects to, and does hereby, terminate the contract made with you for driving your logs on the Chippewa and Flambeau rivers in the state of Wisconsin, and for fitting said logs at Beef Slough for transportation down the Mississippi, being the contract bearing date August 23d, 1882, all the provisions of which are hereby terminated, and will not be hereafter considered binding between the parties. If you do not receive your logs at Beef Slough when delivered in the pockets, and fit them for transportation, it will be taken for granted that you elect to have this company act for you in that regard, charging therefor same as for like services done for others.

"Yours respectfully,

Mississippi River Logging Co.

"By F. Weyerhaeuser, Prest."

"(8) I find that since said 4th day of April, 1889, and as a consequence of the refusal of the defendant company to further handle, drive, or care for the logs owned by the plaintiff for the prices named in the contract, the plaintiff has been compelled to pay larger sums for the performance of the work necessary therefor, such additional payments amounting to 38½ cents per thousand feet, subject to reduction of the \$250 per year, the contract price for driving; and I further find that plaintiff paid the sum of \$350.27 as an extra charge for brailing in 1889, in addition to the total of 38½ cents increase.

"(9) I further find that at the date of the contract in question, to wit, August 23, 1882, the plaintiff had upon the banks or in the waters of the Flambeau and Chippewa rivers, below the forks thereof, logs and timber to the amount of 14,901,430 feet according to bank scale.

"(10) I find that since the said 23d day of August, 1882, the plaintiff has cut from the lands by him owned at the date of the contract, and placed in the waters of the Chippewa and Flambeau rivers, as provided in said contract, timber to the amount of 97,848,024 feet at bank scale, and that there was in April, 1889, standing uncut upon the said lands the further amount of 3,869,000 feet of pine timber at bank scale, and 724,000 feet of hemlock timber."

"(13) I find that in 1884 an extraordinary flood occurred in the Chippewa river, which brought about a change in the channel of the river, near the entrance to Beef Slough, and resulted in the filling up thereof. The defendant company made all reasonable efforts and expenditures to keep open said slough and the entrance thereto, but without avail; and finally, in 1889, Beef Slough was wholly abandoned, and since then it has not been used in connection with the logging business on the Chippewa river.

"(14) I find that, when it became apparent that Beef Slough was becoming unfit for booming purposes, a company was organized, under the laws of the state of Minnesota, for the purpose of creating and managing a boom at West Newton Slough, on the west bank of the Mississippi river; and booming facilities costing in excess of \$100,000 were there created, and the logs coming down the Chippewa river have since then been run into and handled in West Newton Slough, instead of Beef Slough.

"(15) I find that the relations existing between the West Newton Boom Company and the defendant company are substantially the same as those existing between the defendant company and the Beef Slough Company.

"(16) I find that, by the use of the facilities created at West Newton Slough, the logs driven down the Chippewa river can be boomed, brailed, formed into rafts, and be delivered to towboats for transportation down the Mississippi river, but the expense thereof is somewhat in excess of what the same work cost at Beef Slough.

"(17) I find that the defendant failed to handle, as it was required to do under the contract, the sum of 42,238,799 feet of pine timber; and that the

additional cost for handling the same, which plaintiff has been compelled to pay or will be compelled to pay, equals the sum of \$15,611.00 over and above the cost at contract rates.

Shiras, District Judge."

In view of the foregoing findings, the circuit court decided that the plaintiff below was entitled to recover. 61 Fed. 893.

John J. Jenkins (H. H. Hayden, on the brief), for plaintiff in error.
J. A. Tawney and Francis B. Daniels (David B. Henderson, Louis G. Hurd, and George W. Kiesel, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It was insisted on the oral argument of the case by counsel for the plaintiff in error, and the point is elaborated to some extent in the brief, that the circuit court erred in holding that the logging company was not relieved of its obligation to further perform its contract by the filling up of Beef Slough, which was occasioned, as it seems, by an extraordinary flood in the Chippewa river, that occurred in the year 1884. It was insisted that the filling up of the slough was an act of God, which rendered further performance of the contract impossible, and operated to discharge the same. This question was considered at considerable length in the opinion of the learned trial judge, and was decided adversely to the contention of the logging company on two grounds: First, for the reason that the flood which filled up the slough was an event which might reasonably have been anticipated, and against the occurrence of which the logging company ought to have protected itself by a proper stipulation in the contract; second, for the reason that the filling up of Beef Slough did not in fact render it impossible for the logging company to do substantially all that it had contracted to do. The circuit court held that by making use of some other slough near the mouth of the Chippewa river for the purpose of sorting and brailing logs, as the court held it had the right to do, the defendant company might have fulfilled all the obligations which the contract imposed. *Robson v. Logging Co.*, 61 Fed. 893, 900, 901. The reasoning as well as the decision of the circuit court on this branch of the case meets with our approval; and, inasmuch as the alleged error is not specified in the assignment of errors in accordance with the requirements of rule 11 of this court (11 C. C. A. cii., 47 Fed. vi.), it will not be further noticed.

It is also contended that the contract sued upon lacked mutuality, and for that reason was not enforceable against the logging company. This is but another form of stating the proposition that the logging company's promise to take possession of all the plaintiff's logs and timber in the Chippewa river, and to drive the same down that river, and to brail and deliver them ready to be taken in tow by towboats, for a certain specified compensation, to be paid by the plaintiff, rested upon no consideration, because the plaintiff did not expressly promise to deliver any logs or timber to be so handled. We may concede it to be an elementary rule that, so long as a contract is wholly executory, neither party thereto is bound unless both are bound. A promise by one party to do a given act, nothing having

been done or paid in consideration therefor, cannot, as a matter of course, be enforced unless the opposite party either expressly or by necessary implication promises to do something in return. The rule in question is well illustrated by the following cases: *Campbell v. Lambert*, 36 La. Ann. 35; *Railway Co. v. Dane*, 43 N. Y. 240; *Stensgaard v. Smith*, 43 Minn. 11, 44 N. W. 669; *Bailey v. Austrian*, 19 Minn. 535 (Gil. 465); *Mers v. Insurance Co.*, 68 Mo. 127; *Chambliss v. Smith*, 30 Ala. 366; *Willetts v. Insurance Co.*, 45 N. Y. 45; *Clark*, Cont. 168, and cases there cited. We think, however, that the contract sued upon does not fall within the rule last stated. The special finding shows that, prior to the execution of the agreement, certain differences and disputes in regard to the handling of the plaintiff's logs and timber in the Chippewa river, and the prices to be paid therefor, had arisen between the parties to the contract. The contract also recites that it was entered into by the respective parties, "for the purpose of settling all said differences." Now, while the agreement does not expressly state that, when signed, it should operate as a settlement of past differences and a relinquishment of all claims growing out of previous transactions, yet, by necessary implication, such was the effect of the agreement when executed and delivered. By entering into the contract, the plaintiff evidently released and absolved the logging company from whatever claims he had theretofore preferred against it growing out of the transportation of logs and timber on the Chippewa river. By a necessary inference, that which was declared to be the purpose of the contract, to wit, the settlement of past differences, was accomplished when the contract was signed and delivered. Neither party could thereafter maintain an action against the other founded upon a claim that was then in controversy if it related to the transportation of logs or timber on the river in question. It results from this view that the contract in suit cannot be regarded as having been wholly executory when it was signed and delivered. By the very act of signing and delivering the agreement, the plaintiff manifestly released claims against the logging company, of some kind, that were then in dispute, which might have become the subject-matter of an action at law, if, indeed, a suit was not then pending. This in itself constituted a sufficient consideration for the defendant company's promise to drive and brail, for a specified price, such logs as the plaintiff might thereafter place in the Chippewa river. The point, therefore, that the contract was voidable when executed, for want of mutuality, in our opinion, is not well taken.

Another point that is urged with some force is that "the contract, being silent as to its duration, was terminable at the pleasure of either party." It is obvious, we think, from the relations of the parties and the circumstances under which the contract was executed, that if this idea that the contract might be terminated at the pleasure of either party had been suggested to the plaintiff or to the defendant, particularly to the former, prior to the execution of the agreement, it would never have been executed in its present form. The logging company had been engaged for some years in the business of driving logs down the Chippewa river, and in placing them

in booms or sloughs, where the logs of different owners could be assorted, brailed, and formed into rafts in a fit condition to be towed to their destination at various points on the Mississippi river. The work of sorting the logs was done by a boom company which was under the domination and control of the logging company, and was merely one of the subagencies by which that company placed the logs of different owners in the Mississippi river in a condition to be towed. This was not a temporary employment of the logging company in which it had been engaged for a few months or a single season, but it was its permanent occupation; and it is fair to infer from the special finding that it had created facilities for driving, booming, and assorting logs which probably gave it a monopoly of that business on the Flambeau and Chippewa rivers. The plaintiff, on the other hand, was the owner of a mill at Lansing, on the Mississippi river. He also owned some pine lands on the head waters of the Flambeau and Chippewa rivers, and drew his supply of logs largely from that source, and expected to do so for some years to come, until the supply was exhausted. He had previously employed the logging company to drive and brail such logs as were cut on his lands, and disputes had arisen as to the mode of doing the work, and as to the prices that ought to be charged therefor, which controversies the parties not only desired to settle, but to guard against the recurrence of similar disputes in the future. Under these circumstances, it would be unreasonable to suppose that the parties to the contract contemplated a merely temporary agreement which either could terminate at will. Such an agreement would not furnish adequate protection to either party against future controversies which both desired to avoid. It would not settle for any definite period the compensation to be paid for the services to be rendered by the logging company, which must have been a matter of vital importance to the plaintiff, inasmuch as the logging company controlled practically all the facilities on the Chippewa and Flambeau rivers for driving and sorting logs. Moreover, an agreement that could be terminated at the pleasure of either party might prove to be a very inadequate consideration for the settlement of claims growing out of past transactions that had been surrendered and discharged when the contract in suit was executed. Aside from these considerations, which render it highly improbable that an agreement was contemplated which could be terminated at any time, the contract, as made, contains provisions which clearly indicate that the parties expected it to continue in force for a period of some years at least. It contained a stipulation that the payments to be made by the plaintiff should be made "annually at the close of each season's business." It also contained a statement that the contract was entered into "for the purpose of settling differences and providing for the future," which latter clause would be clearly inapt if the contract was entered into with the understanding that either party might terminate it at his mere pleasure or convenience. We entertain no doubt, therefore, of the intention of the parties to make a contract of some years' duration, which in the meantime could not be revoked by either party. Nevertheless, the important question remains whether the contract,

when considered in relation to the circumstances under which it was made, furnishes the means of determining its possible duration. This inquiry is essential, because, when a contract calls for the rendition of services, if it is so far incomplete that the period of its intended duration cannot be determined by a fair inference from its provisions, either party is ordinarily at liberty to terminate it at will on giving reasonable notice of his intention to do so. *Irish v. Dean*, 39 Wis. 562; *Coffin v. Landis*, 46 Pa. St. 426, 430. See, also, *Wood, Mast. & S.* 265, and *Mechem*, Ag. § 210.

For the reasons that we have already suggested, we have reached the conclusion that it may be fairly inferred from the terms of the agreement, and from the circumstances which led to its execution, that the parties to the instrument intended that it should continue in force and remain operative as long as the plaintiff was actively engaged in removing the timber from the lands which he then owned on the head waters of the Flambeau and Chippewa rivers. The fact that the plaintiff owned lands thus located, and found it necessary to make use of the Chippewa river as a vehicle of transportation; the fact that the logging company was engaged in the business of driving and assorting logs, and that it controlled most of the facilities for doing that work successfully; and the further fact that controversies had arisen, and were liable to arise in the future as long as the parties occupied such relation,—were the several circumstances which led to the execution of the contract. So far as appears, neither the plaintiff nor the logging company had any intention, when the contract was signed, of abandoning the business in which they were respectively engaged; and neither party seems to have anticipated a change in their relations or in the existing mode of doing business that would render the provisions of the contract inequitable or burdensome for some years to come. It was doubtless expected that in the course of a few years the timber on the lands then owned by the plaintiff would be exhausted; that the conditions that had given birth to the agreement would then cease to exist; and that on the happening of that event, and not before, it would cease to be operative. There is nothing in the provisions of the contract or in the situation of the parties that would warrant us in holding that it was probably intended that the logging company should have the right to terminate the contract before the plaintiff had exhausted the timber on the lands which he then owned, while there are very persuasive reasons to support the contrary view, that it was contemplated by the parties that it should remain in force until that event had transpired. It is a fundamental rule that, in construing a contract, effect should be given to the intention of the parties, and that in ascertaining that intention the court should place itself, as nearly as possible, in the position that they occupied when the contract was made. It frequently happens that the full scope and purpose of an agreement cannot be accurately ascertained without considering the subject-matter to which it relates and the circumstances under which it was executed. When a case of that kind occurs, and the necessity arises for going outside of the language employed, for the purpose of ascertaining its meaning or the probable intention of the parties thereto, a court is always privileged to do so,

and may properly consider any fact or circumstance which sheds light on the transaction. The case at bar is one which, in our judgment, demands a liberal application of this doctrine. While the parties to the contract have failed to state how long it should continue in force, they have, nevertheless, manifested an intention to enter into a business arrangement with each other which should last for some years and until a certain expected event had occurred. We think, therefore, that the happening of that event should be held to limit the duration of the contract, and that until such time the logging company remains bound by its provisions.

A number of exceptions were also taken to the action of the trial court in admitting testimony. As the case was tried by the court, without the intervention of a jury, none of these exceptions seem to us to be of sufficient importance to deserve special notice, save one, which relates to the introduction of certain scale books that were offered for the purpose of showing the quantity of logs that had been cut from the plaintiff's land. The circuit court considered the admissibility of this testimony at some length, and, as we fully concur in the view taken by the trial court, we cannot do better than quote the following passage from its opinion:

"The evidence shows that as the logs are cut in the woods they are scaled—that is, measured to ascertain their contents—by persons known as 'camp scalers,' and the measurements are entered upon cards. At the close of the day the measurements thus taken are entered upon the scale book. From time to time, inspectors visit the camps, and verify the contents of the scale books by counting and remeasuring a sufficient portion of the logs to satisfy them of the correctness of the books. If errors are detected, the book is corrected. After verification and correction by the inspectors, the scale book is sent to the owner of the logs, and payment is made to the log cutters and handlers according to the contents of the book, which is thus made the evidence upon which the owner of the logs must make payment to his employes. It is clearly to the interest of the log owner that these scale books shall not show the cutting of any greater number of logs than the facts will justify. The mode by which the entries are made on the scale book is such as to assure accuracy therein. The parties who cut and haul the logs, and the owner, who is to pay for the cutting and hauling, act upon the contents of the books, and deem them to be proper evidence of the facts therein stated. That which is received and acted upon by persons engaged in any line of business as competent evidence is ordinarily admissible when the same fact becomes a matter of inquiry in judicial proceedings. It would seem, therefore, that the scale books should be admitted in evidence, unless it appears that there is better evidence within the power of plaintiff to produce. It is said that the camp scalers should have been hunted up, and their testimony be introduced, in order to show the number of logs, and the contents thereof, cut on plaintiff's land during the time in controversy. What is sought to be proved is the result, in number and quantity, of the logs cut. When the scalers made the count and measurement, two records thereof were made,—one in the memory of the scaler, the other in the scale book. Which is now the best evidence? Years have elapsed. The entries on the scale books remain unchanged. They are now just what they were when originally made. Can the same be said of the record made upon the memory of the scalers? If the scalers had been produced, and had testified that in the years past they had counted and measured a large quantity of logs, and had at the time entered the results upon scale books prepared for the purpose, and that, as they now remembered it, the number and quantity were so and so, but, upon the production of the scale books, they showed a different quantity and measurement, which should control? The rule requiring the production of the best evidence of which the case is susceptible is intended to guard against fraud and mistake, and to aid in arriving at the truth. That

evidence which is the least liable to mislead is the best evidence; and it cannot be maintained that there is more reliable evidence of the number and quantity of the logs cut upon plaintiff's land than the scale books wherein the entries were made from day to day by the camp scalers, and which were revised and corrected by the inspectors. The books were properly identified, and the inspectors who revised them at the different camps testified to their correctness; and, under these circumstances, I hold that the books cannot be excluded upon the ground that it appears that there is better evidence adducible upon the question of the number and quantity of logs cut by plaintiff, and placed in the waters of the Chippewa and Flambeau rivers."

For the reasons so well stated by the trial judge, we entertain no doubt that the scale books in question were properly received in evidence. They appear to have been kept under conditions that were calculated to prevent mistakes therein, and to insure a high degree of accuracy. They were also identified by witnesses who were familiar with their contents, and whose special duty it was to see that they were properly and accurately kept. Under these circumstances, we think that the trial court would have erred if it had excluded the books on the ground that they had not been sufficiently identified, or that they were not the best evidence. Finding no error in the action of the circuit court to which our attention has been specifically directed by the assignment of errors, the judgment of the circuit court is hereby affirmed.

CUDAHY PACKING CO. v. SIOUX NAT. BANK OF SIOUX CITY.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1895.)

No. 599.

PRACTICE—WAIVER OF JURY TRIAL—REV. ST. § 649.

A statement contained in a bill of exceptions, that the "cause came on for hearing, and a jury having been impaneled and sworn, and the introduction of evidence having been commenced, by stipulation of parties hereto duly entered, the jury was withdrawn, trial to jury waived," and the cause referred, is insufficient, where the local practice act permits a reference to be ordered on oral consent of the parties in open court, to show that a written stipulation waiving a jury was filed, as required by Rev. St. § 649, or to give the appellate court jurisdiction to review errors committed in the course of the trial. *Rush v. Newman*, 7 C. C. A. 136, 53 Fed. 158, 12 U. S. App. 635, followed.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

This was a suit which was brought by the defendant in error, the Sioux National Bank of Sioux City, Iowa, against the Cudahy Packing Company, the plaintiff in error, to recover an amount of money which the bank had expended in taking up and paying certain pig tickets that had been issued by the Cudahy Packing Company in payment for hogs by it purchased. For some months prior to April 22, 1893, an arrangement had existed between the Union Loan & Trust Company of Sioux City, Iowa, and the Cudahy Packing Company, by virtue of which the trust company was under an obligation to pay such checks or pig tickets (so termed) as the packing company issued for hogs purchased at the stock yards in Sioux City, Iowa. At the close of each day's business the packing company gave to the trust company a voucher for the total amount of pig tickets issued by the former company during the day, which voucher contained the statement, printed across its face, that "when approved, dated, and signed, this voucher becomes a draft on the Cudahy Packing Company of South Omaha, Nebraska, payable through the

Union Stock Yards National Bank of South Omaha, or the Bankers' National Bank of Chicago, for ——— dollars." On Monday, April 24, 1893, the trust company found itself insolvent, and without means to pay pig tickets to the amount of \$13,509.52 that had been issued by the packing company the previous Saturday, and would probably be presented to the trust company for payment during the day. It accordingly took the voucher, for \$13,509.52, that it had received from the packing company for Saturday's purchases, to the Sioux National Bank, with which it kept an account, and proposed to assign the voucher to the bank, to obtain the money wherewith to pay the outstanding pig tickets, on account of which the voucher had been executed and delivered. The bank assented to the proposition, took an assignment of the voucher, as if it were a draft, and subsequently paid checks drawn on it by the trust company in settlement of pig tickets to the amount of \$11,513.62. The Cudahy Packing Company refused to pay the voucher when it was presented to it for payment, claiming that it had funds on deposit with the trust company, where the voucher was assigned to the plaintiff bank, sufficient to meet all outstanding pig tickets by it issued on Saturday, April 22, 1893. The bank thereupon sued the packing company on the voucher, claiming in its complaint that it was, in legal effect, a draft or bill of exchange that had been accepted by the packing company prior to the purchase of the same by the bank. It subsequently, by leave of court, amended its complaint by adding thereto a count for money had and received by the packing company from the bank, to the amount it had expended in paying outstanding pig tickets, to wit, for the sum of \$11,513.62. There was a trial before a referee appointed by the court, which resulted in a judgment against the packing company for \$12,535. 63 Fed. 805. The present writ of error was brought by the packing company to obtain a reversal of the judgment.

D. A. Holmes (C. H. Lewis and A. L. Beardsley, on the brief), for plaintiff in error.

Asa F. Call (William L. Joy and C. L. Joy, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The first question to be considered is whether the errors assigned upon the record, or any of them, are subject to review by this court. The decision of this question depends upon whether it affirmatively appears from the record that "a stipulation in writing waiving a jury" was filed with the clerk, pursuant to the provisions of section 649 of the Revised Statutes of the United States. It has been so often decided, both by this court and by the supreme court, that an oral stipulation waiving a jury trial, in law cases tried in the federal courts, is not sufficient to authorize an appellate court to review errors committed in the progress of the trial, that we need not stop to repeat what has so often been said on that point. It will suffice to say that if the stipulation waiving a jury is oral, and not in writing, as the statute requires, no question can be considered in such a case by an appellate court, on a writ of error, except the question whether the declaration or complaint is sufficient to support the judgment. *Bond v. Dustin*, 112 U. S. 604, 5 Sup. Ct. 296; *Rush v. Newman*, 12 U. S. App. 635, 7 C. C. A. 136, 58 Fed. 158; *Searcy Co. v. Thompson*, 13 C. C. A. 349, 66 Fed. 92; *U. S. v. Carr*, 19 U. S. App. 679, 10 C. C. A. 80, 61 Fed. 802. The foregoing rule is subject to an exception that was pointed out in *Supervisors v. Kenricott*,

103 U. S. 554, 556, and is referred to in *Bond v. Dustin*, *supra*,—that when a case is presented to the trial court for decision on an agreed-statement of all the facts, prepared and signed by counsel, an appellate court, on writ of error, may always determine whether the judgment rendered was such as should have been rendered on the agreed facts. In the present case the only evidence found in the record that a written stipulation waiving a jury was filed is in the following recital contained in the bill of exceptions, to wit:

"This cause came on for hearing, and a jury having been impaneled and sworn, and the introduction of evidence having been commenced, by stipulation of parties hereto duly entered, the jury was withdrawn, trial to jury waived, and the cause was referred to W. E. Cody, Esq., for the purpose of taking and reporting the evidence, and reporting upon the facts of this case, the same to be submitted to the court upon the report of said referee, and the pleadings."

In no other part of the record do we find any evidence that the stipulation referred to was made otherwise than by word of mouth in open court, and simply noted by the clerk in the record, whereas the fact that the Code of Iowa permits a reference to be ordered in obedience to the oral consent of the parties in open court, entered on the minutes (McClain, Code Iowa, § 4021), renders it extremely probable, in the absence of any written agreement found in the bill of exceptions, that the stipulation referred to in the bill was merely verbal. This latter fact—that the Code of Iowa permits a reference to be made orally—distinguishes the case at bar from *Boogher v. Insurance Co.*, 103 U. S. 90, 97, in which case it was held that a written consent to a reference would be presumed, because by the practice act of the state a case could not be referred without the written consent of the parties thereto. Besides, it was stated by counsel in the course of the argument, and the statement was not challenged, that the agreement to refer was in point of fact made orally in open court, in accordance with the Iowa statute. This court held in *Rush v. Newman*, *supra*, that the following statement found in the record, "Both parties in open court having waived a jury, and agreed to trial before the court," was not sufficient to show that the waiver of a jury was in writing. We also took occasion, in the same case, to quote several forms of expression, all of which had been adjudged to be inadequate to show with the requisite certainty that a jury had been waived, in conformity with the federal statute, by a written stipulation. Following our rulings in *Rush v. Newman* and *U. S. v. Carr*, *supra*, and the adjudications therein referred to, we feel constrained to hold that the present record fails to show that the parties dispensed with a jury by a stipulation in writing made and filed with the clerk. While it may, at first blush, seem somewhat overcritical to question the sufficiency of the language employed in the present record to show that a jury was waived by a written agreement, yet the proposition, now well established, that our jurisdiction to review the judgment of the circuit court, in most of the respects whereof complaint is made, depends upon such a written waiver having been filed, renders it imperative that we should scan the record closely to ascertain if

we have any authority to rectify the alleged errors of the trial court. In the brief of counsel for the plaintiff in error, our attention is directed to the case of *Paine v. Railroad Co.*, 118 U. S. 152, 6 Sup. Ct. 1019, as furnishing sufficient authority for a review of all the alleged errors that have been assigned; but, from an examination of the statement in that case, it will be found that a written stipulation waiving a jury was duly signed by the parties and filed. The supreme court accordingly ruled that it could determine whether the judgment was right upon the facts specially found by the referee. The decisions in *Roberts v. Benjamin*, 124 U. S. 64, 8 Sup. Ct. 393, in *Andes v. Slauson*, 130 U. S. 435, 9 Sup. Ct. 573, and in a very recent case,—*Shipman v. Mining Co.*, 15 Sup. Ct. 886,—are to the same effect. The case at bar differs from these cases in that the record fails to show that a written waiver of a jury was filed, the result being that we have no jurisdiction to decide whether the judgment was right upon the facts reported by the referee, but must content ourselves with the inquiry whether the declaration is sufficient to sustain the judgment. We have no doubt that it is. As heretofore stated, the declaration contains two counts, one being upon an accepted draft, and the other upon the common count for money laid out and expended for the benefit of the packing company. If the latter count was defective, as contended, because it did not allege that the money in question was expended at the packing company's request, there was certainly no defect in the first count of the declaration. The judgment of the circuit court must accordingly be affirmed.

SHREVE et al. v. CHEESMAN et al.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 560.

1. CIRCUIT COURT OF APPEALS — JURISDICTION — WRIT OF ERROR TO SUPREME COURT PENDING.

The fact that a writ of error has been sued out of the supreme court to review a judgment of the circuit court for want of jurisdiction does not prevent the circuit court of appeals from entertaining a writ of error to review an order, made after the judgment was entered, which denies a new trial claimed under a statute of a state which gives a defeated party a right to a second trial in an action of ejectment.

2. PRACTICE—BILL OF EXCEPTIONS.

The fact that a bill of exceptions, showing the proceedings upon a motion for such a new trial, after judgment, was certified after the issue of a writ of error from the supreme court to review the judgment, is not a fatal objection to such bill.

3. COSTS—AS CONDITION OF NEW TRIAL—COLORADO STATUTE.

Code Civ. Proc. Colo. 1887, § 272, provides that the defeated party in an action to recover land may, at any time before the first day of the term succeeding that at which judgment is rendered against him, pay all costs recovered by such judgment, and thereupon have a new trial of the case. Another statute (1 Mills' Ann. St. 1891, § 677) provides that a successful plaintiff shall recover against the defendant his costs to be taxed. *Held*, that the provision of section 677 entitles the successful party to all costs of the action, including those of a prior mistrial as well as those of the

final trial, and a defeated party seeking a new trial under section 272 of the Code must first pay all costs of the prevailing party at a mistrial, as well as his other costs.

4. SAME—PRIOR ERRONEOUS DECISION—RULE OF PROPERTY AND PRACTICE.

A party who, after a mistrial, had been defeated on the second trial in an action in the circuit court of the United States in Colorado to recover lands, paid the costs of the second trial, and in due time applied for a new trial under Code Civ. Proc. Colo. § 272. Some years before, another judge, sitting in the same court, had decided that it was unnecessary, in such a case, to pay the costs of the mistrial. The judge to whom the application for new trial was made in this case denied it, after holding it under advisement beyond the time for paying the costs, on the ground that the costs of the new trial should have been paid. *Held* that, as the former decision, though erroneous, might well be regarded as a rule of property and practice, in reliance upon which the applicant had omitted to pay the costs in time, the order denying the new trial should be reversed, and a new trial granted, upon condition of the applicant's paying the costs within 60 days. Thayer, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Colorado.

Thomas M. Patterson and Charles C. Parsons, for plaintiffs in error.
Tyson S. Dines (Charles J. Hughes, Jr., on the brief), for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Does section 272, c. 23, of the Colorado Code of Civil Procedure of 1887, require the defeated party, in an action to recover the possession of real property to pay the costs of a prior mistrial of the action, in which the jury has disagreed, to entitle him to a new trial as of right under that section? If so, do the facts that the circuit court in which the action was pending had, several years prior to his application, decided that this section did not require such payment, and that the defeated party complied with the provisions of that section as it had been construed by that court, relieve him from the consequences of his failure to comply with the terms of the section as properly construed? These are the principal questions presented by this record.

The defendants in error, Walter S. Cheesman and George W. Clayton, brought an action in the court below against the plaintiffs in error, James A. Shreve, J. A. Perkins, and others, for the possession of certain real property, and for damages for the removal of minerals therefrom. Issues were joined, the action was tried, and the jury disagreed. At the May term of the circuit court in 1893 the action was tried again, a verdict was returned, and on June 27, 1893, a judgment was rendered in favor of the defendants in error. Section 272 of the Code of Civil Procedure of Colorado provides:

"Whenever judgment shall be rendered against either party, under the provisions of this chapter, it shall be lawful for the party against whom such judgment is rendered, his heirs or assigns, at any time before the first day of the next succeeding term, to pay all costs recovered thereby, and upon application of the party against whom the same was rendered, his heirs or assigns, the court shall vacate such judgment and grant a new trial in such case."

On November 3, 1890, in *Parkhurst v. Price*,¹ the resident district judge and acting circuit judge of the district of Colorado delivered an opinion, in which he held that a party who was finally defeated in an action for the recovery of possession of real property was not required to pay the costs of a prior mistrial of the action in which the jury had disagreed, in order to entitle him to a new trial under this section. In accordance with this ruling, the plaintiffs in error paid all the costs in this action, except the costs of the mistrial, and on November 2, 1893, before the term next succeeding the entry of the judgment, applied for a new trial under this section. It so happened that the district judge of another district was then temporarily holding the circuit court in the district of Colorado. He heard this application, took it under advisement, and on May 26, 1894, denied it, on the ground that the defendants in error had failed to pay the costs as required by law. On November 23, 1894, the plaintiffs in error sued out the writ of error in this case to reverse this order denying the new trial.

A motion was made by the defendants in error to dismiss this writ because the plaintiffs in error had, on June 26, 1894, sued out of the supreme court of the United States a writ of error to reverse the judgment in this action, on the ground that the court below had no jurisdiction of the case. The order denying the new trial, which the statute granted as a right, is a final decision that is reviewable in this court under the act which established it. 26 Stat. 828, c. 517, § 6; Supp. Rev. St. p. 903, § 6; *Standley v. Roberts*, 8 C. C. A. 305, 308, 59 Fed. 836; *Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co.*, 6 C. C. A. 180, 56 Fed. 956; *Mining Co. v. Campbell*, 10 C. C. A. 172, 61 Fed. 932. The fact that the plaintiffs in error are exercising a right, given to them by the same act of congress, to the decision of the supreme court upon another question in this case, is no reason for us to deprive them of their right to a hearing and determination of the question committed to our decision by that act. The fact that our writ of error was not issued until after the supreme court had issued its writ is not material. The question before the supreme court arises upon proceedings anterior to the judgment, and the question before this court upon proceedings subsequent to the judgment, so that the requisite records, as well as the questions before the two courts, are different, separate, and distinct.

The fact that the bill of exceptions was certified after the writ of the supreme court issued is not a fatal objection to the bill. It was made and certified during the term at which the order denying the new trial was made. It contains a record of the facts disclosed at the hearing which resulted in that order. The fact that a writ of error had been issued to review the judgment certainly did not deprive the court below of its jurisdiction, or relieve it of its duty, to make a true record of the proceedings in that court after the judgment. This bill of exceptions is that record. It was rightfully made, and is properly in this case for our consideration. *Hunnicut v. Peyton*, 102 U. S. 333, 353, 354. The motion to dismiss is denied.

Section 272 of the Colorado Code, *supra*, gives to the party against

¹ Not reported. Oral opinion.

whom a judgment for the recovery of real property is rendered a right "to pay all costs recovered thereby," and then to have a new trial of the action. The statutes of Colorado provide:

"If any person shall sue in any court in this state in any action, real, personal, or mixed, or upon any statute for any offense or wrong immediately personal to the plaintiff, and shall recover any debt or damages in such action, then the plaintiff or demandant shall have judgment to recover against the defendant his costs to be taxed; and the same shall be recovered, together with the debt or damages, by execution, except in the cases hereinafter mentioned." 1 Mills' Ann. St. Colo. 1891, § 677.

In the case at bar the defendants in error recovered a judgment for the possession of certain real property, for \$28,957.15 damages, "and their costs to be taxed." Their costs at the mistrial were taxed at the amount of \$1,814.81, and the costs of the last trial were taxed at \$128.97. The plaintiffs in error paid the latter, but did not pay the former, amount. It goes without saying, at this late day, that under section 721, Rev. St., the defendants in error were entitled to recover such costs as were allowed by the statutes of Colorado, in the absence of any act of congress prescribing a different rule. *Hathaway v. Roach*, 2 Woodb. & M. 63, Fed. Cas. No. 6,213; *Ethridge v. Jackson*, 2 Sawy. 598, Fed. Cas. No. 4,541. An exhaustive and interesting argument drawn from the history of the allowance of costs to the prevailing party has been made by counsel for plaintiff in error to show that the words "costs to be taxed," in section 677, supra, of the Colorado statutes, mean his costs at the last trial to be taxed. This argument is, in substance, that at common law no costs were recovered; that costs were first allowed in A. D. 1278 by the statute of Gloucester (6 Edw. I. c. 1); that in 1800, in *Bird v. Appleton*, 1 East, 111, the court of king's bench held that under that and numerous ancillary statutes the costs of a mistrial could not be recovered by the party who finally prevailed; that this construction was adopted by the court of common pleas in 1816, in *Worcestershire & S. Canal Co. v. Trent & M. Nav. Co.*, 2 Marsh. C. P. 475; that the state of Colorado has provided that in that state the common law of England, so far as the same is applicable and of a general nature, and all acts and statutes of the British parliament made in aid of or to supply the defects of the common law, prior to the fourth year of James I., which are of a general nature, and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority, with certain exceptions, not material here (Mills' Ann. St. Colo. 1891, § 4184); that it is a settled rule that whenever a statute of a foreign state is adopted, the construction placed upon it by the judicial tribunals of that state before its adoption is adopted with it, and that consequently the rule declared in *Bird v. Appleton* and *Worcestershire & S. Canal Co. v. Trent & M. Nav. Co.*, that a prevailing party cannot recover his costs of a mistrial, has become the law of the state of Colorado. The argument is logical and persuasive. It would be entitled to serious consideration if the statute of Gloucester and the acts of parliament that enlarged its scope were actually in force in the state of Colorado. They are not. The statute of that state, which we have quoted, and that alone, measures the rights of parties to

costs in this action, and that statute bears about the same relation to the statute of Gloucester that one of Fulton's steamboats does to the modern ocean liner. The statute of Gloucester provided that the demandant might recover against the tenant the costs of his writ purchased, together with his damage, and that the act should hold place in all cases where a man recovered his damage. The statute of Colorado provides that the prevailing party shall recover his costs to be taxed. It is plain that the construction placed upon the former statute could be of very little value as a guide to the proper interpretation of the latter. Moreover, the statute of Colorado needs no interpretation. Its language is simple and plain. "His costs to be taxed" cannot mean less than all his costs in the action to be taxed. The moment an attempt is made to limit these words to a part of his costs, we are met by the unanswerable question, what part? That which was before clear and certain becomes a matter of doubt and conjecture. When the meaning of a statute is plain, arguments drawn from the history of the legislation it embodies and the construction given to ambiguous statutes on the same or similar subjects serve only to create doubt where none should exist, and to confuse the judgment when it would otherwise be sound and clear. There is no better canon of interpretation than that, when a statute is plain and unambiguous, the legislature must be presumed to have intended what it has expressed, and no room is left for construction. *Knox Co. v. Morton*, 68 Fed. 787; *U. S. v. Fisher*, 2 Cranch, 358, 399; *Railway Co. v. Phelps*, 137 U. S. 528, 536, 11 Sup. Ct. 168. It was as imperatively necessary for the plaintiffs in error to procure the attendance of their witnesses, and to incur the costs of the mistrial, as it was for them to incur the costs of serving the summons or procuring the attendance of witnesses at the last trial. If they had incurred no costs at the mistrial, they would in all probability have been defeated then. The statute does not except these costs from its general provision, and it would be judicial legislation for the court to create exceptions to the general provisions of this law when the legislature has made none. Where the legislature has made no exception to the positive terms of a general statute, the conclusive presumption is that it intended to make none, and it is not the province of the courts to do so. *Madden v. Lancaster Co.*, 12 C. C. A. 566, 573, 65 Fed. 188; *Morgan v. City of Des Moines*, 8 C. C. A. 569, 60 Fed. 208; *McIver v. Ragan*, 2 Wheat. 25, 29; *Bank v. Dalton*, 9 How. 522, 528; *Vance v. Vance*, 108 U. S. 514, 521, 2 Sup. Ct. 854.

Our conclusion is that:

The provisions of section 677, *Mills' Ann. St. Colo. 1891*, that the prevailing party shall recover his costs to be taxed, authorizes him to recover all his costs in the action, including those of a prior mistrial, as well as those of the last trial; and a defeated party who would obtain a new trial under section 272 of the Code of Civil Procedure of Colorado of 1887 must first pay the costs of the prevailing party at a mistrial, as well as all other necessary costs he has incurred in the action. *Walker v. Barron*, 6 Minn. 508 (Gil. 353); *Fitch v. Stevens*, 2 Metc. (Mass.) 506; *Stoddard v. Treadwell*, 29 Cal. 281; *Oregin v. Railroad Co.*, 19 Hun, 349; *Howell v. Van Siclen*, 8 Hun, 524; *Lanz*

v. Trout, 46 How. Prac. 94; *Wessels v. Carr* (City Ct. N. Y.) 6 N. Y. Supp. 535; *Isaacs v. Plaster Works*, 43 N. Y. Super. Ct. 397, 401. There is no doubt that there are many cases where applications are made for the exercise of the discretion of the court, as in motions for continuances, motions for new trials for cause, and similar applications, in which the trial court has ample power to regulate the costs to be recovered as one of the terms upon which it will exercise its discretion. No reference is made to these cases in this opinion. There was no application for the exercise of any discretion in the court below, and none was exercised.

But the circuit court of the United States for the district of Colorado had, upon full consideration, decided and rendered an opinion, three years before the application for a new trial was made in this case, to the effect that the defeated party was not required to pay the costs of a mistrial in which the jury disagreed, in order to entitle him to a new trial under these statutes; and that decision had never been appealed from or reversed. No court, in Colorado or elsewhere, so far as we can learn, had given any other construction to these statutes. Was not this decision an authoritative declaration of the law of Colorado, and, until reversed, a rule of property and of practice upon which the plaintiffs in error had the right to rely? Chancellor Kent says:

"If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness; and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their actions and contracts by it." Kent, Comm. 476.

It is a principle of general jurisprudence that courts of concurrent or co-ordinate jurisdiction will follow the deliberate decisions of each other, in order to prevent unseemly conflicts, and to preserve uniformity of decision and harmony of action. This principle is nowhere more firmly established or more implicitly followed than in the circuit courts of the United States. A deliberate decision of a question of law by one of these courts is generally treated as a controlling precedent in every federal circuit court in the Union, until it is reversed or modified by an appellate court. Striking illustrations of this principle will be found in: *Vulcanite Co. v. Willis*, 1 Flap. 388, 393, Fed. Cas. No. 5,603, in which Judge Emmons said of these courts: "They constitute a single system; and when one court has fully considered and deliberately decided a question, every suggestion of propriety and fit public action demands it should be followed until modified by the appellate court"; *Washburn v. Gould*, 3 Story, 122, 133, Fed. Cas. No. 17,214; *The Chelmsford*, 34 Fed. 399, 402, in which Judge Butler said: "As respects the claim for supplies furnished in Boston, at the owner's instance,—\$694.45,—and forwarded to the vessel at Portland, I should have no hesitation in disallowing it in the absence of authority on the subject. * * * I find, however, that the precise question has been decided the other way in *The Sarah J. Weed*, 2 Lowell, 555, Fed. Cas. No. 12,350; *The Agnes Barton*, 26 Fed. 542; and *The Huron*, 29 Fed. 183. * * * In neither of the cases is the subject discussed at any length, or any adequate reason assigned, in my judgment, for the conclusion reached. So great, how-

ever, is the importance I attach to uniformity of decision by courts of co-ordinate jurisdiction, that I feel constrained to adopt the rule thus established in the several districts in which these cases arose. It seems more important that the rule should be uniform and certain than that it should be consistent with principle"; *Wells v. Navigation Co.*, 15 Fed. 561, 570; *Reed v. Railroad Co.*, 21 Fed. 283; *American Wood Paper Co. v. Fiber Disintegrating Co.*, 3 Fish. Pat. Cas. 362, Fed. Cas. No. 320; *Goodyear v. Berry*, 3 Fish. Pat. Cas. 439, Fed. Cas. No. 5,556; *Machinery Co. v. Knox*, 39 Fed. 702. Nor has it been thought less vital to a wise administration of justice in the federal courts that the various judges who sit in the same court should not attempt to overrule the decisions of each other, especially upon questions involving rules of property or of practice, except for the most cogent reasons. In *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.*, 1 Sawy. 685, 689, Fed. Cas. No. 2,990, Mr. Justice Field refused to review the action of the circuit judge, on the ground that such a practice would lead to unseemly conflict. To the same effect are *Oglesby v. Attrill*, 14 Fed. 214, 215; *U. S. v. Biebusch*, 1 McCrary, 42, 43, 1 Fed. 213; *Appleton v. Smith*, 1 Dill. 202, Fed. Cas. No. 498. In *U. S. v. Biebusch*, Judge McCrary declared that it was well settled in this circuit that the rulings of the district judge while holding the circuit court were not subject to be reviewed in the same court, either by the circuit judge or the circuit justice. In *Zinsser v. Krueger*, 45 Fed. 572, 574, Judge Green, while presiding in the circuit court for the district of New Jersey, held that a prior decision of a question of law by Judge Butler while he was sitting in that court in another case became a precedent to be implicitly followed in that court, unless it clearly appeared that the principles which governed it had been grossly misunderstood or misapplied. Moreover, there are no decisions to which the maxim, "*Stare decisis, et non quieta movere*," applies more universally, or with more salutary effect, than to those which construe statutes that establish or declare rules of property. It is universally conceded that it is often more important that these rules should be certain and changeless than that they should be right. Men engaged in active business buy and sell in reliance upon them. Lawyers advise their clients and enforce and protect their rights with constant reference to them; and, while all interests will readily adjust themselves to and protect themselves under erroneous rules, there is neither protection nor safety for any interest under shifting rules. *Seale v. Mitchell*, 5 Cal. 402, 403; *Bates v. Relyea*, 23 Wend. 336, 341; *Goodell v. Jackson*, 20 Johns. 693, 722.

In view of the principles and authorities to which we have adverted, it is not strange that the plaintiffs in error relied with confidence upon a construction given to the statutes of Colorado by the decision of the circuit court in 1890, and attempted to preserve their right to a new trial in accordance therewith. That decision was delivered by a judge whose opinions command the respect and confidence of lawyers and laymen, and it was an authoritative declaration of the law after careful consideration by a court of high rank. It was apparently the only decision upon the question. According to the concurring opinions and practice of the federal judges, this de-

cision was a very persuasive, if not a binding, precedent, not only in the circuit court in Colorado, but in all other United States circuit courts, until reversed or modified by an appellate court. It was a rule of property, a rule to which the doctrine of stare decisis is peculiarly applicable, and it was a rule of practice in the court in which this case was pending. It was in this state of the law that the plaintiffs in error paid the costs which they were required to pay to entitle them to a new trial according to this decision, and applied to the court for that trial within the time prescribed by the statutes. It is not an unreasonable presumption that they would have paid all the costs of the defendants in error if the decision of the circuit court, which had stood unchallenged for three years, and which we now think was erroneous, had never been rendered. It may well be presumed, too, that if the circuit court had announced, when the application was made, that the former decision would be overruled, and that the true construction of the statute required the payment of all the costs, the plaintiffs in error would have paid the costs of the mistrial then, for there was yet time to do so under the statute. The delay of the decision for six months brought its rendition too late to enable them to do so, and gave the order the vicious effect of a retrospective law. The plaintiffs in error were hardly bound to presume that the rule which had been established by the circuit court, and had stood unchallenged for three years, was not the law. Under these circumstances, we are of the opinion that this order ought not to be affirmed so as to give it this retroactive effect. Neither courts nor legislatures should give a retrospective effect to radical changes in rules of property or of practice. It was not the fault of the court below that the business of that court so crowded upon its attention that it could not decide this application for six months after it was made; but the plaintiffs in error ought not to suffer on this account. It is a maxim of the law that "an act of the court shall prejudice no man." *Broom*, Leg. Max. 122; *Rodman v. Reynolds*, 114 Ind. 148, 150, 16 N. E. 516. In *Rodman v. Reynolds*, supra, the supreme court of Indiana said:

"It is reasonable to make a party responsible for what he does himself, or for what he omits to do, but it is not reasonable to make him responsible for what the court does, or omits to do. In such a case as this the party cannot compel the court to act upon his application, and he ought not to be bound by the delay of the court, if he has himself done what was required of him."

The object of the trial of lawsuits is to reach just decisions, and to thereby preserve and protect the rights of litigants. In this case the substantial rights of all parties will, in our opinion, be preserved, and the ends of justice best subserved by an order which will put the parties in this action as nearly as may be in the situation in which they would have been if the change in the rule established by the circuit court had been made when the application for a new trial was presented. Accordingly the order denying the new trial will be reversed, and the cause will be remanded to the circuit court, with directions to enter an order denying the new trial, unless the plaintiffs in error shall, within 60 days after such order is entered, pay to the defendants in error their costs of the mistrial, to wit, \$1,814.81 and interest thereon at the rate of 8 per cent. per annum from November

2, 1893, until it is paid, and, in case such payment is made within that time, to enter an order granting the new trial, but, in case such payment is not so made to make the order denying it absolute; and it is so ordered.

THAYER, Circuit Judge (dissenting). I agree with my associates that section 272, c. 23, of the Colorado Code of Civil Procedure, rightly construed, requires the party against whom a verdict is rendered to pay the costs of a prior mistrial, to entitle him to a new trial as a matter of right. I further agree that the judge to whom the application for a new trial was addressed might very properly have followed the ruling of the local district judge in *Parkhurst v. Price*, supra, even if he was of the opinion that that decision was probably erroneous, leaving the aggrieved party to prosecute a writ of error from the order granting the new trial. I cannot assent to the view, however, which seems to be maintained by my associates, that he was bound to follow the rule previously applied in *Parkhurst v. Price*, if he thought that rule, as applied to the case at bar, was clearly wrong. Judge Hallett entertained doubt with respect to the question, and decided it with much apparent hesitation. His language was as follows:

"When there is a mistrial or a failure of the jury to agree, and no order whatever is made in respect to such costs, it seems to me to be a logical conclusion that each party ought to pay the costs which he has made. This, however, is so far doubtful that I confess I should feel some embarrassment if I were acting as counsel in this case, or in any other presenting a similar question. * * * The clerk may conform the taxation to these suggestions, casting out all costs at the mistrial except meals for jurors."

Under the circumstances, I think the decision in *Parkhurst v. Price* can hardly be said to have established a rule of property or procedure which all judges sitting in the same court were thereafter bound to follow until the rule was reversed on appeal. But, be this as it may, inasmuch as the statute was rightly construed in this case by the circuit court, and inasmuch as the plaintiffs in error did not in fact pay the costs entitling them to a new trial within the statutory period, I am of the opinion that this court has no power to extend the time fixed by law for the payment of such costs. The right to a new trial depends upon a literal compliance with the conditions prescribed by statute, both as respects the costs to be paid and the time within which they shall be paid; and no court, in my judgment, is vested with power to enlarge the time within which the costs must be paid to entitle the losing party to a new trial as a matter of right. For these reasons I am constrained to dissent from the order reversing the case, and granting 60 days within which to pay the costs. The view taken by my associates puts the judge who acted on the motion for a new trial in the awkward predicament of not being able to decide the case right, for, in whichever way he decided it, he was bound to be reversed. Moreover, this court makes an order awarding the plaintiff in error a new trial, which order would have been so far erroneous that it would have been reversed by this court if it had been made by the circuit court. I think, therefore, that the judgment should be affirmed.

THE CITY OF NAPLES.

GILCHRIST et al. v. EUSTROM.

(Circuit Court of Appeals, Eighth Circuit. August 26, 1895.)

No. 536.

1. NEGLIGENCE—EVIDENCE—PRESUMPTION OF CARE.

Libellant, an inspector of grain, while in the discharge of his official duty of inspecting a vessel preparatory to shipping a cargo of grain, fell down a hatchway in the lower deck of the vessel, and was injured. He testified that he followed the directions of the captain of the vessel in going to the place where the accident occurred, and that the lower deck was only lighted by two candles at a considerable distance from the hatchway into which he fell, and which was invisible in the darkness, though he was exercising great care. The captain and crew of the vessel testified that the deck was well lighted by numerous lanterns and candles, some of them placed immediately around the hatchway. *Held* that, upon this conflict of evidence, a finding in favor of libellant by the district judge, who saw and heard the witnesses, supported by the presumption against a reckless disregard of his own safety on libellant's part, would not be disturbed on appeal.

2. ADMIRALTY PRACTICE—TIME FOR APPEAL.

Under section 11 of the act of congress of March 3, 1891 (26 Stat. 829), an appeal to the circuit court of appeals in an admiralty proceeding may be taken at any time within six months after the entry of the order, judgment, or decree sought to be reviewed.

Appeal from the District Court of the United States for the District of Minnesota.

This is an appeal from a decree in admiralty in the district court of the United States for the district of Minnesota, Fifth division. The action is one for damages for personal injuries received by the appellee by falling through an open lower hatchway on the steamship City of Naples, while she was lying at her dock at West Superior, Wis., about to receive a cargo of wheat from an elevator at that place, on the 22d day of May, 1893, at about 3 o'clock p. m. It was tried by the court without a jury, and a decree rendered in favor of the libellant for \$2,000, and costs, and against Joseph C. Gilchrist and Alexander McDougall and A. R. McFarlane, stipulators on the bond given for the release of the vessel. 61 Fed. 1012. For about three years prior to the accident the libellant had been employed by the state grain inspection department of the state of Minnesota as a grain inspector, and from the 8th day of September, 1892, up to the 22d day of May, 1893, during the navigation season, he had been engaged in inspecting vessels at the ports of Duluth and Superior relative to the conditions of their holds to receive cargoes of grain for shipment. The City of Naples was a vessel of the usual type of lake vessels, of about 2,000 tons burden, and about 300 feet in length, having two decks, provided with nine cargo hatches, numbered from 1 to 9, beginning forward with hatch No. 1, and numbering aft in consecutive order; the hatches of the lower deck being directly beneath those of the upper deck. There was a permanent stairway extending from the upper deck to the lower deck in hatchway No. 1, which was the usual method of ascending from and descending to the lower deck. There was also a stairway extending from the forecabin to the port side down into the forward compartment in the bows of the vessel, which was sometimes used by the crew to go below, but was not the usual method. The libellant was on the vessel, and went through, examining the hold and the space between decks on Sunday, and on Monday he came aboard for the purpose of inspecting the vessel preparatory to her receiving a cargo of wheat; a rain the night before, when the hatches were up, having made the inspection necessary. He was on the upper deck, and attempted to swing himself down to the lower deck through hatch No. 7 by putting his hands on the combings, when he was told

by the master of the vessel not to go down that way, and thereupon he went forward on the port side to the forecabin stairway, and descended into the forward compartment, and, proceeding aft through the bulkhead door, fell into hatch No. 1, which was open, and received the injuries complained of.

The libellant testifies that the master directed him to go down the forecabin stairway, but the master denies this. A brief summary of the libellant's testimony is to the effect that he went to the second deck by the route he was directed to go by the master of the vessel; that upon passing through the bulkhead door he found the lower deck dark; that he saw what he took to be the light made by a candle some 20 or 25 feet from the bulkhead door, and supposed that it marked the location of the first hatchway, as there were no other lights visible in that part of the deck; that he looked, but could see nothing but darkness at his feet; that he started for the light which he saw, walking slowly, with his feet close to the floor, so he would not run onto anything before he got to the light; that he had not gone more than two steps before he fell into the hatchway; that there were no lights whatever around or near the hatchway; that in the entire lower deck there were no lights, except the feeble lights made by two candles, one 20 or 25 feet from the door by which he entered, and towards which he was cautiously feeling his way when he fell into the hatchway, and the other at the opposite end of the deck; and that these two lights did not dispel the darkness, and did not give out sufficient light to disclose the location of the hatchway to the most careful observer. On the other hand, the master and crew of the vessel, or some of them, testify that the lower deck was well lighted with 12 or 15 lanterns and 50 or 60 candles, and that there were 3 lanterns around or near the first hatchway, and a candle at each corner thereof, which plainly and clearly disclosed its location to one entering that deck by the bulkhead door. It is highly probable that the lower deck had been well lighted in the morning or forenoon, when the crew were at work there, but, conceding this to be so, the question remains whether the lights were left burning until the middle of the afternoon, when the appellee received his injury. The libellant complains that the master of the vessel was negligent in directing him, without cautioning or warning him of the danger, to go down without a lantern or guide, by an unusual route, to the lower deck, which was not lighted, and at or near the entrance to which was an open, unlighted hatchway, without guards or combings. The district court awarded the libellant \$2,000 damages, from which decree this appeal was taken.

Herbert R. Spencer, for appellants.

John C. Hollembaek, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Before considering the case on its merits, it is proper to notice a motion filed by the appellee to dismiss the appeal. It is said that this court erred in allowing, on proper petition for that purpose, Alexander McDougall and A. R. McFarlane as sureties on the bond given for the release of the vessel, to be made parties appellant in the cause; that the appeal was not taken in time; and that the assignments of error are not sufficiently specific. The order mentioned was made after argument and due consideration on the authority of *Coasting Co. v. Tolson*, 136 U. S. 572, 10 Sup. Ct. 1063, and we see no reason to change our views on the question. *Hardee v. Wilson*, 13 Sup. Ct. 39; *Insurance Co. v. Pendleton*, 115 U. S. 339, 6 Sup. Ct. 74; The appeal was taken within six months, and is in time. Ben. Adm. (3d Ed.) § 622; Act Cong. March 3, 1891 (26 Stat. 829), § 11. If there is anything inconsistent with this holding in admiralty rule 45

(adopted in 1842), it must give way to section 11 of the act of congress above cited.

The assignments of error, while not as specific as they might have been, are, we think, sufficient. The libelant was rightfully and properly on the vessel in the discharge of his official duty as an inspector of vessels about to receive cargoes of grain. The master of the vessel knew that the libelant had come on board to discharge his official duty as inspector, and he knew what was necessary to enable him to discharge that duty efficiently and properly. A guide with a light, or well-lighted hatches and hold, were indispensable to a safe and intelligent discharge of this duty. No guide was tendered, and the libelant testifies that the lower deck and hatchway were not lighted. We do not find that the libelant knew the exact location of hatch No. 1, through which he fell, nor do we think he knew the location of this hatch with reference to the door through which he entered to the lower deck. He had never gone down this stairway before. It would serve no useful purpose to set out and discuss the evidence in detail. It is voluminous and conflicting. We have read it all very carefully, and, applying the well-settled rule in this class of cases, we are not able to say the learned district judge erred in his conclusions on the facts of the case. He saw and heard the witnesses testify, and was, therefore, in a much better position to judge of their intelligence and credibility than this court. The weight of evidence is not determined by the number of witnesses, but by their intelligence and credibility. Hence it is an established rule that when an appeal in admiralty involves only questions of fact dependent upon conflicting testimony, the decree of the district judge, who has had the opportunity of seeing the witnesses and judging of their intelligence and veracity from their appearance and demeanor on the stand, will not be reversed unless the appellate court can clearly see that the decree was against the weight of evidence. The preponderance of the evidence must be such as would justify the granting of a new trial in a court of common law on the ground that the verdict was against the weight of evidence. *The Grafton*, 1 Blatchf. 173, Fed. Cas. No. 5,655; *Post v. Steamship Co.*, 48 Fed. 565; *The Jersey City*, 1 U. S. App. 244, 2 C. C. A. 365, 51 Fed. 527; *Levy v. The Thomas Melville*, 37 Fed. 272; *The Saratoga*, 40 Fed. 509; *Anderson v. The Ashbrooke*, 44 Fed. 124.

It is insisted with great earnestness that the libelant's injuries were the result of his own negligence in stepping into a hatchway which was well lighted, and which he must have seen; but the libelant denies that the hatchway was lighted, or that he saw it, or that he could have seen it by the exercise of the utmost diligence. This positive testimony of the libelant is strengthened and corroborated by the presumption of fact that the libelant, in the full possession of his senses, would not have deliberately walked into an open hatch which was well lighted and plainly visible. He knew the vessel had open hatchways, and knew that he would be seriously injured, if not killed, by stepping into one of them. Knowing these facts, the natural instinct of self-preservation would prompt him to avoid the danger by the exercise of due care. If the libelant had been killed by

the fall, the presumption arising from this natural instinct of self-preservation would have stood in the place of positive evidence, and would have been sufficient to warrant a recovery in the absence of countervailing testimony. *Johnson v. Railroad Co.*, 20 N. Y. 65, 69. The probative force of this presumption in suits for personal injuries where the defense is contributory negligence has been recognized and enforced in many cases. We cite and quote from some of them.

"The natural instinct," says Agnew, J., in *Allen v. Willard*, 57 Pa. St. 374, 380, "which leads men in their sober senses to avoid injury and preserve life, is an element of evidence. In all questions touching the conduct of men, motives, feelings, and natural instincts are allowed to have their weight, and to constitute evidence for the consideration of courts and juries."

In the case of *Railway Co. v. Price*, 29 Md. 420, 438, the court said:

"These facts and the circumstances of the case were proper to be considered by the jury, and in connection with these facts and circumstances it was competent to the jury to infer the absence of fault on the part of the deceased from the general and known disposition of men to take care of themselves, and to keep out of the way of difficulty and danger."

In the case of *Railroad Co. v. Nowicki*, 46 Ill. App. 566, the court said:

"While it is true that in an action for personal injuries, based upon the negligence of the defendant, it is an essential element of the plaintiff's case that the injured party must have been in the exercise of ordinary care, yet it is not indispensable that such fact should be directly shown by affirmative evidence. There is in all men a natural instinct of self-preservation, and such instinct is an element of evidence of which the jury may take notice, and, in the absence of all testimony upon the subject, find that a deceased party, in obedience to the ordinary instincts of mankind, exercised that care for his safety which a prudent man would, under the same conditions, have made use of."

In the case of *McGhee v. White*, 66 Fed. 502, 13 C. C. A. 608, a witness testified that the deceased saw the train, and attempted to get over before it, and whipped up his horses to do so. The circuit court of appeals conceded that "if this were true it would have been the duty of the court below to charge the jury to return a verdict for the receivers." But the court said:

"It is very improbable that, if Kennedy had seen the train coming, he would have attempted to cross when so far from the track that he could not reach it with his wagon wheels before the coming of the train. The presumption of fact, and of law, too, would be against the existence of such wanton and reckless negligence, and the plaintiff was entitled to have the jury weigh the credibility of Miss Caldwell's evidence in the light of the circumstances."

The libellant was not on the vessel as a mere licensee. He was there in the discharge of an official duty in which the vessel itself had an interest, for it could not receive its cargo until it had been inspected. The right and duty of the libellant to inspect the vessel did not authorize him to take command of her, or to give orders to her crew to prepare her for inspection, or to light up the vessel for that purpose. It was the master's duty to prepare the vessel for inspection, and furnish what was necessary and proper for that purpose, and to exercise reasonable precaution for the safety of the libellant while

in the discharge of his official duties. In the assessment of damages the district judge found "the libelant was not free from fault," and "that the rule in admiralty for the apportionment of damages must prevail in this case," and, applying that rule, assessed the libelant's damages at \$2,000. If the libelant is entitled to recover damages at all, the sum awarded by the district court is reasonable.

The decree of the district court is affirmed.

NELSON v. FIRST NAT. BANK OF KILLINGLEY.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1895.)

No. 543.

1. EVIDENCE—CERTIFICATE OF PROTEST—MINNESOTA STATUTE.

In accordance with the provisions of the Minnesota statute (Gen. St. 1878, c. 26, § 8; Gen. St. 1894, § 2275) making the certificate of protest of a bill or note of any notary public of that or another state evidence of the facts therein certified, such a certificate is competent evidence, in a federal court sitting in Minnesota, of the presentment, demand, dishonor, or notice of dishonor of a note drawn in Minnesota, and payable and protested in Connecticut.

2. BILLS AND NOTES—NOTICE OF DISHONOR.

It is not essential that a notice of dishonor or of protest of a note should state in so many words that the holder looks to the indorser for payment, but a notice from which that fact may be reasonably inferred is sufficient. A copy of the note and of the protest sent to the indorser constitutes such a notice.

3. SAME—PROTEST BY OFFICER OF BANK.

Since the removal of the disqualification of interested witnesses, a notary who is an officer of a bank may legally protest paper belonging to it.

4. EVIDENCE—ADMISSION BY AGENT.

A letter written in the ordinary course of business by a clerk in the office of one sought to be charged as indorser of a note, acknowledging the receipt of notice of the protest thereof, is competent evidence of the sending of the notice.

5. MEASURE OF DAMAGES—EXCHANGE OF COLLATERAL.

Where the holder of an indorsed note has exchanged collateral, held to secure such note, without the indorser's consent, the measure of the indorser's damage is the difference between the value of the collateral originally held and that for which it is exchanged, at the time of the exchange.

6. EVIDENCE—VALUE OF CORPORATE STOCK.

Upon the question of the value of stock in a corporation which has been placed in the hands of a receiver, under a statute of the state creating it, in proceedings for its dissolution as insolvent, the opinions of competent witnesses as to the value of the stock are admissible, as is also evidence of the amount and value of the assets and liabilities of the corporation at different times between the appointment of the receiver and the sale of the assets in accordance with the statutory requirements.

7. SAME.

Upon the same question it is also admissible to prove the amounts realized at the sales made of the property of the corporation by the receiver, under the order of the court, in the regular course of the insolvency proceedings, though taking place at a time remote from that to which the inquiry as to the value of the stock relates.

8. SAME—COMPETENCY OF EXPERT.

A witness ought not to be permitted to give an opinion as to the value of an article when it does not appear that he has acquired any correct information from which to form an opinion, or that he has formed any opinion whatever.

9. PRINCIPAL AND SURETY—DELAY OF CREDITOR.

A surety is not discharged by mere delay of the creditor in enforcing his remedy against the principal until it has become barred by the statute of limitations, when no agreement to extend the time of payment has been made, and the surety has had the right, at any time, either to pay the debt and enforce repayment from the principal, or to compel the principal himself to pay the debt.

In Error to the Circuit Court of the United States for the District of Minnesota.

In September, 1884, the defendant in error, the First National Bank of Killingley, took, in renewal of a like note held by it that was then due, the promissory note of Dwight M. Sabin for \$10,000, payable to his own order, and indorsed by himself, Charles N. Nelson, the plaintiff in error, and others. This note was made and dated at Stillwater, in the state of Minnesota, and was payable at the office of the defendant in error, in the state of Connecticut. The maker and indorsers of the note were citizens and residents of Minnesota. At the time this note was made, the bank held as collateral security for this debt \$10,000 of the special preferred stock of Seymour, Sabin & Co., a corporation of Minnesota, guarantied by the Northwestern Manufacturing & Car Company, another corporation of that state. In the certificates which represented this special preferred stock, Seymour, Sabin & Co. agreed to pay a semiannual dividend of 7 per cent. per annum on the par value of this stock until July 1, 1892, and to pay to the holder thereof at that time its par value. The Northwestern Manufacturing & Car Company had guarantied the performance of this agreement. This stock was the property of Seymour, Sabin & Co., subject to the pledge to the bank; and, when the original loan was made, Seymour, Sabin & Co. received the proceeds of the loan. On February 23, 1885, the bank exchanged this stock for stock of the Minnesota Thresher Company, another corporation of Minnesota, which subsequently proved to be worthless.

The statutes of the state of Minnesota provided that, whenever a corporation of the state became insolvent, the proper district court of that state might sequester its property, appoint a receiver thereof, sell its assets, distribute the proceeds thereof among its creditors, and wind up the corporation. Gen. St. Minn. 1878, c. 76 (Gen. St. 1894, §§ 5889-5911). Under these statutes, the proper district court of the state of Minnesota had in May, 1884, adjudged that Seymour, Sabin & Co. and the Northwestern Manufacturing & Car Company were each insolvent, and had appointed a receiver of the property of each of them; and these receivers were in September, 1884, when the note in suit was made, and in February, 1885, when the collateral security was exchanged, in possession of all the property of these corporations, and were proceeding under the direction of the court to wind them up under the statutes.

The bank brought this action against Nelson as an indorser on this note, and alleged that the note had been presented, that its payment had been demanded, that it had been protested, and that Nelson had been notified of its dishonor at its maturity. The plaintiff in error, in his answer, denied presentment, demand, protest, and notice of dishonor, and alleged that he was, and that the bank knew that he was, a mere accommodation indorser of this note, and that it had exchanged the stock of Seymour, Sabin & Co., which was worth the face of the note and was pledged for its payment, for the worthless stock of the Minnesota Thresher Company, without his knowledge or consent, and had thereby released him from all liability on the note. The bank replied that Nelson was an indorser for value; that the exchange of the collateral security was made with his knowledge, consent, and approval; and that the stock of Seymour, Sabin & Co. and the guaranty of the Northwestern Manufacturing & Car Company were worthless at the time of the exchange. The evidence at the trial was conflicting upon the issues relative to the consent to and approval of the exchange of the collateral security by the plaintiff in error, and relative to the value of the guarantied stock of Seymour, Sabin & Co. at the time of the exchange; and these questions were submitted to the

jury under proper instructions, who returned a verdict against the plaintiff in error for the full amount of the note and interest. This writ was sued out to reverse the judgment entered upon that verdict, for the alleged errors referred to in the opinion of the court.

W. P. Warner (Harris Richardson, C. G. Lawrence, and Horace G. Stone, on the brief), for plaintiff in error.

M. D. Munn and J. M. Gilman, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

Is the certificate of protest of a promissory note drawn in one of the United States, signed by residents of that state, and payable in another, competent evidence in the state of Minnesota of either the presentment, demand, dishonor, or notice of dishonor of the note? The first alleged error in the trial of this case is that the court below admitted in evidence the certificate of protest of the note in suit made by a notary public of the state of Connecticut. The objection urged to it is that the note stood upon the same footing as an inland bill of exchange, that such a bill requires no protest, and hence the certificate was not an official act, and is incompetent. This objection cannot be sustained on the ground that this was an inland bill or inland note, as distinguished from a foreign bill or foreign note. A bill of exchange drawn in one of the states of the United States, payable in another, is a foreign bill, under the settled interpretation of the commercial law in the national courts. *Bank v. Daniel*, 12 Pet. 32, 53, 54; *Buckner v. Finley*, 2 Pet. 586, 592; *Dickens v. Beal*, 10 Pet. 572, 579.

A more serious objection to the certificate is that the paper protested was not a bill of exchange at all, but a promissory note, and it is not necessary to protest such a note in order to charge the indorser. All that is required is that due presentment and demand shall be made, and that the indorser shall be seasonably notified that the note is dishonored, and that the holder looks to him for payment. Proof of such presentment, demand, and notice may be made by any competent witness, and the certificate of these facts by a notary is not indispensable to a recovery against an indorser. *Nicholls v. Webb*, 8 Wheat. 326, 331; *Bay v. Church*, 15 Conn. 15; 3 Rand. Com. Paper, § 1143. But it does not necessarily follow that the certificate of protest is incompetent evidence of presentment, demand, and dishonor, because a protest was unnecessary to charge the indorser. It has been held by eminent authority that the certificate of a notary public is competent evidence of the presentment and demand of payment of a promissory note under the common law, though a protest was unnecessary to charge the indorser. *Williams v. Putnam*, 14 N. H. 542; *Bank v. Stackpole*, 41 Me. 302.

It is the common practice of banks and business men to cause a notary public to protest such notes as that here in suit, and it is a wise and salutary custom. It tends to insure prompt and efficient action, definitely fixing the relation of the parties at the maturity of

the paper, and to preserve a correct and reliable record of their rights and liabilities. It was undoubtedly in view of these facts that the legislature of the state of Minnesota early provided that:

"The instrument of protest of any notary public appointed and qualified under the laws of this state, or the laws of any other state or territory of the United States, accompanying any bill of exchange or promissory note, which has been protested by such notary for non acceptance or non payment, shall be received in all the courts of the state as prima facie evidence of the facts therein certified." Gen. St. Minn. 1878, c. 26, § 8 (Gen. St. 1894, § 2275).

This statute is a conclusive answer to the objections to this certificate. Under it the certificate of protest in question would have been competent evidence in the courts of the state, whether a protest of the note was indispensable or not. *Bettis v. Schreiber*, 31 Minn. 329, 332, 17 N. W. 863. And the rules of evidence prescribed by the statute of a state are declared by act of congress to be "rules of decision in trials at common law in the courts of the United States," "except where the constitution, treaties, or statutes of the United States otherwise require or provide." Rev. St. § 721; *Brandon v. Loftus*, 4 How. 127; *Sims v. Hundley*, 6 How. 1, 6; *Potter v. Bank*, 102 U. S. 163, 165.

The notary public testified that, immediately after protesting the note, he mailed to the plaintiff in error, at the request of the bank, a copy of the note attached to a certificate over his hand and seal that he had protested the same for nonpayment. It is insisted that this notice was insufficient to charge the indorser, because it does not expressly state that the bank looks to him for payment. The objection is untenable. For what other purpose could the plaintiff in error have inferred that this notice was sent to him by the holder of this note? There is no hard and fast rule that requires the notice to state in so many words that the holder looks to the indorser for payment of the note. A notice of dishonor or of protest of the paper from which it may be reasonably inferred that the holder intends to look to the indorser for payment is sufficient notice of that intention, and no other inference could be reasonably drawn from this notice. A notice of nonpayment and protest sent to the indorser by the holder of the note is, by necessary implication, an assertion by the holder of his right to collect of the indorser. *Bank v. Carneal*, 2 Pet. 543, 553; *Mills v. Bank*, 11 Wheat. 431, 436.

It is argued that the certificate of protest and the notice were incompetent, because the notary was the cashier of the bank that held the note. It is true that, when the rule prevailed which disqualified any party interested in an action from testifying in the cause, some of the courts held that a party in interest could not protest commercial paper, on the ground that, inasmuch as he could not testify to the presentment, demand, and notice, he was disqualified from making evidence of these facts by his certificate. *Bank v. Cox*, 21 Wend. 119; *Bank v. Porter*, 2 Watts, 141. But, in the circuit courts of the United States, interest in the litigation no longer disqualifies a witness; and this rule falls with its reasoning. A notary public who is the cashier of a bank may now legally protest its paper.

It is assigned as error that the trial court admitted in evidence the following letter:

"Stillwater, Minn., Feb. 27, 1885.

"H. N. Clemons, Esq., Danielsville, Ct.—Dear Sir: Yours of 21st inst., inclosing notice of protest, received. Mr. Nelson is now East, at Boston, I think; and I forwarded the same to him.

"Yours, resp'y

J. A. Phipps, for C. N. N."

Mr. Clemons was the notary public who testified that he protested the note, and mailed the notice of protest on February 21, 1885, directed to the plaintiff in error at Stillwater, Minn., where he lived. This letter of Phipps was the answer he received. Testimony had been introduced tending to prove that J. A. Phipps, who signed the letter, was at its date a clerk in the office of the plaintiff in error, employed by the C. N. Nelson Lumber Company, a corporation of which Nelson was president. It was necessary for the defendant in error to prove that it had used reasonable diligence to notify Nelson of the dishonor of the note in order to charge him as an indorser. For this purpose, the testimony of the notary that he mailed the notice, addressed to him at his proper post-office address, was competent. But the written admission of the clerk in the office of the plaintiff in error that the notice was received there, made at the time and in the usual course of business, was certainly not incompetent evidence of the diligence of the bank, and it is as convincing proof to our minds that the notice was actually sent as the testimony of any witness could be. The admission of the receipt of a letter by a clerk in the office of a principal who has authorized him to receive his letters may well be deemed to be the admission of his principal.

One of the chief defenses of the plaintiff in error was that the \$10,000 of guarantied stock of Seymour, Sabin & Co. was worth the full amount of the note on February 23, 1885, and that the bank exchanged it on that day for the worthless stock of the Minnesota Thresher Company without his consent. His claim was that he was a surety for the maker of this note, and that this action of the bank absolutely released him, regardless of the value of the security exchanged. The court, however, held during the trial, and at its close charged the jury, that the bank was liable to him on account of this exchange for the damage he had sustained thereby only, and that the measure of that damage was the difference between the value of the guarantied stock of Seymour, Sabin & Co. and the value of the stock of the Minnesota Thresher Company at the time of the exchange. This is undoubtedly the true rule. It restores to the debtor all the loss he sustains, while it does no injustice to the creditor. It is supported by reason and sustained by authority. *Vose v. Railroad Co.*, 50 N. Y. 369, 374, 375; *Griggs v. Day* (N. Y. App.) 32 N. E. 612; *Potter v. Bank*, 28 N. Y. 641; *Booth v. Powers*, 56 N. Y. 22; *Thayer v. Manley*, 73 N. Y. 305; *Bank v. Gordon*, 8 N. H. 66; *Story, Eq. Jur.* § 326; *Law v. East India Co.*, 4 Ves. 824, 833; *Payne v. Bank*, 6 Smedes & M. 24, 38, 39; *Neff's Appeal*, 9 Watts & S. 36, 43. Under this rule, an important issue arose over the value of the stock at the time of the exchange. At that time, Seymour, Sabin & Co., the

corporation that issued the stock, and the Northwestern Manufacturing & Car Company, the corporation which guaranteed the stock, were insolvent, and all of their property was in the hands of receivers appointed by the state court under chapter 76 of the General Statutes of Minnesota of 1878 (Gen. St. 1894, §§ 5889-5911), to convert their assets into money, distribute it among their creditors, and wind up the corporations. It is evident that there were then two, and only two, methods by which the holder of this stock could obtain anything of value for it. One was to sell it for whatever it would bring in the market. The other was to follow the assets of these corporations in the state court, and to obtain from the receivers the share of their proceeds to which the holder of the stock should become entitled on their distribution. Accordingly, the court below permitted competent witnesses to give to the jury their opinion of the value of this stock at the time of the exchange; and it also allowed the parties to prove the amount of the assets and liabilities of the corporations at different times between the appointment of the receivers, in May, 1884, and the sales of the property of the corporations by direction of the court, in 1887 and 1888, together with the amounts finally realized from those sales. There was certainly no error in this general rule. There is no better or safer criterion to determine the value of stock or of the debt of an insolvent corporation than a comparison of the value of its assets with the amount of its liabilities; and where the assets are sold at public auction, after ample notice, and converted into money under orders of a court, in accordance with the provisions of the statutes under which the corporations exist, the amount realized from their sale is ordinarily very conclusive evidence of their value. The fact that the statutes of a state under which a corporation is organized constitute the charter of the corporation must not be overlooked in considering this question. Chapter 76 of the General Statutes of Minnesota of 1878 (Gen. St. 1894, §§ 5889-5911), which provided for the sequestration of the property of these insolvent corporations and its sale under the orders of the state court, necessarily conditioned the value of the stock and liabilities of these corporations; and we should hesitate long before we should hold that the amount obtained for their property at a public sale in accordance with the law of their existence was no evidence of the value of that property.

Our conclusion is that the general rule adopted by the court below was correct, that proof of the value of the assets and of the amount of the liabilities of these insolvent corporations, and proof of the amount realized from their assets at auction sales made under orders of the court, and the opinions of witnesses as to the value of the stock and the value of the assets, were all competent evidence tending to show the value of this stock and of the liability of these corporations upon it.

We turn now to the specific objections to the introduction of some of this evidence. The exchange of stock was made on February 23, 1885. It is assigned as error that the court below admitted in evidence a certain page of the report of the receiver of Seymour, Sabin & Co. to the district court of the state, which contained a schedule

of the liabilities of that corporation on May 12, 1884, the date when the receiver was appointed. But the condition of this record is such that this assignment cannot be considered. The objections to this page of the receiver's report were that it was incompetent, irrelevant, immaterial, and hearsay, for the reason that the defendant in error proposed to offer a statement of a given fact made by the receiver to the court, and to have that statement stand as proof of the fact against the plaintiff in error (a stranger to the record), but did not propose to offer the report of the receiver as an entirety; in other words, that it offered to prove what the liabilities of the corporation were, but did not offer to prove what its assets were in the opinion of the same man. The court overruled these objections, and the plaintiff in error excepted. But the defendant in error thereupon withdrew the offer, and hence no prejudice resulted to the plaintiff in error from this ruling. After withdrawing this offer, the defendant in error offered in evidence the entire report of the receiver, which stated that the assets of the corporation on May 12, 1884, were \$1,147,978.27 and that the liabilities were \$1,751,766.19. The only objection the plaintiff in error made to this report was that it was "incompetent, but not on the ground that no foundation was laid"; but he does not seem to have pressed this objection, for no ruling was made upon it, and the report was thereupon read in evidence, and no exception to the action of the court or counsel was taken. Upon this record there is nothing in this objection for us to review. Moreover, if a proper foundation had been laid by the testimony of the receiver that this report was a true statement of the assets and liabilities of the corporation, the report would have undoubtedly been competent evidence of the worthlessness of the stock of that corporation, because it disclosed the fact that it was insolvent, and that its liabilities exceeded its assets by more than \$600,000, nine months before the stock was exchanged, and the stock could derive no dividend or value from the property of this corporation unless its assets exceeded its liabilities. Since the plaintiff in error waived the objection that no foundation had been laid for the introduction of the report, it was properly received in evidence.

Another alleged error is that the court admitted in evidence a like report of the receiver of the Northwestern Manufacturing & Car Company, made May 10, 1884, over the objections of the plaintiff in error that it was incompetent, irrelevant, and immaterial. But the plaintiff in error subsequently verified the correctness of this very report by the testimony of the receiver, and offered it in evidence on his own behalf. If there was error in admitting it in the first instance, there was certainly no prejudice on the trial, after the plaintiff in error had himself verified and introduced it; and error without prejudice is no ground for reversal.

On September 27, 1887, all the property of the Northwestern Manufacturing & Car Company was sold at public auction, by the order of the state court which was winding up the corporation, and the sale was afterwards confirmed by that court. Great publicity was given to the sale. Notice of its time, place, and character was given six weeks before the sale by publication in the two leading news-

papers of the city of St. Paul, in the Chicago Tribune, the New York Evening Post, the Boston Journal, and the local newspaper published at the home office of the corporation, at Stillwater, in Minnesota. On September 20, 1888, all the property of Seymour, Sabin & Co. was sold at public auction, by order of the same court, and that sale was subsequently confirmed. Complaint is made that the court below admitted these orders of sale, the reports of these sales made to the court by the officers appointed to conduct them, and the orders confirming them. The objection urged is that these sales were too remote from February 23, 1885, when the stock was exchanged, to be any evidence of the value of that stock at that time. If it were not for the fact already adverted to, that the assets of these corporations were in custodia legis at the time of the exchange of the stock, and that these sales were made by the court in accordance with the provisions of the statutes under which these corporations were organized, this objection might well be sustained. Property that is not in the custody of the law, and property that may, at the option of a party, be taken from its custody, may ordinarily be freely sold by its owner at public or private sale immediately or within a very short period of time. In an action for the conversion of such property, opinions of its value or sales of it at a period remote from the time of its conversion are incompetent evidence of its value. This is the general rule, because the great bulk of property is of this character. It is subject to public or private sale at any time at the option of its owner. But the assets of these corporations were not in this situation when this stock was exchanged. They were in the custody of the court, and no stockholder or creditor could reach or sell any of them without its order. They were subject to an unusual restriction as to their sale or disposition. They could be sold only under the orders of the court, and in accordance with the provisions of the statutes relative to the winding up of the insolvent corporations; and the owners of this stock could obtain nothing from these assets except through the proceeds of such a sale. The actual value of the stock did not then depend upon the value of the assets of these corporations to sell at private sale in the open market at that time, but it depended entirely upon the amounts that could be realized from these assets by the court through the administration of the trust imposed upon it by the statutes. To say that the amounts which the court did realize from this property are no evidence of the amounts which it should or could have realized is to fly in the face of the presumption of sound judgment, wise discretion, and reasonable diligence, raised by the fact that the administration of the affairs of these corporations was conducted, and these sales were made, under the orders of a court of general equity jurisdiction. It was within the discretion of that court to direct a sale of all this property immediately after the receivers were appointed, or to postpone the sales of some of it to times when, in its opinion, larger sums could be realized. That court undoubtedly pursued the course which in its opinion would be most beneficial to the creditors and stockholders of these corporations, and the result was that the sale of the last of these assets was made three years and seven months after the ex-

change of this stock. But the vital question here was, what were these assets worth on February 23, 1885, to sell under the orders of this court, in whose custody they were, under the provisions of the statutes of Minnesota. The testimony of witnesses familiar with the property and its value was properly offered and admitted to prove this fact. Competent witnesses were properly permitted to testify to their opinion as to the value of the stock at the time of its exchange. Evidence of the amounts which the assets of this corporation actually did sell for was also admitted in evidence; and, after the most patient and careful consideration, we are unable to persuade ourselves that the amount which the property actually brought under the orders of the court was not some evidence of the amount which this property was worth on February 23, 1885, to sell under those orders.

The court below permitted a number of competent witnesses called by the plaintiff in error to testify what the guarantied stock of Seymour, Sabin & Co. was worth in their opinion at the time the bank parted with it, but it refused to allow one witness to give his opinion on this subject on the ground that he had not shown himself competent to do so. This ruling is assigned as error. The witness was the cashier of the First National Bank of Stillwater in 1884 and 1885, and that bank held some special preferred stock of Seymour, Sabin & Co., as collateral to a debt due to it. The car company had kept an account with this bank prior to its failure in May, 1884. The bank held a claim against the car company at the time of its failure, and some of its bills receivable passed through the bank for collection. The witness knew all these facts, and that the car company was in high credit before it was declared insolvent; but he had never examined its assets, and knew nothing of their value except from the statements of the officers of the corporation or of the officers of the court, and nothing of the liabilities of the corporation except that claims to the amount of more than \$3,000,000 were made against it. He knew of sales of the stock made before the failure in 1884, but he knew of but one transaction concerning the stock after the receivers took the assets of the corporations into their possession, and that transaction was that the bank held some of it as collateral. There was no evidence that the stock had any market value, that this witness knew of any market value for it, or that he had formed any opinion of its value after the corporations were adjudged insolvent and the receivers were appointed; and in this state of the proof the court below held that he was not competent to enlighten the jury by his opinion of its value in February, 1885. A witness ought not to be permitted to give in evidence his opinion of the value of an article unless it appears that he has an opinion, and that he has had and has used advantages superior to those of the jurymen for acquiring correct information on which to base his opinion. In this instance it did not appear that the witness had acquired any correct information from which to form an opinion, or that he had formed any opinion whatever upon this subject. Moreover, an appellate court ought not to reverse a judgment on account of the ruling of a trial court upon the competency of a witness to testify, unless the

ruling is prejudicial and clearly erroneous, because the bearing and action of the witness on the stand may sometimes properly influence the trial court upon a doubtful question of this character, and these cannot be printed and presented to the appellate court. For these reasons we are satisfied that this case ought not to be reversed on account of this ruling.

It is contended that the plaintiff in error was relieved from all liability on the note in suit, and that the court should have so charged the jury, because he stood in the relation of a surety for the maker of the note, and the defendant in error had permitted its claim against the principal to become barred by the statute of limitations before the trial of this action. The facts on which this claim is based are that the bank filed a claim against the maker of the note and the plaintiff in error in this action several years before the statute of limitations ran against either of them, and caused the summons in the action to be served upon the plaintiff in error, but did not cause it to be served upon the maker of the note at all, and its claim against him became barred by the statute before the trial of the action. There was, however, no evidence of any agreement on the part of the bank to extend the time of payment to the maker, or to forbear or delay the prosecution of its action against him. The statutes of the state of Minnesota provided that an action might be brought against two or more persons for the purpose of compelling one of them to satisfy a debt due to the other for which the plaintiff was a surety. Gen. St. Minn. 1878, c. 66, § 130 (Gen. St. 1894, § 5272). The plaintiff in error could have paid the note at any time before the statute ran in favor of the maker, and could then have enforced repayment by the maker, or he could have maintained an action against the maker under the statute we have cited, without first paying the note. Under this state of facts, the plaintiff in error was not released from his liability on the note by the mere failure of the bank to press its action against the maker. Conceding that the plaintiff in error was an accommodation indorser of the note, and that his relation to the maker after he was charged as an indorser was that of a surety, still this relation imposed no obligation of active diligence upon the bank in the prosecution of its suit against the principal. The surety assumes for himself the liability of his principal. The contract of suretyship is not that the creditor will see that the principal pays the debt or performs the obligation, but that the surety will see that the principal pays or performs. It is true that, if the creditor makes a binding agreement with the principal that he will extend the time of payment or forbear to collect the debt, this will release the surety. But the reason of this rule is that such an agreement ties the hands of both creditor and surety, and deprives the surety of his right to pay the debt at any time and enforce repayment from the principal. Mere forbearance or delay in enforcing the obligation of the principal has no such effect, and hence does not release the surety. 2 Brandt, Sur. § 342; Reid v. Flippen, 47 Ga. 273, 276, 277; Whiting v. Clark, 17 Cal. 407, 411; Hunt v. Bridgham, 2 Pick. 581, 584; Mueller v. Dobschuetz, 89

Ill. 176, 182; *Hubbell v. Carpenter*, 5 N. Y. 171, 177, 178; *Rucker v. Robinson*, 38 Mo. 154; *Morse v. Huntington*, 40 Vt. 488.

There are 43 alleged errors assigned in this record. We have carefully considered each one of them. We have reviewed the most important of them,—those upon which counsel for plaintiff in error appeared to place chief reliance,—and we have stated the reasons why they cannot be sustained. No good purpose would be served by an extended discussion of the alleged errors we have not noticed. It is sufficient to say that no exception was taken to the charge of the court, the evidence was sufficient to warrant the verdict, and the court below, in our opinion, committed no material error in the trial of this case. The judgment below must be affirmed, with costs; and it is so ordered.

REYNOLDS v. GREAT NORTHERN RY. CO.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1895.)

No. 548.

1. CONTRIBUTORY NEGLIGENCE.

On a clear winter night plaintiff was driving, at a gentle trot, along a highway, which ran parallel with defendant's railroad track, and about 12 feet therefrom, on an open prairie, across which an approaching train could be seen at a distance of a mile or more. Plaintiff knew that a train was soon to approach from behind him on the railroad, and that his horse, though gentle, would require some care in management when the train passed him; but, though so muffled in a coat to protect him from the cold that he could not hear easily, he did not look for the train, and when it approached him his team collided with it, his horse was killed, and his wagon broken. *Held*, that it was not error to direct a verdict for the defendant on the ground of plaintiff's contributory negligence.

2. RAILROAD COMPANIES — DUTY TO GIVE SIGNALS AT CROSSINGS — NORTH DAKOTA STATUTE.

Held, further, that the defendant railroad company was not required by the North Dakota statute (Comp. Laws 1887, § 3016), requiring a bell to be rung or whistle sounded when any railroad shall cross "any other road or street," to give these signals at a private crossing, built to give access from a slaughterhouse to the highway, but not itself on any highway, though on a section line, which might, under a statute, be opened as a road by the board of supervisors.

3. SAME.

A statute which requires railroad companies to give a warning signal of the approach of trains to their crossings of a road or street imposes no duty to give such warning to those who have not lately used, who are not using, and who do not intend to use, the crossing; and such parties cannot recover of the railroad companies for a failure to give the warning.

4. SAME—FENCING TRACK.

Where there is no statute requiring railroad tracks to be fenced, it is not error, in an action against a railroad company for damages arising from a collision, to exclude evidence that the track was unfenced.

5. EVIDENCE—CROSS-EXAMINATION.

When a witness has testified on direct examination that he knows who put in a railroad crossing, and when it was put in, it is proper, in cross-examination, to ask him how it came to be put in.

In Error to the Circuit Court of the United States for the District of North Dakota.

This was an action by B. P. Reynolds against the Great Northern Railway Company for damages for alleged negligence. Upon the trial in the circuit court a verdict was directed for the defendant. Plaintiff brings error. Affirmed.

Taylor Crum (A. G. Hanson, on the brief), for plaintiff in error.

W. E. Dodge, for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. Between 6 and 7 o'clock on a clear night in February, 1894, B. P. Reynolds, the plaintiff in error, was driving along a public road which runs over a level territory parallel with and 12 feet distant from the railroad of the Great Northern Railway Company, the defendant in error, when his horse and sleigh went against a train, which was coming along the railroad from his rear, and he was injured, his sleigh was broken, and his horse was killed. He sued the defendant in error for negligence. The company denied negligence on its own part, and alleged that the carelessness of the plaintiff in error caused the injury. At the close of the evidence for the plaintiff the court directed a verdict for the company, and this writ of error challenges the judgment upon that verdict.

The facts are undisputed, and they are these: The railroad of the defendant in error runs northwesterly from Fargo, in North Dakota. About half a mile northwest of Fargo, on this railroad, is the Standard Oil station. A little more than a mile northwesterly of the oil station, and on the east side of the track, stands the private slaughterhouse of one Moulton. In the summer of 1893, Moulton requested the defendant in error to put a crossing opposite his slaughterhouse, so that he could reach the public highway on the west side of the track, and it consented. Thereupon he graded the crossing, and the section men of the company planked it. This crossing was not on any traveled road. It extended only from the public road on the west side of the track to the doors of the slaughterhouse of Mr. Moulton, and it had never been opened, or laid out, or worked, or maintained by public authority. It was, however, on a section line, and people who had occasion to cross the railroad at that place had sometimes driven over it. The statutes of North Dakota required the railroad company to ring its bell or sound its whistle at a distance of at least 80 rods from its crossing of "any other road or street." And the plaintiff claimed that the company was negligent, because it gave no such signal of the approach of its train to Moulton's crossing. The defendant never had rung its bell or sounded its whistle for this crossing, and it did not do so on the night of the accident. The public road from the oil station to this crossing ran along the west side of the railroad, parallel to, and about 10 or 12 feet distant from, it. The plaintiff in error had lived on a farm about seven miles northwest from Fargo, and on the west side of the railroad, for three years, and had frequently passed over this road, and was familiar with its location and character. He was driving home from Fargo, along this road, and was about 10 rods southeasterly of Moulton's crossing when the accident occurred. He did not intend to cross the railroad, or to

use the crossing in any way. The night was clear and cold. The mercury stood at zero. The ground was covered with snow. The two roads extended from the oil station to Moulton's crossing over a prairie without an obstruction to the view, and the plaintiff could have seen the coming engine, with its bright headlight, the distance of a mile from the place of the accident, if he had looked. He knew that a train passed up the railroad northwesterly every evening, but did not know at exactly what time it passed. He looked back towards Fargo, to see if it was coming, when he was about 40 rods northwesterly from the oil station, but he never looked again until he was struck by the train. He was driving on a gentle trot a manageable horse that was liable to be a little frightened by a moving train, and he testified that he was listening for the company to sound its whistle or ring its bell for Moulton's crossing, so as to be prepared for the train. The wind came from the north. He wore a buffalo coat. Its collar was turned up about his ears, and he never heard the roar of the approaching train until it struck him.

Was the charge of the court below to return a verdict for the defendant in error upon this state of facts erroneous? The rules of law by which this question must be answered are: (1) In order to maintain an action for negligence, where the injury was not wantonly, maliciously, or intentionally inflicted, it must appear that the negligence of the defendant was the proximate cause of the injury, and it must not appear that the negligence of the plaintiff contributed to that injury. (2) Where a diligent use of the senses by the plaintiff would have avoided a known or apprehended danger, a failure to use them is, under ordinary circumstances, contributory negligence, and should be so declared by the court. (3) It is the duty of the trial court at the close of the evidence to direct a verdict for the party who is clearly entitled to recover, where it would be its duty to set aside a verdict in favor of his opponent if one were rendered. *Railroad Co. v. Houston*, 95 U. S. 697; *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125; *Aerkfetz v. Humphreys*, 145 U. S. 418, 420, 12 Sup. Ct. 835; *Railway Co. v. Davis*, 3 C. C. A. 429, 53 Fed. 61; *Railway Co. v. Moseley*, 6 C. C. A. 641, 57 Fed. 921; *Donaldson v. Railway Co.*, 21 Minn. 293; *Brown v. Railway Co.*, 22 Minn. 165; *Smith v. Railway Co.*, 26 Minn. 419, 4 N. W. 782; *Lenix v. Railway Co.*, 76 Mo. 86; *Powell v. Railway Co.*, 76 Mo. 80; *Gowen v. Harley*, 6 C. C. A. 190, 56 Fed. 973, 980, and cases cited.

Conceding for the moment, but not deciding, that it was the duty of the defendant to give the statutory signal for Moulton's crossing, do not the facts of this case conclusively show that the plaintiff was himself guilty of contributory negligence? The question here is not whether the negligence of the defendant or that of the plaintiff was the more proximate cause of the injury, but whether or not the plaintiff's negligence contributed to it. In *Railroad Co. v. Houston*, 95 U. S. 697, 702, Mr. Justice Field, in delivering the opinion of the supreme court in a case in which a woman had been killed while crossing a railroad, said:

"The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordi-

nary precautions for her safety. Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger." *Schofield v. Railroad Co.*, 114 U. S. 615, 5 Sup. Ct. 1125; *McGrath v. Railroad Co.*, 59 N. Y. 469; *Rodrian v. Railroad Co.* (N. Y. App.) 26 N. E. 741.

The danger to the plaintiff from the coming train was from his possible failure to manage his frightened horse and keep him in the road, not from the possibility that the train would cross the road upon which he was traveling. He testified that his horse was gentle and manageable in the presence of moving trains, but that he might be a little frightened by one, and that for this reason he listened to hear the bell or whistle, that he might be prepared for the coming of the train he expected, and thus control his horse. In other words, he knew he was in a dangerous place, and the company did not, and he relied upon the bell or whistle of the company to make him careful to manage his horse and keep him in the public road, where he belonged. There were, however, two methods perfectly open to him that would have protected him against this danger, regardless of the statutory signals. One was to drive his horse with tight reins, and manage him as carefully as if the train was constantly passing, as long as he continued to drive along within 12 feet of the railroad track. The other was to use his eyes to look back often enough to see the bright headlight of a train before it could overtake him. The view from the place of the accident southwesterly was unobstructed for more than a mile, and to look was to see the coming train. The facts that the temperature was at zero, that he had turned the collar of his buffalo coat up against his ears, that he was sitting in a sleigh, that the wind came from the north, and that he never heard the roar of the approaching train until it struck him, show that he had made his sense of hearing practically useless. This made the duty of the diligent and frequent use of his eyes more imperative. *Railway Co. v. Moseley*, 6 C. C. A. 641, 645, 57 Fed. 921; *Mynning v. Railroad Co.* (Mich.) 26 N. W. 514. It certainly is not a diligent use of the senses, when danger is apprehended from a train coming from the rear, to cover the ears with a buffalo coat, and steadily look in a direction opposite to that from which the train is expected, while a horse goes three-quarters of a mile on a gentle trot. The ordinary use of his eyes would have informed the plaintiff of the coming of this train, and would have enabled him to avoid the danger. Moreover, after he had closed his ears to the roar of the train coming from the rear by the collar of his buffalo coat, and had concluded not to look back while he was traveling three-quarters of a mile, it was certainly not the exercise of ordinary care to drive so carelessly that a horse that was gentle and manageable in the presence of moving trains would draw him onto the railroad or against the train as it passed. If he would not look for, and so dressed himself that he could not hear, the train he expected to come from his rear, ordinary prudence required him to drive his gentle horse so carefully that he would be prepared for its coming at any time. The evidence of contributory negligence was conclusive.

There is another reason why the judgment of the court below should not be reversed. This record does not tend to prove any negligence on the part of the railroad company. The fact that it failed to give the statutory signal for Moulton's crossing is the only evidence of its negligence in this record. It owed no duty to ring its bell or sound its whistle because the plaintiff was driving along the public road, unless that duty was imposed upon it by this statute. In the absence of the statute, it had as much right to use its railroad for its trains without notice to the plaintiff as the plaintiff had to use the public road without notice to it. If there was any difference between them, the heavier burden of care was upon the plaintiff, for he knew that he was there, and in danger, and the company had no such knowledge. Hence the company violated no duty to the plaintiff which the statutes did not impose. Did the statutes require the whistle to be sounded or the bell to be rung for Moulton's crossing? Section 3014 of the Compiled Laws of Dakota of 1887 provides that every railroad corporation operating a line of road within that state shall erect suitable signs of caution at each crossing of its road with a public highway. Section 3016 of these statutes requires that a bell shall be rung or a whistle sounded at the distance of 80 rods from the place where any railroad shall cross any other road or street. Section 3017 provides that when any person owns land on both sides of any railroad the corporation owning such railroad shall, when required, make and keep in repair one causeway or other safe and adequate means of crossing the same. The question is, was Moulton's crossing, at the place where this railroad passed it, "any other road or street," within the meaning of section 3016, *supra*? Article 2, c. 12, of the Political Code of North Dakota, which treats of public highways and roads, provides that all public roads and highways that have been open and in use as such, and included in a road district in the town in which they are situated, for 20 years preceding March 9, 1883, shall be public roads or highways (section 1261, Comp. Laws Dak. 1887); that every road laid out by order of proper authorities, as provided in this article, from which no appeal has been taken, shall be a public highway (section 1262, *Id.*); and that the congressional section lines shall be considered public roads, to be opened to the width of two rods on each side of said section lines upon order of the board of supervisors. Section 1264 provides that the supervisors in the several towns shall "have the care and superintendence of the roads and bridges therein." Section 1266 provides that the overseers of highways in each town "shall repair and keep in order the roads within their respective districts." Section 1271 provides for a road tax. Section 1272 provides that the supervisors shall assess a road tax on all real estate and personal property. In section 1277 the overseers of highways are called "road overseers." Now, it is certain that Moulton's crossing was not a public highway. It had not been used 20 years. It had not been laid out by the proper authorities. It had not been opened on the section line by order of the board of supervisors of the township. It was a mere private crossing, put in at the request of Moulton, to enable him to reach his slaughterhouse from the public road, which was on the opposite side

of the railroad. In the instances to which we have referred the legislature of Dakota has repeatedly used the word "road" as synonymous with the term "public highway." The presumption is that they used it in the same sense in section 3016. This presumption is strengthened by the fact that it borders upon absurdity to suppose that the legislature intended to require the railroad companies to give this statutory signal 80 rods on either side of every farm crossing or way from a private dwelling or business house across their roads. If such were the rule, there would be few places on the line of this railroad in the eastern part of North Dakota where the bell or whistle would not be required to be sounding. We do not think this was the intention of the legislature, and, as Moulton's crossing was not a public highway, the railroad company was, in our opinion, guilty of no negligence in its failure to give the statutory signal at that crossing.

Our conclusion is that the term "other road," in section 3016 of the Compiled Statutes of Dakota, 1887, refers to a public highway as defined by the statutes of that state, and that it has no reference to farm ways and private wagon roads that cross the railroad. *Sather v. Railroad Co.* (Minn.) 41 N. W. 458; *Greeley v. Railway Co.*, 33 Minn. 137, 22 N. W. 179; *Brooks v. Railroad Co.*, 13 Barb. 597; *Cook v. Railroad Co.*, 36 Wis. 45; *Railroad Co. v. Long*, 6 Am. & Eng. R. Cas. 254; *Railroad Co. v. Willey* (Mich.) 10 N. W. 120.

Moreover, even if Moulton's crossing had been upon a road or street, the failure of the company to give the statutory warning for it would not have charged it with the neglect of any duty it owed to the plaintiff. Failure to discharge a duty to the plaintiff, and resulting injury to him, are indispensable elements of actionable negligence. Where there has been no such failure, there has been no wrong, and therefore there is no remedy. In the absence of a statute which requires warning of a coming train at a crossing, the railway company owes to a workman in an adjacent field, to a domestic in a neighboring house, or to a traveler on a parallel road who has not crossed, and does not intend to cross or enter upon, the railroad no duty to signal the approach of its trains. The measure of the reciprocal rights and duties of these parties and the railroad is not changed or affected by the enactment of such a statute. The evil it is intended to remedy did not threaten them. The warning it requires was not provided for their benefit. The object of such a statute is to warn persons in the vicinity of the crossing, who have just crossed, who are in the act of crossing, and who intend to cross the railroad upon it, of the approach of the train, to the end that collisions and the danger of fright and injury from the use of the crossing may be avoided. Accordingly such a statute imposes upon the railroad companies a duty to warn such persons, but it imposes upon them no duty to warn others. Consequently, a failure to give the warning becomes a neglect of statutory duty, and, if injury results, raises a cause of action in favor of the former, but not in favor of the latter. This is a just and reasonable rule, because the crossing was a menace of danger to the former, but not to the latter. Its existence and use by the company neither increases nor diminishes the danger of the traveler on

a parallel road, who has not used, is not using, and does not intend to use it; and hence he does not fall within the class of those for whom such a statute imposes upon railroad companies the duty of giving a warning of the approach of their trains to the crossing. Our conclusion is that a statute which requires railroad companies to give a warning signal of the approach of trains to their crossing of a road or street imposes no duty to give such warning to those who have not lately used, who are not using, and who do not intend to use the crossing, and such parties cannot recover of the railroad companies for a failure to give the warning. The purpose of such a statute is to warn those who have lately used, those who are using, and those who are about to use the crossing. It imposes a duty upon the railroad company to give to these persons the statutory warning, and a failure to give it is a neglect of duty to them, for which they alone may recover if injury results. These views are supported by the great weight of authority. *Pike v. Railroad Co.*, 39 Fed. 754; *Bell v. Railroad Co.*, 72 Mo. 50, 58; *Evans v. Railroad Co.*, 62 Mo. 49, 57, 58; *Rohback v. Railroad Co.*, 43 Mo. 187; *Elwood v. Railway Co.*, 4 Hun, 808; *O'Donnell v. Railway Co.*, 6 R. I. 211, 216; *Railway Co. v. Feathers*, 10 Lea, 103, 105; *Railway Co. v. Payne*, 29 Kan. 166, opinion by Judge Horton, concurred in by Mr. Justice Brewer; *Railway Co. v. Pierce*, 33 Kan. 61, 64, 5 Pac. 378; *Clark v. Railway Co.* (Kan. Sup.) 11 Pac. 134, 136; *Gorris v. Scott*, L. R. 9 Exch. 125.

It is assigned as error that the court below refused to permit the plaintiff to testify whether or not there was any fence along the track of the railroad company at the place of the accident. It is not claimed that there is any statute in the state of North Dakota requiring a railway company to fence its track, and we are unable to perceive how the fact that it was or was not fenced could affect the right of the plaintiff to recover under the undisputed facts of this case.

It is assigned as error that the court permitted the witness Moulton to testify upon cross-examination "how the crossing opposite his slaughterhouse came to be put in." There was no error in this ruling. He had testified in chief that he knew who put the crossing in, and when it was put in, and it was certainly fair cross-examination to ask him how it came to be put in.

The judgment below must be affirmed, and it is so ordered.

BURKE et al. v. ANDERSON.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1895.)

No. 194.

MASTER AND SERVANT—LIABILITY OF MASTER—USE OF EXPLOSIVES.

One M. was a contractor, engaged in making a roadbed for a railroad, and one J. had sole charge of the work for him as general manager and superintendent. The work was carried on by blasting the frozen ground with dynamite and other explosives, and afterwards breaking it up with picks, J. having personal charge of the blasting. Plaintiff, a common laborer, unfamiliar with the use of explosives, was hired by J., and set to work, digging with a pick, at a spot where the blasting had been done the

day before, without warning of possible danger. Plaintiff was injured by an explosion caused by striking with his pick a piece of dynamite remaining from the blast, which was found to have been negligently conducted. *Held*, that as M. had created the risk due to the presence of explosives for his own purposes, and was bound not only to exercise the utmost care and every available precaution against possible injury to the workmen, but to give them warning of the risk, and as plaintiff was ignorant of the risk when he undertook the work of digging, M. was liable to plaintiff for the injury suffered.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

This was an action by T. Knut Anderson against Matthew C. Burke and John Burke for personal injuries. The plaintiff recovered judgment in the circuit court. Defendants bring error. Affirmed.

This action is founded upon alleged negligence of the defendants, who are the plaintiffs in error, whereby the plaintiff below sustained serious personal injuries from an explosion of dynamite or some other explosive material, alleged to have been left in the ground by the defendants after blasting operations, and at a place where they set the defendant at work without warning or knowledge of the danger; the explosion resulting, as inferred, by a blow struck with the pick used by the plaintiff, in excavating, under the direction of the defendants. Matthew C. Burke was a contractor, engaged in making the roadbed for a railroad near West Duluth, Minn., in the winter of 1893. His codefendant, John Burke, had sole charge of the work for him, or, as stated in their joint answer, "was general manager and superintendent of said work, and had charge of said work under and for" Matthew C. Burke. The plaintiff was "a common laboring man," 39 years of age, and had commenced work for the defendants, as such, only three days before the accident. The ground was frozen, and it was found necessary to use explosives in breaking it up preparatory to the work of excavation. Holes were drilled down to the proposed line of grade, charged with either dynamite or black powder, or both, and fired by a fuse or by a battery according to circumstances. The plaintiff was employed in digging, and had no part in or connection with the blasting, and it appears that he had never before worked where dynamite was used, and had no acquaintance with its use. The blasting operations were conducted by John Burke, assisted by a man called the "Frenchman"; and, on the afternoon before the accident, they had blasted in advance of the workmen at the place where the injury occurred. On the following morning, February 17th, the plaintiff was sent by John Burke, with other laborers, and without any warning or knowledge of danger, to excavate the ground as it was left after blasting, the plaintiff working with a pick. Within a few moments after commencing work, and while striking with his pick into the bank, an explosion occurred, of dynamite or some explosive which had been left in the ground, and the plaintiff was seriously injured in his eyes, face, and arms.

The plaintiff asserts negligence on the part of the defendants (1) in failure to cause the explosion or withdrawal of the entire charge used in the blasting before commencing the work of picking and digging; (2) in failure to examine sufficiently the blasting holes after the explosion, before ordering the commencement of work; (3) in ordering and placing the plaintiff to pick in the bottom of the unexploded hole, without warning him of the danger to be apprehended in the work. On the part of the defendant it is claimed that the injury to the plaintiff was the result of unavoidable accident, and not due to negligence of any person; that, after the holes were drilled, they were all "squibbed" by exploding a small charge of dynamite at the bottom, to make a chamber for the blasting charge, then loaded with dynamite and black powder, connected with the battery, and fired; that the appearance of the ground indicated that there was complete discharge of the explosives, but "in fact a part of a stick of dynamite, for some reason, failed to explode, and was among the dirt" into which the plaintiff struck his pick. Instructions

were requested in behalf of the defendant Matthew C. Burke (1) directing verdict in his favor, upon the theory that no negligence was shown against him; (2) directing that he is not liable "for anything that the defendant John Burke did or failed to do in connection with the work of charging or unloading or scraping the same out, if the jury find the holes in question were scraped out as claimed by plaintiff." Error is assigned upon the refusal of the court to so instruct, and also upon the following portion of the instructions given to the jury: "If the accident came to the plaintiff, and he sustained this substantial damage, which he has testified to, through the fault of John Burke in the management of that work, without fault on the part of the plaintiff, then I have no reason to doubt that not only John Burke would be liable, but that his codefendant, Matthew Burke, would also be liable." A verdict was rendered in favor of the plaintiff for \$4,000. Sundry errors are assigned upon rulings admitting testimony in behalf of the plaintiff tending to show (1) attempt and failure to fire the other holes with a battery; (2) that the battery had missed fire before the accident; (3) that sticks of unexploded dynamite had been left by their blasting operations previous to the occasion in controversy; (4) that in the blasting in question it was attempted to fire with a battery, but the two lower holes did not explode; (5) that the battery had missed fire on previous occasions. Error is further assigned upon a ruling which excluded the defendant John Burke from answering whether or not, from what he knew of the explosion and the appearance of the ground, "he had then or has now any doubt but that all those holes exploded."

William G. Challis and Draper, Davis & Hollister, for plaintiffs in error.

T. M. Thorsen and John Jenswold, Jr., for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after stating the facts as above, delivered the opinion of the court.

The question in this case upon which the liability of the principal defendant, Matthew C. Burke, depends, is this: What is the rule of care to be applied to an employer of labor who uses explosives or other dangerous means in the prosecution of the work in which the laborer is engaged? Matthew C. Burke was the employer, as contractor for the excavation and construction of the bed for a railroad in the winter season, and dynamite and other explosives were used for blasting the frozen ground, in advance of the laborers who were engaged in excavating. He was not personally attending to the operations, but they were supervised and managed by his codefendant, John Burke, whom he employed for that purpose, who personally conducted the advance blasting (assisted by a special workman), and also personally directed the force of laborers in the work of excavation which followed. The plaintiff below was a common laborer in this force, had entered upon the work only three days before, and had no experience with the use of dynamite, or work where it was used. The blasting was completed on the previous day, and the plaintiff had no part therein; but he was sent by John Burke to work in the ground where the explosives had been used, and there received his injury, apparently caused by some portion of the explosives which had been left unexploded through the blasting operation. The liability of Matthew C. Burke is asserted on the doctrine of respondeat superior,

and based upon the alleged negligence of John Burke (1) in so carrying on the blasting, or using the dynamite and powder, that an unexploded portion was left in the ground; and (2) in sending the plaintiff into the place where this danger lurked, without warning of its existence and without sufficient precautions to guard against injury. The counter proposition, on which Matthew C. Burke claims exemption from any liability, is substantially this: That the work of blasting and removing any unexploded charge was "not the personal duty of the master, but only the work of an operative," and consequently any negligence therein of John Burke was in the character of fellow servant, a risk assumed by the plaintiff, which precludes recovery against the master.

This conflict must be resolved in accordance with the general rule, which is clearly pronounced in the recent decision by the supreme court in *Mather v. Rillston*, 156 U. S. 391, 15 Sup. Ct. 464. There the plaintiff was without experience in mining or in the use of explosives, and was employed in operating the drums in the engine house of a mine. Explosives for mining purposes had recently been stored in the engine house, and the heat and the jarring incident to that place were a constant source of danger, of the nature of which the plaintiff was not well advised. An explosion occurred, the cause of which was not definitely shown, and the plaintiff was injured. His action was against the operators of the mine for negligence. The instructions of the court below left it to the jury to decide whether the defendants were negligent in so using and storing the exploding caps and material, and in failing to give the injured employé due warning of their dangerous character, and their verdict was against the defendants upon the issue thus presented. In affirming the judgment, the court, speaking unanimously, through Mr. Justice Field, states the doctrine applicable here:

"All occupations producing articles or works of necessity, utility, or convenience may undoubtedly be carried on, and competent persons, familiar with the business, and having sufficient skill therein, may properly be employed upon them; but in such cases, where the occupation is attended with danger to life, body, or limb, it is incumbent on the promoters thereof and the employers of others thereon to take all reasonable and needed precautions to secure safety to the persons engaged in their prosecution; and for any negligence in this respect, from which injury follows to the persons engaged, the promoters or the employers may be held responsible and mulcted to the extent of the injury inflicted. The explosive nature of the materials used in this case * * * was well known to the employers, and was a continuing admonition to them to take every precaution to guard against explosions. Occupations, however important, which cannot be conducted without necessary danger to life, body, or limb, should not be prosecuted at all without all reasonable precautions against such dangers afforded by science. The necessary danger attending them should operate as a prohibition to their pursuit without such safeguards. * * * If an occupation attended with danger can be prosecuted by proper precautions without fatal results, such precautions must be taken by the promoters of the pursuit or employers of laborers thereon. Liability for injuries following a disregard of such precautions will otherwise be incurred, and this fact should not be lost sight of. So, too, if persons engaged in dangerous occupations are not informed of the accompanying dangers, by the promoters thereof, or by the employers of laborers thereon, and such laborers remain in ignorance of the dangers and suffer in consequence, the employers will also be chargeable for the injuries sustained."

And the same doctrine is asserted in the opinion of Judge Jenkins for this court, in *Goodlander Mill Co. v. Standard Oil Co.*, 11 C. C. A. 253, 63 Fed. 400, as follows:

"One who uses a dangerous agency does so at his peril, and must respond to the injuries thereby occasioned, not caused by extraordinary natural occurrences, or by the interposition of strangers."

The case of *Fletcher v. Rylands*, L. R. 1 Exch. 265, affirmed L. R. 3 H. L. 330, there cited, is well in point.

In the case at bar the only explicable cause of injury to the plaintiff was the presence in the ground of some remnant of the explosives which had been employed in blasting. The danger was not inherent in his work; was not one to be anticipated in the labor with pick and spade in a gravel cut for which he was hired; it was not of natural or purely accidental origin, but was produced by the act or requirement of the master in using a dangerous agency to advance his undertaking. Except for the explosive materials carried there for the master's purposes, the plaintiff could have worked safely in the place to which he was assigned. The testimony is undisputed that he had engaged in the work only three days before, had no experience in or knowledge of the use or danger of explosives thus employed, and had no information or suspicion that danger was incurred by digging in this ground. He obeyed the express order of the superintendent to enter and work there, relying, as he had a right to rely, upon the implied assurance of the master that the place was reasonably safe; that there was no other danger there "than such as was obvious and necessary." *Railroad Co. v. Baugh*, 149 U. S. 368, 386, 13 Sup. Ct. 914. The master provides the place for his servant to work, and, if his acts create special danger, he is not alone chargeable with the positive duty to exercise the utmost care and every available precaution against possible injury to those who are to work there; but, if danger impends notwithstanding the precautions taken, he is further obligated to give due information and timely warning to those in his service who are ignorant of its extent before calling upon them to incur the risk.

In respect of the employment of the plaintiff and the directions for his work, it is unquestionable and conceded that the superintendent represented the master as vice principal. In the same relation he is chargeable with knowledge of the danger in using the explosives, and with the duty to protect employes and notify them of risk. If the plaintiff was not informed of the peril which compliance with the order involved, or it was not clearly apparent, the risk thus created cannot be held to have been contemplated in the service in which he engaged, and therefore it was not one assumed by him in his employment.

The instructions requested on behalf of the principal defendant, and the theory of the whole defense as well, rest upon the claim that the operation of blasting was common labor, and not the work of a superintendent or vice principal; that its performance by this superintendent was in the character of fellow servant, and the master was not liable for any neglect therein beyond the exercise of ordinary care in selecting his servants. In the same connection it is argued that the

use and care of the explosives was not a personal duty of the master. Whether these claims could be maintained by the master in any case in which he brings into his work the dangerous means which produce injury, and whether the rule of strict care does not impose a positive obligation which he cannot evade by delegating the performance, are questions of interest, but they do not require consideration here. It is sufficient that the risk was created by the master or for his purposes; that there is legitimate finding by the jury of negligence, on the part of those engaged in the performance, causing the injury; and, finally, that the plaintiff was ignorant of the risk, and had not assumed it. The doctrine which exempts the master from liability arising out of the negligence of fellow servants is based upon the assumption by the servant of the ordinary risks of his employment, in which the negligence of fellow servants is included, but it has no application to risks which are not contemplated by him in entering upon the service (*Railroad Co. v. Hambly*, 154 U. S. 349, 357, 14 Sup. Ct. 983), and certainly cannot govern for this extraordinary risk interposed by the master without warning.

The cases which are cited in support of the defendant's contention are clearly distinguishable in their facts, and are not inconsistent with the rule applied here. In *City of Minneapolis v. Lundin*, 7 C. C. A. 344, 58 Fed. 525, the injured servant was a blaster hired for and engaged in the use of the explosives, and acquainted with the danger incurred. In *Cornellson v. Railway Co.*, 50 Minn. 23, 52 N. W. 224, the plaintiff was directly engaged in the blasting in which he received his injury and had experience in the work. Neither case presents the want of knowledge or notice shown by this plaintiff. The instructions given to the jury were in accord with these views; those requested on behalf of the defendant were antagonistic, and properly refused. The several assignments of error relating to the instructions must therefore be overruled. The other assignments are all founded upon rulings in the admission and rejection of testimony, but they present no substantial error and no question requiring discussion. The judgment is affirmed.

HALDANE et al. v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. August 26, 1895.)

No. 608.

1. PRACTICE ON APPEAL—ASSIGNMENT OF ERRORS.

Alleged errors in the admission and exclusion of evidence will not be considered by the circuit court of appeals, unless the testimony alleged to have been erroneously admitted or excluded is set out substantially in the assignment of errors and the brief, as required by rules 11 and 24 of that court (11 C. C. A. cil., lxxxviii., 47 Fed. vi., xl.).

2. SAME.

Nor will that court notice an assignment of error, based upon the refusal of an instruction to the jury, which does not set out the instruction and assign error for the refusal of the same, as required by rule 24.

3. CONTRACTS—ACCEPTANCE OF BIDS—NOTICE.

The officers of the quartermaster's department of the United States army advertised for proposals for furnishing a quantity of hay, such pro-

posals being required by a circular issued in connection with the advertisement, to be accompanied by a guaranty that the bidder would not withdraw his proposal within 60 days, and that, if the proposal were accepted, he would enter into a contract within 10 days after the day on which he should be notified of such acceptance. *Held*, that personal notice of the acceptance of a bid was intended by the terms of such circular, and that a notice of the acceptance of a bid which was deposited in the mail a few days before the expiration of the 60 days, but did not reach the bidder until after the expiration thereof, was insufficient to render him or his guarantors liable for a failure to enter into a contract.

4. SAME—TIME.

Held, further, that the insertion of the clause in the circular requiring that the bids should not be withdrawn for 60 days was a determination that that period was a reasonable time for the bids to remain open, and that the government had no right to accept a bid after the expiration of 60 days.

In Error to the District Court of the United States for the District of Kansas.

This case arose out of the following circumstances: On April 30, 1890, the United States, through Major C. W. Foster, chief quartermaster for the department of Missouri, advertised for proposals to furnish hay and straw for certain military posts; among others, for Ft. Riley, Kan. The advertisement notified bidders that proposals for the delivery of 5,000,000 pounds of hay and 1,000,000 pounds of straw at Ft. Riley, Kan., would be received at the office of the chief quartermaster at St. Louis, Mo., and at the office of the post quartermaster at Ft. Riley, "until 12 o'clock noon, central standard time, May 31st, 1890, and then opened." A circular issued in connection with the advertisement contained, among other things, the following notice, addressed to bidders: "Deliveries to commence July 1, 1890, if required; be continued at such times and in such quantities as may be required; and be completed, if required, by October 15, 1890; otherwise, to be completed by June 30, 1891. * * * The proposals must be made in triplicate, * * * and will not be entertained unless accompanied by a guaranty having justification in amount of not less than 10 per centum of the total consideration of the proposal, executed strictly in accordance with instructions printed upon the back of the form, that the bidder will not withdraw his proposal within sixty days succeeding the 31st day of May, 1890, and that, if the proposal be accepted in whole or in part, he will enter into a contract and bond agreeably to the terms of his proposal within ten days after the day on which he is notified of such acceptance and award, and that, in case of his failure to enter into such contract and give bond within said time, he will pay to the United States the difference in money between the amount of his bid and the amount for which the proper officer of the United States may contract with another party to furnish said supplies. * * *" The plaintiffs in error Peter Haldane and W. D. Moore filed a proposal on May 30, 1890, to furnish and stack at Ft. Riley 5,000,000 pounds of hay, at 15 ⁴⁰/₁₀₀ cents per hundredweight. The other plaintiffs in error, George A. Taylor and L. R. White, signed the proposal as guarantors. Other proposals to furnish hay at Ft. Riley were made by Thomas Dixon, C. J. Cook, and C. M. Dysche, respectively. All of the proposals so made were duly opened on May 31, 1890. Subsequently, on June 10, 1890, C. M. Dysche was duly notified that his bid to furnish and deliver 5,000,000 pounds of hay at Ft. Riley had been accepted, and that a contract and bond would be forwarded to him for execution as soon as possible. Dysche, it seems, on July 21, 1890, finally refused to enter into a contract with the government to furnish hay at Ft. Riley in accordance with his proposal; whereupon the chief quartermaster, as it is claimed, duly notified Peter Haldane and W. D. Moore that their proposal of May 30th to deliver 5,000,000 pounds of hay at Ft. Riley was accepted by the government. On or about July 22, 1890, the chief quartermaster also transmitted to them, by mail, a contract, to be by them executed in accordance with their proposal. The contract so tendered contained, among other things, the following clause: "Deliveries on this contract, if required, shall commence on the first day of

August, 1890; provided that the agreement is approved by the quartermaster general, U. S. army; otherwise, not until such approval is obtained." Haldane and Moore claimed that they received no notice, personal or otherwise, of the acceptance by the government of their proposal until July 31, 1890, more than 60 days subsequent to May 31, 1890, and for that reason, and other reasons as well, they declined to sign the contract or deliver the hay. For their refusal to execute said contract, and to deliver the hay according to their proposal of May 30, 1890, the United States brought an action against them in the district court of the United States for the district of Kansas, and recovered a judgment against them and their guarantors in the sum of \$3,572.28. To reverse that judgment, the defendants below sued out the present writ of error.

J. R. McClure, for plaintiffs in error.

W. C. Perry, U. S. Atty., filed brief for the United States.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is contended in behalf of the government that the errors complained of in the brief of counsel for the plaintiffs in error, and on the oral argument of the case, have not been properly assigned in accordance with our rules; and this point is undoubtedly well taken so far as the assignments relate to the admission and exclusion of evidence. We have invariably held that we would not consider alleged errors in the admission and exclusion of evidence unless the testimony that is claimed to have been erroneously admitted or excluded is set out substantially in the assignment of errors and in the brief, as required by rules 11 and 24 of this court (11 C. C. A. cii., lxxxviii).¹ *National Bank of Commerce v. First Nat. Bank*, 10 C. C. A. 87, 61 Fed. 809. There has been no attempt to comply with the provisions of these rules in the present case, and for that reason we shall not notice any of the exceptions to the admission or exclusion of evidence.

It is also manifest, we think, that the proposition most urgently argued by counsel for the plaintiffs in error—namely, that the government had no power to accept the proposal of Haldane and Moore after the acceptance of the bid of C. M. Dysche—is not so presented by this record that we can notice it, if we insist, as we are disposed to do, on a substantial observance of our rules. The proposition in question was not presented to the trial court except by an instruction, and the assignment of errors does not set out the instruction and assign error for the refusal of the same, as subdivision 2 of the second paragraph of rule 24 requires should be done when counsel intend to rely in this court upon error committed by the trial court in refusing an instruction.

Another error, which we think has been sufficiently assigned to warrant us in noticing it, consists in the action of the trial court in charging the jury, as it did in substance, that the deposit of a notice in the mail by the officers of the government on or about July 24, 1890, addressed to Haldane and Moore, notifying them that their proposal of May 30, 1890, to furnish hay at Ft. Riley, had been ac-

¹ 47 Fed. vi., xi.

cepted, was a good and sufficient notice of acceptance to bind Haldane and Moore to deliver the hay, notwithstanding the fact that the notice did not reach them or either of them until July 31, 1890. The court declined to submit to the jury the question whether the defendants were notified in time of the acceptance of their bid, but decided as a matter of law, and so charged the jury, that the mailing of the notice of acceptance on or about July 24, 1890, addressed to the defendants at their place of residence, bound them to comply with their proposal of May 30, 1890. There was very positive and specific testimony produced before the jury that Haldane and Moore were absent from home during the latter part of July, 1890; that Haldane did not return to Junction City (where he resided, and to which place the notice of acceptance was addressed) until July 31, 1890, and that Moore did not return until some days later; that both of the defendants had been informed by the post quartermaster at Ft. Riley some time in June, after the government had formally accepted the proposal of C. M. Dysche, that there was no possibility of their obtaining the contract to furnish hay at Ft. Riley, because it had been awarded to Dysche; and that Haldane and Moore thereupon abandoned all hope of obtaining the contract and all preparations to furnish the hay, and subsequently left home, about the middle of July, Haldane going to Colorado to buy cattle, and Moore to Topeka, and subsequently to Kansas City. There was evidence that neither Haldane nor Moore had any intimation of the acceptance of their bid by the government until the morning of July 31, 1890, when Haldane returned to Junction City, and received the notice of acceptance from the mail in a letter which bore date July 24, 1890, but was probably not mailed until a day or two afterwards.

The doctrine is well established that, when a statute requires notice to be given to a person for the purpose of creating a liability, personal notice is intended, unless some other form of notice is expressly authorized by the statute. *Rathbun v. Acker*, 18 Barb. 393; *McDermott v. Board*, 25 Barb. 635, 646; *Ryan v. Kelley*, 9 Mo. App. 396; *Corneli v. Partridge*, 3 Mo. App. 575; *State v. Jacobs*, 2 Jones (N. C.) 52; *Gorham v. Lockett*, 6 B. Mon. 146, 161, 168. The same rule, we think, is applicable to notices required to be given by the terms of an express contract. If a contract requires a notice to be given for the purpose of creating a liability or imposing an obligation, personal notice should be given, unless the parties expressly stipulate that the notice shall be served in some other way, as by mailing it to a designated address. This, we think, is the correct rule, except in those cases where the party to be notified conceals himself or resorts to some trick or artifice to avoid the service of personal notice. In such cases, no doubt, reasonable efforts to serve the notice personally is all that should be required of him whose duty it is to give the notice. In the present case the circular issued by the government for the information of bidders notified them that they would be expected to enter into a contract and give a bond within 10 days after the day on which the bidder was notified of the acceptance of his bid. No agreement having been made, and no information having been given to them that a notice deposited in

the mail would be deemed sufficient to constitute an acceptance by the government, the bidder had the right to expect personal notice, or at least to insist that, if the mail was used to convey notice, the acceptance of the proposal should not be deemed complete or effectual to bind the bidder until the agency employed to convey the notice had delivered it into the hands of the bidder. We think, therefore, that the district court erred in deciding that the deposit of the notice of acceptance in the mail some 5 or 6 days before the expiration of the 60 days during which the proposal was to remain open was a sufficient acceptance to bind the defendants. We think that the jury should have been instructed, under the circumstances heretofore detailed, that if they found that the notice of acceptance did not in fact reach Haldane and Moore, or either of them, until July 31, 1890, they were not bound to abide by and carry out their proposal.

It was suggested in the charge of the learned trial judge, but not decided, that possibly the government had the right to accept the defendants' bid even after the lapse of 60 days; that the stipulation in the circular that the bid should not be withdrawn for 60 days was not tantamount to a statement that it should not be subject to acceptance after that time. We cannot assent to that view. In the absence of the clause not to withdraw the bid for 60 days, it would only have remained open for a reasonable time. By the insertion of the clause in question, the parties to the transaction, in effect, determined how long ought to be allowed for acceptance, and, by inference at least, they agreed that more than 60 days was an unreasonable period for the proposal to remain open and unaccepted.

For the error heretofore pointed out, the judgment of the district court is reversed, and the cause is remanded for a new trial.

ST. LOUIS, I. M. & S. RY. CO. v. NEEDHAM et al.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 596.

1. NEGLIGENCE—PROXIMATE CAUSE—QUESTION FOR JURY.

In an action against a railroad company for damages for the death of an employé in an accident caused by a train running into an open switch, the negligence charged was the failure to provide a target upon the switch. There was evidence that it was the custom of the railroad company to maintain targets on its switches, to notify engineers whether they were open or closed, and that if there had been a target on the switch in question the engineer of the train would have been notified that the switch was open, in time, probably, to avert the accident. *Held*, that it was not error to refuse to instruct the jury that the plaintiff had failed to show that the failure to maintain the target was the proximate cause of the injury, but that that question was for the jury.

2. SAME—RULE OF SAFE PLACE—HARMLESS ERROR.

The extent of the duty of the master to the servant in the matter of place of service is to exercise ordinary care to furnish him a reasonably safe place, and to use ordinary care and diligence to keep it in a reasonably safe condition, and it is error for a court to charge the jury that it is

the master's duty to furnish the servant a reasonably safe place. This court has repeatedly so held. *Railway Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 65, 67, 68; *Gowen v. Harley*, 6 C. C. A. 190, 197, 56 Fed. 980; *Railway Co. v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 48. In this case the court fell into this error by making this broad statement in one portion of its charge, but it subsequently so clearly defined the extent and limits of the duty of the master in this particular case that there is no doubt that the jury were governed by the true rule, and were not misled.

In Error to the Circuit Court of the United States for the Eastern District of Arkansas.

This was an action by Mrs. D. L. Needham and T. B. T. Williams, a minor, by his next friend, said Mrs. Needham, against the St. Louis, Iron Mountain & Southern Railway Company, to recover damages for the death of D. L. Needham. Judgments recovered by the plaintiff on two successive trials were reversed on error. 3 C. C. A. 129, 52 Fed. 371, and 11 C. C. A. 56, 63 Fed. 107. On the third trial, plaintiffs again recovered judgment. Defendant brings error. Affirmed.

Geo. E. Dodge and B. S. Johnson filed brief for plaintiff in error.

J. C. Marshall, C. T. Coffman, and James P. Clarke filed brief for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. On a dark night in December, 1889, at Alexander, in the state of Arkansas, a train of cars upon the railroad of the St. Louis, Iron Mountain & Southern Railway Company, the plaintiff in error, ran upon a spur track through an open switch; and Dan L. Needham, who was in the service of the railroad company as the fireman on this train, was killed. The switch had been left open by the carelessness of some of his fellow servants on a preceding train, and in *Railway Co. v. Needham*, 11 C. C. A. 56, 63 Fed. 107, we held that his widow, Mrs. D. L. Needham, the defendant in error, could not recover of the railroad company for the carelessness of these fellow servants. The case has been retried, and a verdict and judgment rendered against the company on the ground that it was negligent because it failed to maintain a target upon the switch which opened and closed the spur track upon which this train ran.

It is assigned as error that the court below refused to instruct the jury to return a verdict for the defendant on the ground that the plaintiff had failed to show that the proximate cause of the death of Needham was the failure of the company to maintain the target upon the switch. If it was the duty of the railroad company to maintain a target upon this switch, and its negligence in the discharge of this duty directly contributed to the injury of the deceased, it is no defense for the company that the negligence of his fellow servants also contributed to the fatal result. One is liable for an injury caused by the concurring negligence of himself and another, to the same extent as for one caused entirely by his own negligence. *Railway Co. v. Chambers*, 68 Fed. 148, 153, and cases there cited. There was evidence in this case that it was the custom of the railway company to maintain targets upon the switches along its road for the purpose

of notifying the engineers who were driving the engines over it whether the various switches were open or closed. It was the custom, and undoubtedly the duty, of the engineers, to look for these targets as they approached the various switches along the road. The engineer of the train which met with this accident testified that if there had been a target upon this switch he could have seen it, and would have been notified that the switch was open, more than 120 feet before he could learn that fact by a view of the rails themselves. He also testified that if he had received a longer notice that the switch was open, so that his engine and train would inevitably run upon the spur track, he and the other members of the crew upon the train would have had a better opportunity to decrease its speed, and to get safely from it, before the engine rushed off the end of the spur. In our opinion, there was ample evidence here to warrant the jury in the inference that the absence of the target from the switch contributed to the fatal accident to the deceased. As the case was, only the engine, tender, and the forward trucks of the car next the engine went off the end of the spur. It may well have been that, if the engineer had received notice of the open switch when he was 120 feet more distant from it, he and his fellow servants on the train could have so slackened its speed that Needham might have escaped without injury. The very purpose of the target is to give this notice. To hold, as a matter of law, that the absence of the target could not have contributed to the injury, is to hold that its presence was useless. What is the proximate cause of an injury, and what directly contributed to an injury, are ordinarily questions of fact, for the jury, and the evidence in this case brings it completely within this rule. *Insurance Co. v. Melick*, 12 C. C. A. 544, 546, 65 Fed. 178; *Railway Co. v. Callaghan*, 6 C. C. A. 205, 208, 56 Fed. 988; *Railway Co. v. Kellogg*, 94 U. S. 469, 474, 476.

The second error assigned is that the court below erred in charging the jury that the defendant company, as master of the deceased fireman, Needham, was bound, under the relationship that existed between them, to furnish him with a reasonably safe place in which to discharge the duties he was engaged to perform. This declaration, taken by itself, was erroneous. The rule is, as we have said again and again, that the extent of the duty of the master to the servant, in this respect, is to exercise ordinary care to furnish reasonably safe machinery and appliances, and to use ordinary care and diligence to keep them in a reasonably safe condition. *Railway Co. v. Jarvi*, 3 C. C. A. 433, 53 Fed. 65, 67, 68; *Gowen v. Harley*, 6 C. C. A. 190, 197, 56 Fed. 980; *Railway Co. v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 48. But when the facts of this case are considered, and the entire charge of the court is carefully read, they show, beyond all doubt, that this declaration of the court below could not have misled the jury. The only negligence claimed or proved against the railroad company in this case was the failure to provide and maintain the target upon the switch. The evidence tended to show that it was the custom of the railroad company to maintain such targets at all of its switches, that there had been one at this switch, that it had been knocked off about

a month before the accident, and that it had never been replaced. After giving the general declaration to which we have referred, the court charged the jury that if they found that the evidence established these facts, and that the targets in use by the railroad company were intended to, and did, notify its engineers on approaching trains whether said switches were connected with the side tracks or with the main line; that such targets were relied upon by the defendant's employes for that purpose; that the company knew, or by the exercise of a reasonable inspection could have known, that there was no target there; that the deceased did not know that there was no such target there, and was not negligently ignorant thereof,—and if they further found that the absence of such customary target on the switch caused or contributed to the death of the deceased, then they would find that the defendant was negligent in not supplying the target, and liable to the plaintiff for such damages as resulted to her in consequence thereof. He also charged them that if they found that the presence on the switch in question of the customary target would not have prevented the death of the deceased, and that the absence of the target neither caused nor contributed to his death, then they must find for the defendant, although they found that the switch was left open by the servants of the company. This was a clear, correct, and explicit enunciation of the law applicable to the specific facts of this particular case. No intelligent juror could have heard this charge without clearly understanding the exact extent of the master's duty here. The portion of the charge excepted to is in the nature of a broad statement of a general duty that, the court conceived, rested upon the master in this regard. Standing alone and unqualified, it is an erroneous statement. But the remainder of the charge clearly defines the extent and limit of the duty of the master in this particular case, in strict accordance, as we think, with the established rule. An exception cannot be sustained to an isolated sentence of the charge of the court, when the entire charge upon that subject fairly states the law. For this reason this assignment cannot be sustained. *Railway Co. v. Linney*, 7 C. C. A. 656, 660, 59 Fed. 45; *Railway Co. v. James*, 12 U. S. App. 482, 6 C. C. A. 217, 56 Fed. 1001; *Railroad Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, 495; *Railroad Co. v. Gladmon*, 15 Wall. 401, 409; *Evanston v. Gunn*, 99 U. S. 660, 668; *Stewart v. Rancho Co.*, 128 U. S. 383, 385, 388, 9 Sup. Ct. 101; *Spencer v. Tozer*, 15 Minn. 146 (Gil. 112); *Peterson v. Railway Co.*, 38 Minn. 511, 39 N. W. 485; *Simpson v. Krumdick*, 28 Minn. 352, 10 N. W. 18. The judgment below must be affirmed, with costs, and it is so ordered.

UNION IRON WORKS v. SMITH et al.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 589.

1. PATENTS—WHAT CONSTITUTES INVENTION—MECHANICAL SKILL.

Where a guide bar is adapted to slide laterally upon a rod or shaft, and to carry with it a circular saw, also movable upon its shaft, it requires only mechanical skill to apply the lever, which actuates the guide bar, between the points of resistance, so as to obviate a tendency to bind when it is applied only at one end. Nor does it require invention to construct in two pieces a guide bar formerly made of a single piece, where the latter form is inconvenient or unserviceable.

2. SAME—GANG EDGERS.

The Armstrong patent, No. 445,647, for improvements in gang edgers, held void as to claims 1 and 3, for want of invention over the Parish patent No. 369,025.

Appeal from the Circuit Court of the United States for the District of Minnesota.

This was a suit in equity by Henry H. Smith and Alvarado Richardson, copartners doing business as Smith & Richardson and as the Diamond Iron Works, against the Union Iron Works, a corporation, for alleged infringement of a patent relating to improvements in gang edgers. In the circuit court a decree was rendered for complainants. 64 Fed. 583. Defendant appeals.

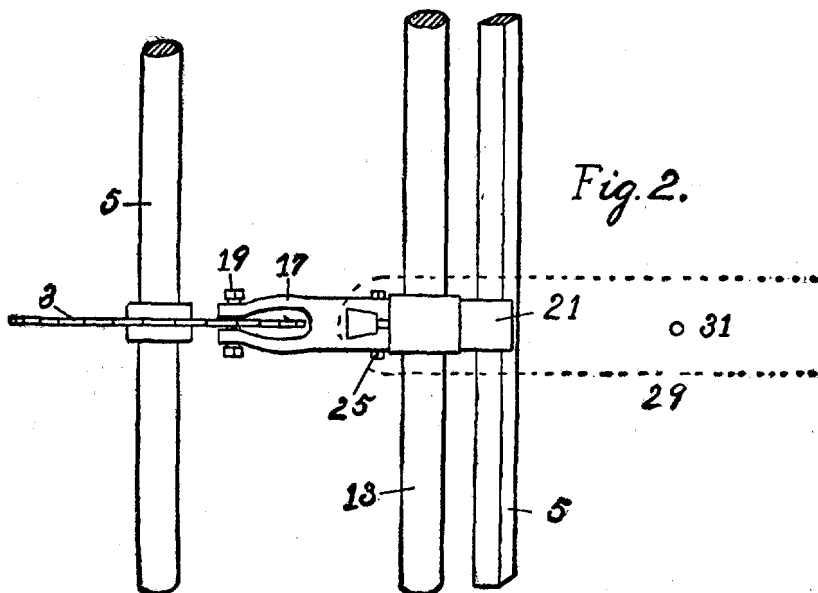
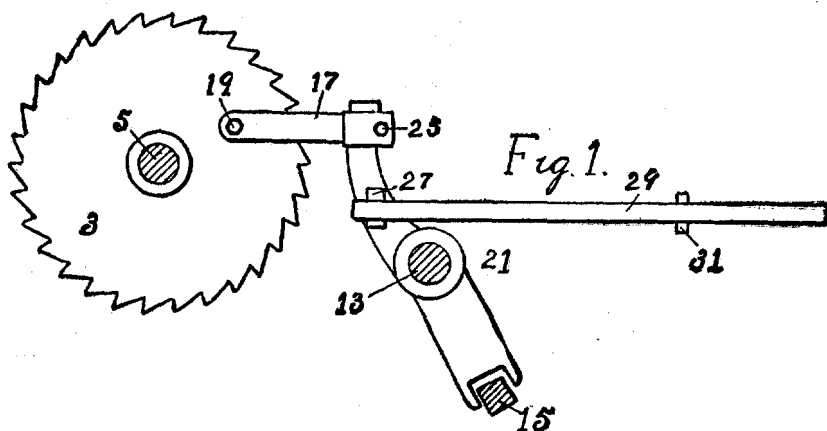
P. H. Gunckel, for appellant.

A. C. Paul (C. G. Hawley, on the brief), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge. This is an appeal from a decree enjoining the Union Iron Works, a corporation, the appellant, from constructing and vending machines containing the combination described in the first and third claims of letters patent No. 445,647, issued February 3, 1891, to Henry H. Smith and Alvarado Richardson, the appellees, as assignees of Frederick N. Armstrong, for improvements in gang edgers. The machine manufactured by the appellant was made according to a pattern copied from one of the machines made under these letters patent, and, if these two claims of the patent are valid, they were undoubtedly infringed by the appellant. The real defense to this suit is that there was no patentable novelty in the improvements shown in the combinations so claimed. Gang edgers are machines used in modern sawmills to cut the rough edges from boards in order to make them of uniform width. They had been described in many patents, and had been used in substantially the same form in which they appear in the patent in suit for many years before this patent was issued. They consist of a number of circular saws driven by a shaft on which they are free to move lengthwise of the shaft, suitable machinery for feeding the boards to the saws, and suitable machinery for moving and adjusting the saws in proper positions upon the shaft while they are in motion, and for holding them steadily there, so that without any unnecessary waste they will strip off the rough edges of successive boards of varying width as the latter come

in contact with the saws. The improvements claimed in the patent of the appellees are to the machinery used for moving the saws on the shaft, adjusting them, and holding them in position. The following sketch illustrates the mechanism to which the claims in suit relate, disencumbered of the parts of the edger not material in this suit:



In this sketch, 3 represents one of the saws, which is mounted upon a suitable arbor, 5, upon which it is adapted to be moved longitudinally. The following quotation from the specification which forms a part of these letters patent describes the various parts of appellees' combination, their relation and use:

"Arranged in front of the saws, and extending transversely across the machine, is a stationary shaft, 13, and below this is a bar, 15, preferably of rectangular form in cross section. A saw guide, 17, is arranged to engage each of the saws, being provided at its forward end with the threaded pins, 19, which engage the opposite faces of the saws. An inclined bar, 21, is mounted upon the shaft, 13, and is provided at its lower end with an opening or socket, 23, which engages the bar, 15. This bar is adapted to slide freely in the direction of the length of the shaft, 13, and is held in an upright and exact position by the guide bar, 15. Any desired number of these bars may be arranged on the shaft, 13. The upper end of the bar, 21, is of rectangular or polygonal shape, and the rear end of the guide, 17, is provided with an opening that is adapted to fit upon this end of the bar, 21. The end of the bar, 17, is split or open, and a clamping bolt, 25, is passed through the end of the guide outside of the opening that fits upon the bar, 21. By this means the guide, 17, may be clamped upon the end of the bar, 21, and by loosening the clamping bolt, 25, the guide may be instantly removed from the bar. The bar, 21, is provided upon each side, preferably at a point above the shaft, 13, with a curved projection, 27. A pivoted lever, 29, is arranged upon the frame of the machine, and extends, preferably, to the end of the frame, passing beneath the feed roll. This lever is supported upon the ends of pointed screws, 31, that engage both sides of the lever. The opposite end of the lever is provided with a fork, which is adapted to engage the projections, 27, upon the bar, 21. By this means a horizontal movement of the lever, 29, will cause the bar, 21, to be moved laterally in the machine, thereby moving the saw guide and moving the saw longitudinally upon its arbor."

The two claims involved in this suit are:

"(1) In a gang edger, the combination, with the movable saws, of a stationary shaft, 13, extending across the machine, the guide bar arranged below said shaft, the bars, 21, mounted upon said shaft, 13, each provided with a recess engaging said guide bar, 15, the saw guides secured to the upper ends of said bars, and engaging said saws, and the pivoted levers engaging said bars, substantially as described."

"(3) The combination, with the saws arranged to move longitudinally upon the saw arbor, of the transverse stationary shaft, 13, the guide bar, 15, arranged below said shaft, the bars, 21, mounted upon said shaft, 13, and engaging said guide bar, the saw guides mounted upon said bars, the curved projections, 27, upon said bars, and the pivoted levers, 29, engaging said projections, 27, substantially as described."

On August 30, 1887, letters patent No. 369,025 were issued to William F. Parish for certain improvements in gang edgers. The following sketch is a copy of the sheet attached to the specification to these letters patent, which exhibits Figs. 2, 3, and 4, referred to therein:

(No Model.)

2 Sheets—Sheet 2.

W. F. PARISH.

GANG EDGER.

No. 369,025.

Patented Aug 30, 1887.

Fig. 2.

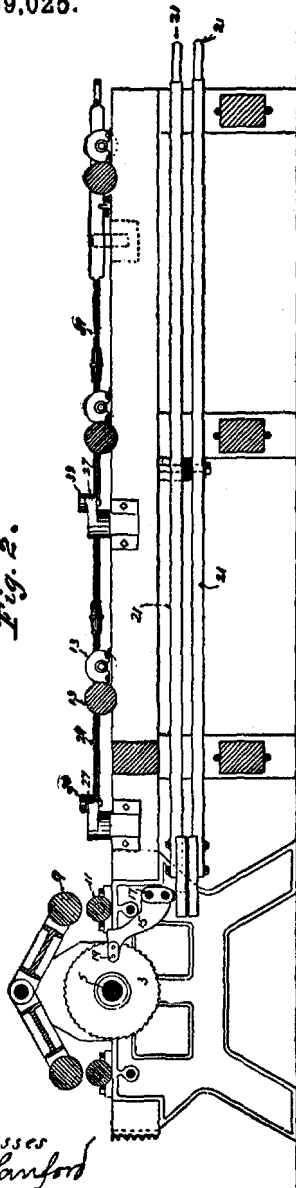


Fig. 4.

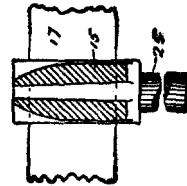
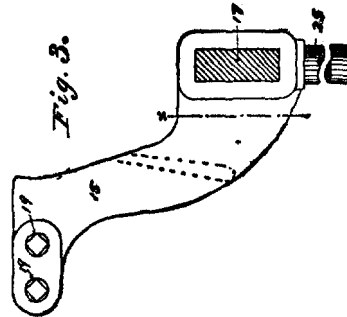


Fig. 3.



Witnesses
R. H. Sanford
A. C. Paul

Inventor
William F. Parish

Fig. 2 is a longitudinal vertical section of the machine. Figs. 3 and 4 are details of one of the sliding yokes by which the saws are moved. In his specification Parish says:

"A yoke or guide, 15, is arranged in connection with each of the movable saws. These yokes are mounted and slide freely on rods or bars, 17, that are located below the feed rolls, and are parallel with the saw arbor. The movable saws each project between the two parts of the yoke, as shown in Figs. 1 and 2. Pins, 19, are provided in the yoke to bear against the opposite faces of the saws. These yokes serve a double purpose. They are the means by which the saws are moved and held at any point on the arbor, and they also engage the opposite faces of each saw at a point near its edge, and just below its cutting portion, thereby serving as guides and steadying the saws while they are cutting. The yokes are preferably constructed, as shown in Fig. 2, with sharp edges at the top, and with the space between the two parts increasing in width from the top towards the bottom. By the sharp upper edges of the yokes any slivers or splinters that come against them are broken, and the shape of the opening permits any refuse material that gets into it to drop out at the bottom. I prefer to form the yoke integrally of cast metal, with a tie between the two parts, as indicated by dotted lines in Fig. 3.

"Pivoted in the frame of the machine are a series of operating levers, 21, one for each movable saw. These levers extend to the end of the machine, where they are provided with suitable locking mechanism and a gauge by which the relative positions of the saws may be determined. The opposite ends of the levers are connected with the yokes, 15, by suitable means. As shown in the drawings, the ends of the levers are provided with slots, 23, into which extend lugs or projections, 25, on the yoke. The levers swing in horizontal planes, and, as the handle end of any lever is moved in one direction, the saw with which the lever is connected moves in the opposite direction. As the yoke slides on a support that is parallel with the saw arbor, the saws are moved without twisting or straining them, as would be done were the yokes carried directly by the levers. * * *

"In Fig. 3 I have shown an enlarged detail view of one of the yokes. I have here shown the yoke adapted to a single rectangular supporting bar. This form of bar may be used as an equivalent for the two bars shown in Fig. 2, or two rectangular bars may be used, if preferred, for the same purpose."

No one can carefully examine the specifications and drawings that form a part of the letters patent to Parish without being strongly impressed with the view that they describe the same elements and the same combination that are claimed by the appellees in this suit; and the combination of elements described in the patent to Parish certainly performs the same function as that performed by the combination claimed by the appellees in this suit. The only differences between the shifting device of Parish and the improved machine of Armstrong are that: (1) The guide bar slides on two circular shafts, which pass through it, or upon one rectangular shaft, as preferred, according to the specification of Parish, and according to the specification of Armstrong it slides upon one circular shaft that passes through it and upon a rectangular shaft, to which it is attached by a recess in the lower end of the guide bar; (2) the lever is attached to the guide bar below the bars upon which it slides according to the specification of Parish, and between those bars and the saw according to the specification of Armstrong; and (3) the saw guide is an integral part of the guide bar in the construction described by Parish, and it is detachable from the guide bar in the construction described by Armstrong. The first difference suggested is an immaterial variation of

construction, that deserves no notice whatever. As to the second, it is strenuously argued that it evidences invention, and displays a marked improvement, because a guide bar would bind and slide with difficulty if the power was applied to one end of it, while it would move easily and smoothly if the power was applied between the two points of resistance,—between the saw and the bars on which the guide bar slides. If this be true, any mechanic, or any man of ordinary capacity who was not a mechanic, would know this fact, and would know how to remedy it immediately. If a bureau drawer binds when one pulls one side of it, it requires no exercise of the inventive faculty to apply the necessary force to the middle of the drawer or to both ends simultaneously.

It is contended that the fact that Armstrong made his saw guide detachable from the guide bar was a great improvement, and evidenced invention, because it enabled the operator to remove the saw without removing the guide bar, and to remove the guide bar without removing the saw. But does it require anything above the skill of the ordinary mechanic to make a standard in two pieces, attachable to and detachable from one another, where a standard in a single piece is inconvenient or unserviceable? We think not. If it does, there are few mechanics, skilled or unskilled, that are not inventors. Moreover, this feature of Armstrong's improved combination is not claimed as a part of his invention in either of the two claims of this patent upon which this suit is based.

Many other patents which describe parts of the combination claimed by Armstrong in the patent in suit, and which illustrate the state of the art when this patent was granted, were pleaded in the answer and proved upon the trial by the appellant. But the improvements upon the machine described by Parish that are here claimed by the appellees are so slight and so simple, and the description in the patent to Parish is, in our opinion, so clearly a complete anticipation of these claims, that it would be a useless waste of time to notice other patents. No change from or improvement upon the shifting device described in the Parish patent is claimed in the first and third claims of the patent here in suit that is not either a mere immaterial variation of the mechanical construction, or so simple and so obvious a change that any mechanic skilled in the art would naturally have made it immediately upon the suggestion of the evil or inconvenience to be remedied. Such improvements evince no invention, and are not patentable. *Stirrat v. Manufacturing Co.*, 10 C. C. A. 216, 220, 61 Fed. 980, and cases there cited.

The decree below must be reversed, with costs, and the cause remanded, with directions to dismiss the bill; and it is so ordered.

UNION SWITCH & SIGNAL CO. v. PHILADELPHIA & R. R. CO. et al.

(Circuit Court, E. D. Pennsylvania. September 25, 1895.)

No. 66.

1. PATENT INFRINGEMENT SUITS — PARTIES DEFENDANT — RAILROAD COMPANY AND ITS RECEIVERS.

A railroad company and its receivers may be joined as defendants in a bill for infringement of a patent. Infringements committed by the receivers inure to the benefit of the corporation itself, and are to be viewed merely as a continuance of infringements alleged to have been committed by the corporation.

2. SAME—MULTIFARIOUS BILL.

A bill which claims upon several patents, covering several inventions, which are incapable of being unitedly used, or which are separately used by defendant, is multifarious.

3. SAME—PLEAS.

Where a bill claims under several separate patents, alleging that the subject-matter of each is conjointly used by defendants in one and the same connected machine, mechanism, or apparatus, the defendants cannot take issue upon this averment by means of a plea, but the same should be averred by answer.

4. EQUITY PLEADING—MOTION TO STRIKE PLEAS FROM FILES.

The question whether defendant may set up a certain defense by means of a plea may be determined by the court upon a motion to strike the plea from the files, where this question has been discussed on its merits in the briefs, although it is claimed that the proper practice would have been to set the pleas down for argument.

This was a bill by the Union Switch & Signal Company against the Philadelphia & Reading Railroad Company and its receivers for alleged infringement of five patents relating to apparatus for electric railway signaling. A demurrer to the bill on the ground of multifariousness was heretofore sustained by the court. 68 Fed. 913. Thereafter an amendment was allowed, and the order sustaining the demurrer was vacated, and an order entered overruling the same. Id. 914. Defendants thereafter filed certain pleas, which complainants have moved to strike from the files.

George H. Christy and J. Snowden Bell, for complainants.

Witter & Kenyon and Thomas Hart, Jr., for respondents.

DALLAS, Circuit Judge. This suit is brought upon five patents. The bill, as originally filed, alleged:

"That the things patented in and by said recited patents constitute and are important elements of a railway electrical signaling apparatus, and are so nearly allied in character as to be capable of conjoint as well as separate use, and that they are and have been so used by the defendants."

Notwithstanding this allegation, the bill was demurred to, upon the ground, among others:

"That it nowhere in said bill of complaint appears, nor is it alleged, that the improvements recited in said patents are all conjointly used or infringed by these defendants, or are all conjointly used or infringed by the defendants in or upon one and the same machine, device, article, or apparatus, or are all capable of conjoint use in or upon one and the same machine, device, article,

or apparatus, but, on the contrary, it appears on the face of the said bill of complaint, and of the aforesaid patents, forming part thereof (profert of each and all of which having been made therein), that the said improvements described and claimed in said several letters patent are of such a diverse nature and character that they are incapable of conjoint use, and cannot be used conjointly, or conjointly in one and the same machine, device, article, or apparatus."

Upon the first argument of this demurrer I understood the learned counsel of the complainants to concede that by "conjoint use," as alleged, was meant, not use in one mechanism, but upon different, though contiguous, parts of the same railroad; and, being of opinion that such uses were separate and distinct, I sustained the demurrer for that reason, and without myself considering what meaning ought to be ascribed to the language of the bill. The other causes assigned for demurrer were not dealt with. It then seemed to be unnecessary to consider them. See 68 Fed. 913. Subsequently the complainants moved to vacate the order made on demurrer as on rehearing, and for leave to amend their bill by adding the following to the clause which has been quoted:

"And your orators in this behalf further aver the fact to be that the conjoint use made by the defendants herein, as herein averred, includes a use of a material and substantial part of the subject-matter of each of the said recited patents in one and the same connected machine, mechanism, or apparatus."

Upon the hearing of these motions this subject was again fully discussed. It was explained to the court that there had been no purpose to admit that the conjoint use alleged did not refer to use in one mechanism; and it is, I think, proper to say that it is quite possible that I had misapprehended the remarks of counsel on the previous argument. Under these circumstances, I treated the order which had been made as founded upon a misunderstanding, and considered the challenged allegation without reference to any supposed admission with respect to its intent. I found that "conjoint use," "joint employment," and similar terms, are constantly applied in the books to denote a use in the same machine or apparatus; and I perceived nothing which would justify the imputation that the pleader in this instance had ascribed to the words "conjoint use" a possible, but different and irrelevant, significance, and designed to "palter with us in a double sense." Therefore the allegation as originally made appeared to be sufficient, and it seemed to be the plain duty of the court to vacate the order first made, and to overrule the demurrer, and this was accordingly done. The amendment was allowed. It could do no harm, and it put an end to any shadow of doubt as to the character of the joint use alleged. The two remaining causes of demurrer were not argued upon this second occasion, and were not referred to in the brief opinion which I thereafter filed; but the order overruling the demurrer generally of course disposed of them also. I was and am of opinion that the railroad company and the receivers are so related as to warrant their joinder as defendants; that the infringements alleged against the latter should be viewed as merely a continuance of those alleged to have been

committed by the former; and that, inasmuch as the corporation is benefited by any unlawful use of the inventions by the direction of its receivers, a single bill against both could be upheld without hardship to either; and that, therefore, this bill ought to be sustained, for the avoidance of needless expense, and of the unnecessary repetition of what would be substantially the same litigation. A bill is multifarious where it unites "the demand of several matters of a distinct and independent nature against several defendants"; and such a bill is inhibited as "oppressive, because it would tend to load each defendant with an unnecessary burden of costs by swelling the pleadings with the statement of the several claims of [against] the other defendants, with which he has no connection." Story, Eq. Pl. § 271. Upon this statement of the rule, with the reason on which it rests, it is, I think, manifest that the present case did not call for its application. My reading of the bill satisfied me that it is not fairly subject to the other objection made to it. It is not "vague, uncertain, and indefinite," etc. See 68 Fed. 914.

The defendants (the corporation and its receivers, separately) have now filed a plea by which they seek to raise as an issue of fact the question which was mainly discussed and considered upon the demurrer. This plea sets forth that the defendants cannot and do not embody the several alleged inventions and improvements described and claimed in the said several letters patent, or any two or more of them, conjointly in one and the same machine, mechanism, or apparatus, and cannot and do not conjointly use them, or any material and substantial parts thereof, in one and the same connected machine, mechanism, or apparatus. The complainants move to strike off this plea, and in support of that motion assign several grounds which need not be here separately stated. There can be no doubt that a bill which claims upon several patents covering several inventions which are incapable of being unitedly used, or which are separately used by the defendants, is multifarious. It has been repeatedly decided that a bill which, in such a case as this, omits to allege joint use, is demurrable. *Hayes v. Dayton*, 8 Fed. 702; *Shickle v. Foundry Co.*, 22 Fed. 105; *Telegraph Co. v. Chillicothe*, 7 Fed. 351; *Barney v. Peck*, 16 Fed. 413; *Griffith v. Segar*, 29 Fed. 707; *Lilliendahl v. Detwiller*, 18 Fed. 176. As has been shown, this bill is not subject to such demurrer; but its allegation of conjoint use, being a material and essential one, may, of course, be traversed. But in what manner may this be done? Must it be by answer, or may it be by plea? This is the important question, and it is one upon which, if it were a new one, much, perhaps, might be said in support of its decision either way. The defense set up amounts to a denial that the defendants infringe, as is alleged in the bill,—that is to say, by conjoint use; and, as was urged by counsel in *Sharp v. Reissner*, 9 Fed. 447, where non-infringement broadly had been pleaded, expense to both parties might be avoided by having the single point first and separately investigated and determined. Yet the learned court there pointed out that the allowance of such a plea might, on the other hand, increase

expense; and held, upon reasoning which is perfectly satisfactory to me, that the plea there interposed was bad, remarking, as may now be remarked, that "no authority is cited where a plea like the present one has been * * * allowed in a suit for the infringement of a patent." In the same opinion it is also clearly shown that the question of conjoint use ought not to be decided upon a mere inspection of the several patents sued upon. In *Matthews v. Manufacturing Co.*, 2 Fed. 232, the plea was substantially identical with the present one. The court said: "Undoubtedly, pleas in some cases are allowable in equity which deny merely an allegation of the bill"; but held that the plea before it was not an allowable one, and was "clearly bad in substance." See, also, *Korn v. Wiebusch*, 33 Fed. 50. I do not doubt that the complainants' allegation of joint use may be traversed by answer, though not by plea; but it is not necessary that I should express any opinion at this time, and must not be assumed to entertain one, upon the question of the effect to be given to the defendants' denial, if made by answer, and supported by the proofs. In *Matthews v. Manufacturing Co.*, supra, it was said: "The plaintiff may recover, even though the plea be true"; while in *Lilliendahl v. Detwiller*, supra, the court, in its opinion, used this language: "But in such cases the bill of complaint, in order to be maintainable, must allege, and the proofs must show, that the inventions embraced in the several patents are capable of conjoint use, and are so used by the defendants." I call attention to the point which seems to be suggested by these cases, but repeat that I do not now pass upon it. The second plea—filed by the receivers only—is probably inadmissible under the general rule against double pleas, but I do not deem it necessary to consider that point. It is sufficient to say that the bringing of this suit against the receivers, without leave of this court first had, seems to be authorized by statute. In any case the question is one which should be raised by appropriate motion, and not by plea. If true, the fact alleged is not a defense to the bill. It goes to the right to bring even a maintainable suit. The suggestion that the complainants should have set down these pleas for argument, instead of moving to strike them off, relates to matter of form, and not of substance. The real question involved has been discussed in the briefs submitted, and I am not disposed to delay its decision upon an immaterial point of practice. In *Sharp v. Reissner*, supra, the motion to strike off was held to be correct, and was granted.

The pleas filed are stricken off, and the defendants are assigned to answer within 20 days, with leave to set up by answer the same matter as is alleged in the identical pleas of all the defendants. All questions respecting costs are reserved.

SAWYER SPINDLE CO. et al. v. TAYLOR et al.

(Circuit Court, D. New Jersey. October 7, 1895.)

1. PATENTS—INJUNCTION ON FINAL HEARING—LACHES.

Upon final hearing, laches, in the sense of mere delay in bringing suit against defendants, unaccompanied by any acts amounting to an estoppel, cannot deprive plaintiffs of their right to an injunction. *Kittle v. Hall*, 29 Fed. 508, and *Waite v. Chair Co.*, 45 Fed. 258, distinguished.

2. SAME—DECISIONS IN OTHER CIRCUITS.

Where a patent has been several times sustained by the circuit courts in other circuits, the court should not enter upon an independent consideration of the subject, but should follow those decisions, unless satisfied that additional evidence has been submitted to it, which, if adduced in the former suits, would probably have led to different results. *Wanamaker v. Manufacturing Co.*, 3 C. C. A. 675, 53 Fed. 791, followed.

3. SAME—SPINNING MACHINES.

The Atwood patent, No. 253,572, for a support for spindles for spinning machines, *held* valid and infringed as to claims 3, 4, and 5.

This was a suit in equity by the Sawyer Spindle Company and others against Taylor and others for infringement of a patent relating to spinning machines.

Fish, Richardson & Storrow, for complainants.

A. Q. Keasbey & Sons, for defendants.

DALLAS, Circuit Judge. This suit is upon patent to John E. Atwood, No. 253,572, dated February 14, 1882, for "support for spindles for spinning machines." The claims involved are as follows:

"(3) The combination, substantially as hereinbefore described, of a spindle rail of a spinning machine, a spindle, and a supporting tube flexibly mounted with relation to the spindle rail, and containing step and bolster bearings. (4) The combination, substantially as hereinbefore described, of a spindle rail, a spindle, a supporting tube containing step and bolster bearings, flexible connections between said tube and the spindle rail, and adjusting devices for varying the degree of flexibility of the supporting tube and spindle therein. (5) The combination of the spindle rail, the spindle, the supporting tube, loosely mounted with relation to the rail, and containing the step and bolster bearings for the spindle, the spring, and the nut for compressing it, substantially as described."

The defendants insist that the complainants are chargeable with laches, and that, therefore, "an injunction ought not to be granted, even on final hearing,—at least, until the coming in of the master's report." When the case was before the court on motion for preliminary injunction (56 Fed. 110), the same point was made, but I then, upon full consideration, reached a conclusion adverse to the defendants. The decision upon that motion was made on June 6, 1893, and thus, without further application or appeal, the matter has rested, until now, upon hearing on pleadings and proofs, the court is asked to refrain from granting a perpetual injunction pending any reference that may be ordered. But if the opinion which I formed on the motion for an interlocutory injunction was then rightly con-

trolling, it certainly should be no less potential now that the proofs have been taken, and the plaintiffs insist that by them the main questions in the cause have been settled and resolved in their favor. In fact, however, the defendants' present position is not as strong in this regard as it was on the interlocutory hearing. I do not feel called upon to vindicate the action of the court in granting the preliminary injunction, but may abridge discussion by saying that, if the delay then set up to defeat the motion had not been satisfactorily explained, that motion might have been, upon that ground, refused; but, upon final hearing, laches, in the sense of mere delay in bringing suit against the defendants, cannot deprive the plaintiffs of their right to protection against a continuance of the unlawful use of their patented invention, and consequent injury to their business. It is only by words, acts, or omissions which give rise to estoppel that this right, if and when established by the proofs, can be forfeited. This distinction is clear and well recognized, and cannot be obliterated by a vague use of the word "laches." As I have said, mere delay in bringing suit may, under some circumstances, impel the court to withhold its hand during the course of litigation; and as was remarked in *New York Grape-Sugar Co. v. Buffalo Grape-Sugar Co.*, *infra*, even on final hearing, "cases may arise where a court of equity would refuse an injunction against an innocent infringer, by reason of the protracted course of conduct of a previous owner of the patent, who knew of the infringement, and silently and knowingly permitted the expenditure of substantial sums of money by the infringer." To such cases the doctrine of estoppel may be pertinent, but the present case is not such an one. I have attentively read the very thorough brief of the learned counsel of the defendants, but without finding any fact referred to other than that, as claimed, the plaintiffs long knew of the violation of their rights before proceeding to maintain them; and I am constrained to the conclusion that his contention is met by the rule, as I have already indicated it, that mere delay in seeking relief will not, where there is no estoppel, prevent the granting of a final injunction. *New York Grape-Sugar Co. v. Buffalo Grape-Sugar Co.*, 18 Fed. 638; *Brush Electric Co. v. Electric Imp. Co.*, 45 Fed. 241; *Price v. Steel Co.*, 46 Fed. 107; *McLean v. Fleming*, 96 U. S. 245-253. In *Waite v. Chair Co.*, 45 Fed. 258, it would seem, if the syllabus in the report could be relied on, that the question was considered as arising upon a motion for a preliminary injunction; but, apart from this, the learned judge certainly does appear to have held that long-continued knowledge of infringement, without objection, might, in the discretion of the court, be accepted as a reason for postponing "the question of granting an injunction * * * until the coming in of the master's report." This was held, however, wholly upon the supposed authority of *Kittle v. Hall*, 29 Fed. 508; but in that case Judge Coxe, after saying that the proposition, as presented to him, was a most perplexing one, proceeded to consider it upon the peculiar facts before him, and which, in his opinion, were of such character that, as he said, "the public had a right to assume, from this pro-

found silence and supineness, that the patentee and his successors had relinquished any claim which they might possess." In other words, there was in that case not merely delay, but silence and supineness, under circumstances which called for protest and activity, and which therefore worked an estoppel, and warranted the assumption of an abandonment. In this lies the distinction between that case and the one now under consideration; for, as I said upon the motion for a preliminary injunction, "there is nothing in this case to show a waiver by the complainants of the right which they now assert, or which should preclude them from the allowance of the special equitable remedy which they invoke. They proceeded against these defendants with what, under the circumstances, was due diligence, and have done nothing to justify the imputation that supineness or apparent acquiescence upon their part induced or invited the infringement of which they now complain."

Infringement is not denied, except upon the theory that, "if the patent in suit is sustained at all, it must be confined to the precise form described and shown in the specifications and drawings." I am unable to adopt this theory. It is, in my opinion, not well founded, and it conflicts with the adjudications upon this patent to which I am about to refer. That the difference between the patented combination and that used by the defendants is formal, merely, and not substantial, is plainly obvious, and, indeed, seems to be admitted. I accordingly hold that infringement has been established.

The defense more strenuously urged is stated in the defendants' brief under three heads. It is that the claims in controversy are invalid (1) for lack of invention, as distinguished from mechanical skill; (2) for lack of novelty; and (3) because they are inoperative. But, except to the extent hereafter to be mentioned, the question of validity cannot now be regarded as an open one. This patent has been several times energetically attacked, and, upon full consideration, has uniformly been sustained. *Sawyer Spindle Co. v. W. G. & A. R. Morrison Co.*, 52 Fed. 590, 54 Fed. 693, and 57 Fed. 653; *Same v. Turner*, 55 Fed. 979. In the absence of any adjudication of the matter by a court of review, a court of first instance should not, I think, enter upon an independent consideration of this subject, but should follow the decisions to which I have referred, unless satisfied that additional evidence has been submitted to it, which, if it had been adduced in the former suits, would probably have there led to a different result. In disposing, upon final hearing, of the case of *Manufacturing Co. v. Deisler*, 46 Fed. 854, Judge Butler, with the concurrence of Judge Acheson, acted upon the rule to which I have alluded, and this action was subsequently approved by the court of appeals for this circuit. *Wanamaker v. Manufacturing Co.*, 3 C. C. A. 675, 53 Fed. 791. See, also, *Office Specialty Manuf'g Co. v. Winternight & Cornyn Manuf'g Co.*, 67 Fed. 928. The only evidence now presented which was not before Judge Shipman when he last considered and sustained this patent is the Phillipp Cramer patent, No. 144,319, of November 4, 1873, and the testimony relating thereto; and I am con-

vinced that, if this evidence had been submitted to that learned judge, it neither would nor should have led him to a conclusion different from that which was in fact reached by him. The Cramer patent, which is for "improvement in centrifugal machines for drawing sugar," relates to that class of machines whose supposed analogy to the machine here in question Judge Shipman has characterized as "fanciful." Whether Cramer disclosed a practical and operative mechanism for any purpose is, at most, extremely doubtful, and that he did not disclose anything adapted to a spinning spindle is quite evident. To repeat, substantially, what was said by Judge Shipman with regard to other similar patents, if Cramer's patent gave a suggestion of being capable of such adaptation, yet the history in the record shows that the work of Atwood was that of an inventor. The defendants have produced a model designed to show that the invention of Atwood might be constructed under the Cramer patent, but this model proves too much. If it be conceded that it shows that, in the light supplied by Atwood, ingenuity may now evolve his construction from that of Cramer, yet the fact remains that it also shows that to do this the Cramer mechanism must be materially modified, and a very decided departure be made from anything which was in Cramer's mind. There is nothing in his patent which would have suggested to a mechanic of ordinary intelligence, who was not examining it for that purpose, the Atwood "improvement in the supports for spinning machines"; and "it is not sufficient, to constitute an anticipation, that the device relied upon might, by modification, be made to accomplish the function performed by the patent in question, if it were not designed by its maker, nor adapted nor actually used, for the performance of such functions." *Topliff v. Topliff*, 145 U. S. 161, 12 Sup. Ct. 825. Let a decree be prepared in accordance with this opinion.

C. T. HAM MANUF'G CO. v. R. E. DIETZ CO. et al.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

No. 93.

PATENTS—INVENTION—CONSTRUCTION OF CLAIMS—INFRINGEMENT—TUBULAR LANTERNS.

Appeal from the Circuit Court of the United States for the Northern District of New York.

This was a bill by the R. E. Dietz Company and the Steam Gauge & Lantern Company against the C. T. Ham Manufacturing Company for infringement of certain patents for improvements in tubular lanterns. The circuit court entered an interlocutory decree in favor of complainants upon one of the patents, but found that the other was not infringed. 58 Fed. 367. Defendant appealed.

E. S. Jenney, for appellant.

F. F. Church, for appellees.

Decree affirmed, with costs, on opinion below.

UNITED STATES v. REED.

(Circuit Court of Appeals, Second Circuit. June 4, 1894.)

No. 139.

OFFICE AND OFFICER—SHIPPING COMMISSIONERS' EXPENDITURES—LIABILITY OF UNITED STATES.

Reasonable expenses of a shipping commissioner for necessities incident to the discharge of his duties, including office rent, storage of deceased seamen's effects, cost of removal from one office to another, stationery, telephone charges, etc., constitute valid charges against the United States, in addition to his salary.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit by James C. Reed against the United States under the act of March 3, 1887 (24 Stat. 553), to recover disbursements made by him in the discharge of his duties as shipping commissioner of the United States at the port of New York. The circuit court rendered a judgment in favor of the petitioner in the sum of \$4,033.71. The United States appealed.

In the court below the following findings of fact and conclusions of law were filed by WALLACE, Circuit Judge:

"First. That the petitioner, James C. Reed, was duly appointed the shipping commissioner of the United States of America, at the port of New York, and that he duly qualified and assumed and entered upon the discharge of the duties of such office prior to the 1st day of July, 1884.

"Second. That thereafter, and on or about the 26th day of August, 1884, the secretary of the treasury of the United States of America, under and pursuant

to the direction and powers contained in the act of congress entitled 'An act to remove certain burdens on the American merchant marine, and encourage the American foreign carrying trade and for other purposes,' approved June 26, A. D. 1884, determined and fixed the compensation of the petitioner, as such shipping commissioner at the port of New York, at the sum of four thousand dollars per annum, and, in addition thereto, one-half of the net surplus of the receipts of the office of such commissioner from fees earned, after the payment of salaries and expenses, not to exceed, however, the maximum sum of five thousand dollars in any one year.

"Third. That the petitioner herein continued to hold said office, and to discharge the duties imposed upon him as such shipping commissioner, from July 1, A. D. 1884, to March 1, A. D. 1891.

"Fourth. That during the period between July 1, 1884, and March 1, 1891, no change or modification in the compensation to be paid to and received by the said petitioner as such shipping commissioner was made.

"Fifth. That for the fiscal year commencing July 1, 1886, down to the 1st day of March, 1891, the surplus earnings of the office of shipping commissioner at the port of New York, of service fees, exceeded the necessary expenses incident to the conduct thereof and the discharge of the duties of such shipping commissioner, including the compensation of the petitioner, by the sum of twenty-four thousand seven hundred and ninety-five dollars and one cent.

"Sixth. That the petitioner has been allowed and paid each year, from the 1st day of July, 1884, down to the 1st day of March, 1891, as compensation for his services as shipping commissioner at the port of New York, at the rate of five thousand dollars per annum.

"Seventh. That from the 1st day of July, 1884, to the 20th day of May, 1886, the office of the petitioner, as shipping commissioner, was located at No. 187 Cherry street, in the city of New York, and that the rental of said premises, together with all the other expenses incident to the office and the discharge of the duties of the petitioner, were paid by the United States of America.

"Eighth. That on or about the 20th day of May, 1886, the office of the petitioner was, by direction of the secretary of the treasury, moved from No. 187 Cherry street to the United States barge office, in the city of New York, a building owned by the United States.

"Ninth. That the cost and expenses incident to such removal, and the fitting up of the United States barge office, were paid by the United States.

"Tenth. That on or about the 10th day of April, 1890, the petitioner, by the direction of the secretary of the treasury, removed from the barge office, and procured offices at No. 25 Pearl street, and storage room for deceased seamen's effects at No. 19 Pearl street, at an annual cost of fifteen hundred dollars.

"Eleventh. That the cost of such removal, and the furnishing of such offices, has not been paid by the United States.

"Twelfth. That between the 1st day of July, 1886, and the 1st day of March, 1891, the petitioner incurred sundry expenses, and was obliged to and did make sundry disbursements, amounting in the aggregate to the sum of four thousand and thirty-three dollars and seventy-one cents, for necessities incident to the discharge of the duties imposed upon him by statute as such shipping commissioner, including rent of offices and storage of deceased seamen's effects, furnishing, cost of removal, stationery, telephone, 'Maritime Register,' ice, freight on blanks, safe-deposit vault, telegram, repairs, etc.

"Thirteenth. That the items for which said sum was disbursed were incident to his office.

"Fourteenth. That the said sum of four thousand and thirty-three dollars and seventy-one cents was a reasonable and fair charge for the same.

"Fifteenth. That, from time to time, reports were made monthly by the petitioner, as shipping commissioner, to the secretary of the treasury, which reports contained the items of the receipts and expenditures incurred and proposed to be incurred.

"Sixteenth. That the petitioner has duly demanded payment of the said sum of four thousand and thirty-three dollars and seventy-one cents of the United States, and that no part thereof has been paid.

"Conclusions of Law.

"First. That the secretary of the treasury was authorized to determine the compensation of the petitioner as shipping commissioner at the port of New York, and, having exercised such authority, the compensation of the petitioner remained as so fixed (to wit, five thousand dollars per annum).

"Second. That the secretary of the treasury is authorized to regulate the mode of conducting the business in the shipping offices.

"Third. That all expenditures made by shipping commissioners in the discharge of the duties imposed upon them by the statutes of the United States or the regulations of the treasury department are to be audited and adjusted in the treasury department.

"Fourth. The petitioner is entitled to have and receive from the United States of America the sum of four thousand and thirty-three dollars and seventy-one cents.

"Judgment is therefore rendered for the petitioner for the sum of four thousand and thirty-three dollars and seventy-one cents."

Henry C. Platt, U. S. Atty.

George E. P. Howard, for appellee.

No opinion. Affirmed in open court.

THE MANHANSET.**EVANS v. NELSON.**

(Circuit Court of Appeals, Second Circuit. December 5, 1893.)

No. 39.

MASTER AND SERVANT—PERSONAL INJURY TO SEAMAN—ABSENCE OF LIGHT AT WINCH—ACT IN EXTREMIS.

Appeal from the District Court of the United States for the Eastern District of New York.

This was a libel by Peter Nelson, a seaman, against the steamship Manhanset (Thomas L. Evans, claimant), to recover damages for personal injuries. The district court entered a decree for libellant for \$1,750 and costs. 53 Fed. 843. The claimant appealed.

Convers & Kirlin, for appellant.

Edwin G. Davis, for appellee.

Affirmed, with interest and costs, on the opinion of the district judge.

THE MAJESTIC.

OCEANIC STEAM NAVIGATION CO. v. POTTER et al.

(Circuit Court of Appeals, Second Circuit. May 7, 1894.)

No. 65.

CIRCUIT COURT OF APPEALS—CERTIFICATE TO SUPREME COURT—SHIPPING—
DAMAGE TO PASSENGERS' BAGGAGE.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Grace Howard Potter and others against the steamship Majestic (the Oceanic Steam Navigation Company, claimant), to recover damages for injury to their luggage while being carried as passengers from Liverpool to New York. The district court entered a decree for libelants. 56 Fed. 244. The claimant appealed to this court, which on March 12, 1894, rendered a decision modifying the decree of the district court so as to limit the recovery in favor of each libelant to the sum of \$43.67, with interest. See 9 C. C. A. 161, 60 Fed. 624, where the facts are fully stated. The libelants moved for a reargument, but the same was denied. They thereupon filed the present petition, asking the court to certify the cause to the supreme court of the United States for a decision, upon certain questions of law. The points upon which a decision was desired were stated as follows by the petitioners:

"The following points, which petitioners believe have never yet been determined by any of the courts of the United States, except this court, were discussed by petitioners in their brief, and argued by counsel, and were decided adversely to petitioners: First: (1) That appellant, as appeared from the uncontradicted facts in the case, had issued to petitioners alternative labels for their baggage, directing certain places in the ship, where the baggage, at petitioners' election, might be stowed, and requested petitioners to attach the label selected by them to their baggage upon the voyage in question. (2) That the issue of the aforesaid label under the conditions aforesaid, and the subsequent attaching of the same to the baggage, as appears from the uncontradicted facts in the case, constituted a part of the contract for passage between the parties, and that the ship became obligated to carry the baggage on such voyage, in the particular part of the ship designated by the label selected. (3) That the petitioners' baggage, as appears by the uncontradicted facts in the case, on the voyage in question, had been delivered in London to a railway company, as agent of appellant, and by it checked to New York, and marked before delivery to the railway company by petitioners with the label issued by appellant directing it to be stored in the 'hold,' and by the railroad company delivered in good order to the ship, and that the hold proper of the ship contained no portholes. (4) That appellant, as appeared from the uncontradicted facts in the case, failed to stow the said baggage in the hold proper, but stowed it in what is known as 'Orlop No. 3,' a different part of the ship, containing portholes, one of which became broken by an unanticipated peril of the sea, whereby the said package became damaged. (5) That the appellant, by storing the baggage elsewhere than directed by the label selected, deviated from the contract, and thereby became an insurer of the baggage against all loss and damage, even as against unavoidable accident and perils of the sea. * * * Second: (1) That appellant, as appeared from the uncontradicted facts in the case, was guilty of negligence in stowing and caring for said baggage on the voyage afore-

said, and in failing to inspect it and protect it from injury by the breaking of said porthole, especially as appellant, although labeled for the 'hold' with appellant's own label, had placed the said baggage in orlop No. 3, and not in the 'hold' proper, where there were portholes, and had failed to inspect said portholes, one of which portholes had become broken by an unanticipated peril of the sea. (2) That the stipulation in the contract ticket, even if accepted by libelants, did not, so far as it purported to limit or relieve the appellant's liability, operate in law to relieve appellant from its own negligence in stowage or to limit its liability in case of such negligence, and that, so far as it might be held to so limit or relieve the liability of appellant, it was contrary to public policy and void. * * * As petitioners are informed and believe, the questions governing the liability of steamship carriers at sea for injury to baggage by negligent stowage and other causes arising under tickets and baggage labels of the character issued to the petitioners in this case are wholly novel, and have never been passed upon by any of the courts of the United States in admiralty, except in this case, and it is important, for the protection of all persons traveling on the sea under contract tickets of such character issued by British steamship companies operating steamers to and from various ports in the United States, that the supreme court of the United States should finally, and after careful consideration, decide all questions affecting and concerning tickets of such character, especially as the decisions of the state courts in such cases are by no means uniform. * * * Wherefore petitioners respectfully pray that this court may certify the following specific questions of law, and each of the same, to the supreme court of the United States for its consideration thereupon, upon the entire record in the case: (1) Whether the issue of the alternative labels to the petitioners, and the use of the same by them, at request of appellant, constitute a part of the contract between the ship and passenger. (2) If so, whether the ship did not, upon failure to stow the baggage marked with the label selected, in the place indicated by it, so deviate from the contract as to become an insurer of the safety of the baggage, against all injury and damage from any cause whatsoever. (3) Whether the ship was not guilty of negligence in stowing and caring for the baggage in question, on the undisputed facts in the case, and particularly in view of the manner in which the baggage had been labeled and the character of the place in which it was directed by the label to be stowed. (4) If so, whether the stipulation in the contract ticket, in so far as the same sought to relieve the claimant from or limit its liability for damage caused by its own negligence in stowage, is not contrary to public policy and void under the general maritime law, the law of the United States, and the law of England; and, if valid, whether the same, on its face, is applicable to the present case, in view of the uncontradicted facts in the case."

Everett P. Wheeler, for appellant.

Cary & Whitridge, for appellees.

Petition denied.

THE TRANSFER NO. 8.**NEW YORK, N. H. & H. R. CO. v. REDDY.**

(Circuit Court of Appeals, Second Circuit. December 5, 1893.)

No. 31.

COLLISION—TUGS AND TOWS IN EAST RIVER—NAVIGATION NEAR PIERS.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Philip Reddy against the steam tug Transfer No. 8 (the New York, New Haven & Hartford Railroad Company, claimant), and the steam tug New York Central Lighterage Company No. 2, to recover damages for a collision whereby libellant's canal boat was sunk. In the district court a decree was entered for libellant against Transfer No. 8, and exempting No. 2. 53 Fed. 670. The claimant of No. 8 appeals.

Henry W. Taft, for claimant of the Transfer No. 8.
Stewart & Macklin, for appellee.

Affirmed, with interest and costs, on the opinion of the district judge.

THE A. B. VALENTINE.**WESTERN ASSUR. CO. OF TORONTO v. CORNELL STEAMBOAT CO.**

(Circuit Court of Appeals, Second Circuit. December 21, 1893.)

No. 59.

COLLISION—STEAMER AND TUG WITH TOW.

Appeal from the District Court of the United States for the Northern District of New York.

This was a libel by the Western Assurance Company of Toronto against the steamer A. B. Valentine, the Cornell Steamboat Company, claimant, to recover damages sustained by a canal boat by reason of a collision with the Valentine. In the district court the libel was dismissed. 55 Fed. 350. Libellant appeals.

George Clinton, for appellant.
Amos Van Etten, for appellee.

Decree affirmed, without an opinion, on the opinion of the district judge.

THE SAMMIE.

BUSH et al. v. WILLIAMS.

(Circuit Court of Appeals, Second Circuit. December 18, 1893.)

No. 50.

COLLISION—TOW WITH STEAMER AT PIER.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Thomas Williams, master of the steamship North Erin, against the steam tug Sammie, George E. Bush and others, claimants, to recover damages alleged to have been sustained by the steamship in consequence of a collision with a tow in charge of the Sammie. The district court rendered a decree for libelant in the sum of \$500, with costs, and the claimants appeal.

At the time of the alleged collision, the North Erin was lying in a slip on the south side of the Pennsylvania Railroad pier at Jersey City. The steamship Pennsylvania was lying in the same slip on the lower side. The tug came down the river with the lighter Hoboken in tow, on two short hawsers, bound for the Pennsylvania. The tide was ebb, and as she rounded to and entered the slip, between the North Erin and Pennsylvania, the Hoboken (as claimed by the libelants) struck the North Erin's port quarter, knocking in a plate and doing some other damage. It was denied in behalf of the tug that any collision occurred. The evidence in behalf of the libelant consisted substantially of the testimony of several persons on board the North Erin that they felt a shock; that some of them at once went on deck, and saw the lighter then lying close under the steamer's counter. Nobody was on deck at the time of the collision. On the examination of the chief officer of the North Erin, he was allowed, without objection, to testify that he went on board the lighter Hoboken, saw the captain, and invited him to come on board the North Erin, and survey the damage done; that he accordingly came aboard, saw the crack in the plate, and said: "I did not think that I struck her so hard." At this point objection was made to the conversation as hearsay. The evidence in behalf of the Sammie consisted of the testimony of several of her crew to the effect that they were watching and saw no collision, the engineer stating that the lighter was 10 or 15 feet away from the steamer all the time.

The decision given in the court below by BROWN, District Judge, was as follows:

"I credit the testimony of the steamer's witnesses, fortified by circumstances, rather than the tug's negative testimony, unsustained by any possible explanation of the breaking of the plate by any other cause than the lighter in tow of the tug. This decision is reached without reference to the statements of the master of the lighter Hoboken, which I regard as hearsay and irrelevant."

McCarthy & Berier, for claimants of the Sammie.
Convers & Kirlin, for appellee.

Decree affirmed, with interest and costs, upon the opinion of the district judge.

THE ORANGE.

NEW YORK CENT. & H. R. R. CO. v. HOBOKEN FERRY CO.

(Circuit Court of Appeals, Second Circuit. June 7, 1894.)

No. 8.

COLLISION—STEAM VESSELS CROSSING—CONTRARY SIGNALS—CHANGE OF COURSE.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by the New York Central & Hudson River Railroad Company against the steam ferryboat Orange (the Hoboken Ferry Company, claimant), to recover damages for injuries to libelant's tugboat No. 3, resulting from a collision. The district court found the tug solely in fault, and dismissed the libel, with costs. 64 Fed. 141. The libelant appeals.

Carpenter & Mosher, for appellant.

Leon Abbett, Jr., for appellee.

Decree affirmed upon the opinion of the district judge.

In re THE M. MORAN.

MORAN v. CULLIMAN.

(Circuit Court of Appeals, Second Circuit. December 18, 1893.)

No. 38.

NEGLIGENCE—COLLISION—LOOKOUT.

Appeal from the District Court of the United States for the Eastern District of New York.

This was a petition by Michael Moran, part owner of the steam tug M. Moran, for limitation of liability in respect to the death of two pilots who were crushed between the tug and a ship which she had towed out to sea, it being alleged in the petition that Dora Culliman, administratrix of the estate of one of the deceased, had commenced an action in the supreme court of the state of New York to recover damages against the libelant and petitioner under the New York statute. The district court entered a decree against the petitioner in the sum of \$5,000 upon the claim of the said administratrix. 53 Fed. 845. The petitioner appealed.

Carpenter & Mosher, for appellant.

James Parker, for appellee.

Decree affirmed, with interest and costs, upon the opinion of the district judge.

SPRINGER et al. v. HOWES et al.

(Circuit Court, E. D. North Carolina. October 2, 1895.)

1. REMOVAL OF CAUSES—JURISDICTION TO DETERMINE.

The state court in which an action has been commenced, if an application is made to it for an order of removal to a federal court, and the federal court to which removal is sought, have an equal right to determine whether, upon the face of the record and the petition for removal, a proper case for removal is made out.

2. SAME—COMITY BETWEEN COURTS.

Defendants in an action commenced in a state court filed a petition and bond for its removal to the federal court, and applied to the state court for an order of removal, which was refused. Defendants then appealed to the state supreme court, where an elaborate argument took place, and on full consideration the decision of the lower court was affirmed. Defendants, having filed a transcript of the record in the federal court, then attempted to proceed therein, and plaintiffs moved to remand. *Held*, that the federal court would not, under such circumstances, overrule the decision of the state courts, but would leave the defendants to their appeal therefrom to the supreme court of the United States, and in the meantime remand the case.

This was an action by L. W. and E. D. Springer against Howes & Sheets and others, commenced in a court of the state of North Carolina. The defendants filed a petition and bond for removal to the United States circuit court, and filed a transcript of the record in that court. Plaintiffs moved to remand.

Shepherd & Busbee, for plaintiffs.

John W. Hinsdale, for defendants.

SEYMOUR, District Judge. The suit was begun in the superior court of Beaufort county, N. C. At the appearance term of that court, in February, 1894, the defendants Howes & Sheets filed a petition and bond for removal. The superior court refused to remove, whereupon said defendants appealed to the supreme court of North Carolina. The latter court affirmed the decision of the court below, and filed an opinion, which appears in 20 S. E. 469. The same defendants have caused a transcript of the record to be filed in the circuit court of the United States for the Eastern district of North Carolina, and seek to carry on this litigation in that court. The plaintiffs and the defendants other than Howes & Sheets move to remand. The ground alleged for removal is an alleged separable controversy between themselves, citizens of Pennsylvania, and the plaintiffs and one Mayo (a defendant), citizens of North Carolina. The defendants other than themselves, who are citizens of Pennsylvania, they say, are not necessary parties to the controversy, being sufficiently represented by Mayo, their trustee. I do not propose to discuss the grounds upon which it is claimed that the case is properly in the circuit court, for reasons to be given hereafter. Enough has been said to indicate the statute which controls the case, as to its removability.

Under the statute (Act March 3, 1887) the right of removal on the ground of diverse citizenship is allowed to defendants only if the case is one over which the circuit court is given original jurisdiction by the

first section of the act. Section 3 provides the machinery of removal. A defendant desiring to remove his cause from the state to the federal court may file a petition and bond, etc. "It shall then be the duty of the state court to accept said petition and proceed no further in said suit." Upon a transcript of the record being thereupon filed in the federal court, the suit proceeds therein in the same manner as if it had originally commenced there. Under this legislation it has been decided that if the cause be removable, and the statute be complied with, no order of the state court is necessary. *Insurance Co. v. Dunn*, 19 Wall. 214; *Kern v. Huidekoper*, 103 U. S. 485; *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58; *Railroad Co. v. Koontz*, 104 U. S. 5. When the petitioner presents a sufficient affidavit and bond, the case is thereby removed; the jurisdiction of the state court ceases, and that of the federal court attaches. Even the filing of a transcript of the record in the circuit court is not essential to its jurisdiction. But the state court is not bound to surrender its control of the case until a petition is filed which shows on its face the right to a removal. If the petitioner fail to show in his petition, taken in connection with what already appears in the record, such a right, he does not, in law, show to the state court that it cannot "proceed further with the suit." *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799; *Railroad Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262. Of necessity, therefore, if the question be raised in the state court, such court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. But either without calling upon the state court for a decision, or after a refusal by such court to remove, the petitioner has a right, under the statute, to enter a copy of the record of that court, as it stood at the time of filing his petition, in the circuit court, and have the suit docketed there. The circuit court will, in such case, have the same question to decide as that which might have been presented to, or has been passed on by, the former court. And it is at liberty to determine for itself whether, on the face of the record, a removal has been effected. The pure question of law presented by the petition—of whether, admitting the facts stated to be true, it appears on the face of the record that the petitioner is entitled to remove—is one which both the state court and the federal court have the right to decide. *Railroad Co. v. Dunn*, *supra*. Nor can it be claimed that the decision of this question is more appropriately a function of one court than of the other. *Id.* Each is competent, and equally competent, to pass upon its own jurisdiction. The final supremacy of the federal judicatory is undoubted. From each court an appeal will lie, either directly or mediately, to the supreme court of the United States, with which rests the ultimate determination. But, during the period that must elapse before the question can reach that tribunal, it is desirable that no conflict of authority should arise between courts absolutely independent of one another. Such a conflict is courted by the practice adopted by counsel in this case. I know that the judicious and learned advocate who controls the litigation on behalf of the removal of this suit is led solely by his zeal for his clients, and his confidence in their case, but I think that he is misled.

A bare statement of the facts will, I think, show the incorrectness of the practice adopted. It was not necessary, as I have shown, to apply to the judge of the superior court of Beaufort county for an order of removal. Perhaps inadvertently, such application was made, and the order was denied. From this an appeal was taken to the supreme court of North Carolina. An exhaustive printed argument, extending to nearly 75 pages, was presented to that court, and was, as appears from the *North Carolina Reports*,¹ carefully considered by the five able and impartial lawyers who sat upon its bench. An elaborate opinion was written by one of them, in which all the grounds relied upon by defendants' counsel were met, and upon consideration a unanimous bench affirmed the order of the court below. It was the court of the petitioners' own seeking. They themselves appealed to it, not only with the confidence that I know their counsel felt, and still feel, in the merits of their petition, but also, I doubt not, with the confidence that they, in common with the bar of North Carolina, feel in its supreme judicatory. Upon substantially the same brief, with an addition to it reviewing the decision of the supreme court, I am asked, sitting in the circuit court of the United States, to reverse the decision of the state court. I have examined its opinion in the light of the arguments of counsel, and I see no reason to question its correctness. If the matter were doubtful, its authority would be persuasive. But I do not think it necessary or proper to discuss the subject afresh. It is my opinion that in any contingency a decision rendered under such circumstances ought to stand, unless reversed by the supreme court of the United States. This case differs from that of *Beadleston v. Harpending*, 32 Fed. 644, in the fact that the removal had there been denied by only a single judge sitting at *nisi prius*. In that case Judge Benedict reached the conclusion that the circuit court ought not to interfere with the decision of the state court. Several cases are cited where the circuit courts appear to have come to a contrary conclusion. My own opinion, however, is in correspondence with that expressed in *Beadleston v. Harpending*. It seems to me proper that when a party to a litigation has deliberately and voluntarily intrusted a matter, which either of two tribunals has a right to decide, to one of them, he should not be allowed, in case of an adverse decision, to resort to the other. A defendant seeking to remove a case from a state to a federal court, if he applies to a state judge for an order, does so by his own choice. If the superior court of Beaufort county had decided the matter without having been asked by the parties seeking to remove, to do so, a different question would have been presented. The case will be remanded to the state court.

¹ 115 N. C. 370, 20 S. E. 409.

GREEN v. MILLS.

(Circuit Court of Appeals, Fourth Circuit. June 11, 1895.)

No. 136.

1. JURISDICTION OF CIRCUIT COURT OF APPEALS—CONSTITUTIONAL QUESTIONS.

The mere fact that the validity of a state law under the constitution of the United States is drawn in question will not, of itself, deprive the circuit court of appeals of jurisdiction to decide other questions involved in the case, although the judiciary act of March 3, 1891, provides, in section 5, for direct appeals from the circuit to the supreme court, when constitutional questions are involved. And, if it appears that the case may be disposed of upon grounds independent of the constitutional question, the court will take jurisdiction, and dispose of it accordingly. *Held*, therefore, that where, on appeal from an interlocutory injunction, it appeared that, while the bill challenged the constitutionality of a state law, the further question was also raised whether the case was one of equitable cognizance, the court would take jurisdiction, and, being of opinion that the case was not of equity cognizance, would dissolve the injunction, and order the bill dismissed.

2. EQUITY JURISDICTION — ENJOINING POLITICAL OFFICER — REGISTRATION OF ELECTORS.

A court of equity has no jurisdiction, upon a bill asking relief in behalf of plaintiff and all other citizens similarly situated, to enjoin a county supervisor of registration from performing the duties prescribed by the state registration laws, on the ground that such laws are unconstitutional, and operate to deprive plaintiff and others of their right to vote.

Appeal from the Circuit Court of the United States for the District of South Carolina.

This was a bill of complaint filed in the circuit court of the United States for the district of South Carolina April 19, 1895, by Lawrence P. Mills, described as "a citizen of the state of South Carolina and of the United States," against W. Briggs Green, described as "a citizen of said state and the United States," and exhibited on behalf of complainant and all other citizens of the county of Richland, in the state of South Carolina, circumstanced like himself, and too numerous to be made parties, alleging that complainant was 21 years of age February 4, 1895; that he is a resident of ward 4, precinct of Columbia, in said county and state; that he is a male citizen of the United States; that he has resided in the state of South Carolina for more than one year preceding the last general election in that state, and in the county of Richland for more than 60 days prior to the said general election; that complainant is an elector of the state of South Carolina, possessing all the qualifications of an elector of the most numerous branch of the state legislature, provided by the state constitution, and that he is subject to none of the disqualifications set forth in said constitution; and that he is, under the constitution and laws of the United States, duly qualified to vote at all federal and state elections held in said ward, county, and state.

The bill then set forth section 90 of the General Statutes of South Carolina of 1882, as follows: "All electors of the state shall be registered as hereinafter provided; and no person shall be allowed to vote at any election hereafter to be held unless registered as hereinafter required." And section 132 of the Revised Statutes of South Carolina of 1893 to the same effect: "All electors of this state shall be registered, and no person shall be allowed to vote at any election hereafter to be held unless he shall have heretofore registered in conformity with the requirements of chapter 7 of the General Statutes of 1882, and acts amendatory thereof, or shall be registered as herein required." And also section 94 of the General Statutes of 1882, providing: "When the said registration [in certain books to be provided him and made in the manner provided for in section 93] shall have been completed the books shall be closed and not reopened for registration except for

the purposes and as hereinafter mentioned until after the general election for state officers. After the said next general election the books shall be opened for the registration of such persons as shall thereafter become entitled to register on the first Monday in each month to and until the first Monday in July, inclusive, preceding the following general election, upon which last named day the same shall be closed and not reopened for registration until after the said general election, and ever after the said books shall be opened for the registration of such electors, and on the days above mentioned, until the first day of July preceding a general election, when the same shall be closed as aforesaid until the said general election shall have taken place." And in section 137 of the said Revised Statutes of 1893 it is provided: "After every general election the registration books shall be opened for registration of such persons as shall thereafter become entitled to register on the first Monday in each month until the first day of July preceding a general election, when the same shall be closed until such election shall have taken place." And also section 97 of the General Statutes of 1882, in the following words: "Any person coming of age and becoming qualified as an elector may appear before the supervisor of registration on any day on which the books are opened as aforesaid and take oath as to his age and qualification, as hereinbefore provided, and if the supervisor find him qualified he shall enter his name upon the registration book of the precinct wherein he resides."

It was further alleged "that, in and by the requirements of said registration enactments of the government of the state of South Carolina, it is provided that the respective supervisors of registration in the several counties shall issue to the voter when registered a certificate of registration, and that said voter shall present the same at the polls to the managers of election, and that no one shall be allowed to vote at any election to be held in the said state unless his certificate of registration as aforesaid is exhibited at the time and in the manner aforesaid. And it is further required, in and by the said alleged enactments, that, in case a voter or elector shall remove from one county to another in said state, or from one precinct to another in the same county, or from one residence to another in the same precinct, he shall obtain a transfer and a renewal certificate. And it is further provided, in said enactments, that, in the event an elector shall lose his said certificate of registration, he must obtain a renewal thereof upon furnishing evidence satisfactory to the registrar of the said county wherein he resides that his said certificate has been mislaid or lost, and that the same has not been wilfully or intentionally disposed of." And it was averred "that, by the provisions and requirements of said enactments, the elector failing for any reason to comply with any of the provisions aforesaid is denied the right of suffrage both in federal and state elections," and "that the provisions of the said enactments fixing the time for registration and the closing of the books for that purpose on the 1st day of July preceding every election, and the many and divers provisions, requirements, and conditions set out in the various and sundry sections of said alleged act, were intended to, and that they in effect do, abridge, impede, and destroy the suffrage of the citizen both of the state and of the United States."

The bill further averred the passage on the 24th day of December, 1894, by the government of the state of South Carolina of an act to provide for calling a constitutional convention, by section 4 of which it was declared who should be entitled to vote for delegates to the said constitutional convention; and in addition to the qualifications prescribed for electors by the constitution of the state of South Carolina, a further qualification was provided, to wit, that the elector be "duly registered as now required by law, or who, having been entitled to register as a voter at the time of the general registration of electors in the state which took place in the year of our Lord 1882, or at any time subsequent thereto, failed to register at such time required by law, or who has become a citizen of this state and who shall register as hereinafter provided in such cases." Sections 6 and 7 of this act were set forth as follows: "That on the first Monday of March, in the year of our Lord 1895, the supervisor of registration of each county shall, at the county seat thereof, open his books of registration, and shall hold the same

open for ten consecutive calendar days thereafter, except Sundays, between the hours of 10 o'clock in the forenoon and 4 o'clock in the afternoon, except Charleston, Beaufort, and Richland counties, where the said books shall be kept open from 10 o'clock in the forenoon to 6 o'clock in the afternoon, during which time any elector then or theretofore at any time entitled to register as a qualified voter, or who has become a citizen of this state, shall be, during the time herein fixed by law for registration, entitled to register as such, as hereinafter provided; and any elector having been heretofore duly registered, or having since changed his residence, or having lost his certificate, shall be entitled to have the same transferred or renewed, as now provided by law." "Any elector who shall have been entitled to register at the general registration in the year of our Lord 1882, or at any time subsequent thereto, and who failed to register at such time as required by law, and who shall make application under oath in accordance with the printed form to be prepared by the attorney general, setting forth in each case the fact, to wit: The full name, age, occupation and residence of the applicant at the time of the said general registration, or at any time thereafter, when the said applicant became entitled to register, and the place or places of his residence since the time he became entitled to register, which affidavit shall be supported by the affidavits of two reputable citizens who were each of the age of 21 years on the 13th day of June, A. D. 1882, or at the time the said applicant became entitled thereafter to register, or any elector who has become a citizen of this state, by moving into the same and his place of residence since living in the state and who shall make application under oath, stating the time of his moving into the state and his place of residence since living in the state, which application shall be supported by the affidavit of two reputable citizens, who were 21 years of age at the time the applicant became a resident of this state, such applicant shall be allowed to register as a voter and to have issued to him a certificate as a duly qualified elector in the manner and form now provided by law, and be entitled to vote at said election for delegates to said convention."

The bill then charged that these sections so limited, abridged, and qualified the privilege of registration that they resulted in a practical denial of the right to vote to those electors who, by the operation of the provisions of the General Statutes of 1882 and Revised Statutes of 1893, are now unregistered; and that they were "so interwoven with, and are such integral parts of, the whole alleged registration laws of the state of South Carolina, that, if the same be declared unconstitutional and void, as herein prayed, the whole enactments in regard to registration are likewise void." And it was charged that said sections were in violation of the constitution of the state of South Carolina, and of section 2 of article 1, section 1 of amendment 14, and section 1 of amendment 15, of the constitution of the United States.

The bill continued, and concluded as follows:

"(10) By section 2 of the aforesaid act of 1894 it is provided that the election of delegates to the said constitutional convention shall be held on the third Tuesday in August, 1895; that the said convention shall assemble on the second Tuesday of September, 1895; that such convention is called for the purpose of revising, amending, or changing the constitution of said state, and when assembled will have full power to revise, alter, abridge, curtail, and qualify the right of your orator and of all citizens of the said state of South Carolina to vote for the members of the most numerous branch of the state legislature, and thereby to revise, alter, abridge, and curtail the qualifications now requisite to enable your orator to vote at all federal elections as now imposed by the constitution of the United States. (11) That W. Briggs Green has been appointed to the office of supervisor of registration for Richland county aforesaid, under and in pursuance of the said unconstitutional registration laws; that he is now exercising the duties prescribed by the same, and your orator has been informed and believes that he intends to continue so to do, and, furthermore, he specifically intends to furnish and deliver to the several boards of managers for the several precincts of Richland county aforesaid, to be hereafter appointed, to hold the election of delegates to the said constitutional convention, certain paper writings purporting to be the registration books aforesaid of the several pre-

precincts to be used by said managers at said approaching election. (12) Your orator further shows that, under and by virtue of the said unconstitutional registration laws, the supervisors appointed thereunder are required to continue said partial, void, and illegal registration on the first Mondays in May and June and July, 1895, and that after the 1st day of July, 1895, they are directed by section 8 of the act of 1894 to 'furnish the managers at each precinct with one of the registration books for such precinct, and no elector shall be entitled to vote whose name is not registered as hereinbefore or already provided by law, and who does not produce his registration certificate at the polls where he offers to vote.' (13) That your orator failed to register at the registration made after the general election of 1888, or to be registered during the 10 days in March, 1895, provided for in said act of 1894, because, although he made repeated and persistent efforts to become registered, he found himself unable to comply with the unreasonable, unnecessary, and burdensome rules, regulations, and restrictions, prescribed by said unconstitutional registration laws as conditions precedent to his right to register, and your orator has never been allowed to vote at any federal or state election of the said state of South Carolina. (14) That your orator is desirous of voting for delegates to the aforesaid constitutional convention at the election prescribed by the act of 1894 for the purpose; that the paper writings purporting to be books of registration now in the hands of the said defendant do not and will not contain the name of your orator as a registered voter for the reasons hereinbefore stated; that your orator, and others like circumstanced with him, will not be permitted to vote at said special election by the managers thereof unless their names be found upon the books of registration, and they can produce the registration certificates hereinbefore mentioned; that if the said defendant be permitted to continue the aforesaid illegal, partial, and void registration, and be allowed to turn over to the managers of election for the aforesaid county of Richland (when appointed) said paper writings, purporting to be books of registration for the several precincts in said county, your orator will be deprived of his right to vote at said election, and grievous and irreparable wrong and damage will be done to your orator and a large class of citizens like circumstanced with him, which can be prevented only by the interposition of this court by way of restraining the said defendant from the performance of any of the acts hereinbefore referred to. To the end, therefore, that your orator may have full, perfect, and sufficient relief in the premises, may it please your honors to grant unto your orator a writ of injunction restraining and enjoining the said defendant, individually and as supervisor of registration, from the performance of any of the acts hereinbefore complained of, and that your orator may have such other and further relief in the premises as may be just and reasonable."

Then followed the prayer for process. The bill was sworn to by complainant as "true to the best of his knowledge and belief," and, on preliminary application, the following order was entered: "It is ordered that the defendant, W. Briggs Green, both individually and as supervisor of registration for Richland county, in the state of South Carolina, be enjoined and restrained until the further order of this court from the commission of any of the acts complained of in the above-entitled bill, a copy of which must be served upon him with this order. It is further ordered that the said W. Briggs Green do show cause before me at Columbia, S. C., on Thursday, the 2d day of May, next, why this order should not be continued, or some order of like purport and effect be then granted, enjoining and restraining him, both individually and as such supervisor of registration, from the commission of any of the acts complained of in said bill until the final hearing and determination of this cause. This hearing shall be in the United States circuit court room, Columbia, S. C."

Subpœna was issued returnable on the first Monday of June. On May 2, 1895, cause was shown by defendant under the rule, defendant stating, among other things: "(1) That he is supervisor of registration for Richland county, in the state of South Carolina, and as such is not amenable to the jurisdiction of the court for his conduct in his political capacity aforesaid; that the matters, facts, and things alleged and complained of

in the said bill, and upon which the injunction has been improvidently granted, are all matters relating to the political duties of the office. That this is in effect a suit against the state of South Carolina, in violation of the eleventh amendment to constitution of United States, and this court has no jurisdiction. (2) That he submits that the bill presents no question arising under the constitution or laws of the United States to give jurisdiction to this honorable court. (3) That he submits that the bill presents no case upon which the jurisdiction of a court of equity can be founded, as there are plain and adequate remedies at law for the correction of any of the matters and things alleged, if so be that the allegations are true. (4) That the bill is totally defective for the purposes of the motion in its allegations and in the verification, in this: that there is no sufficient averment of irreparable injury and statement of facts supporting it, and that the material facts on which the injunction is sought are not positively sworn to by the complainant."

On May 8, 1895, the cause having been argued upon bill and return, the circuit court filed an opinion (reported 67 Fed. 818), and entered the following order: "It is ordered, that the restraining order heretofore granted by this court, bearing date the 16th day of April, 1895, enjoining and restraining the said respondent from exercising duties or performing any acts complained of in the said bill of the complainant, either individually or as supervisor of registration for the county of Richland, state aforesaid, be, and the same is hereby, continued, subject to the final determination of the issues involved in this case until the further order of this court." From this order an appeal was prayed and allowed to this court, errors being duly assigned covering the points made on the return. Objections to the docketing of the case were made and overruled, and the appeal was heard June 7th, and decree entered June 11, 1895, reversing the order of the circuit court, dissolving the injunction, and remanding the case with directions to dismiss the bill.

W. A. Barber, Atty. Gen., Edward McCrady, and Geo. S. Mower, for appellant.

H. N. Obear and Chas. A. Douglass, for appellee.

Before FULLER, Circuit Justice, and HUGHES and SEYMOUR, District Judges.

FULLER, Circuit Justice (after stating the facts as above). It is contended on behalf of appellee that jurisdiction of this appeal cannot be entertained, because if the case went to final decree an appeal therefrom would lie only to the supreme court. Under section 7 of the judiciary act of March 3, 1891, where, upon a hearing in equity in the circuit court, an injunction is granted or continued by an interlocutory order or decree, "in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals." By section 5 of that act, appeals or writs of error may be taken directly to the supreme court "in any case in which the jurisdiction of the court is in issue. In such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision," "in any case that involves the construction or application of the constitution of the United States," or "in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States."

It was early held, in *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118, that the act gave to a party to a suit in the circuit court, where the

question of the jurisdiction of the court over the parties or subject matter was raised and put in issue upon the record, at the proper time and in the proper way, the right to a review by the supreme court, after final judgment or decree against him, of the decision upon that question only, or by the circuit court of appeals on the whole case. *Maynard v. Hecht*, 151 U. S. 324, 14 Sup. Ct. 353. And in *Carey v. Railway Co.*, 150 U. S. 170, 14 Sup. Ct. 63, it was ruled that, in order to hold an appeal maintainable under the second of the above-named classes, the construction or application of the constitution of the United States must be involved as controlling, although on appeal or error all other questions would be open to determination, if inquiry were not rendered unnecessary by the ruling on that arising under the constitution. *Horner v. U. S.*, 143 U. S. 570, 12 Sup. Ct. 522. In *U. S. v. Jahn*, 155 U. S. 109, 15 Sup. Ct. 39, the supreme court decided that, if the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment or decree on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified, and come directly to the supreme court, or to carry the whole case to the circuit court of appeals, where the question of jurisdiction can be certified by that court.

In view of these and other cases, we are of opinion that, where the jurisdiction is not in issue, but the question of the constitutionality of a state law is raised, and must necessarily be decided in the disposition of the case, there the case on final decree should be taken directly to the supreme court. But, where the jurisdiction depends on the existence of a federal question, which is controverted, the jurisdiction sustained, and the case goes to decree on the merits, the defendant may take the whole case to the circuit court of appeals. Whether that court, if the conclusion were reached that the constitutional question was controlling in the premises, should remand the case to the circuit court, or may certify the question to the supreme court, we are not called upon to determine. Here the jurisdiction of the circuit court rested on the existence of a federal question, namely, the validity of the state laws, challenged as in contravention of the constitution and laws of the United States; but, conceding the jurisdiction, the question arose on the threshold whether the case made or attempted to be made was one of equitable cognizance, and we think that, upon the final decree, an appeal would lie to this court, whether the bill were dismissed on final hearing on that ground or otherwise. The motion to dismiss will therefore be overruled.

The jurisprudence of the United States has always recognized the distinction between common law and equity as, under the constitution, matter of substance as well as of form and procedure. And the distinction has been steadily maintained, although both jurisdictions are vested in the same courts. *Fenn v. Holme*, 21 How. 481, 484; *Thompson v. Railroad Cos.*, 6 Wall. 134; *Cates v. Allen*, 149 U. S. 451, 13 Sup. Ct. 883, 977; *Mississippi Mills v. Cohn*, 150 U. S. 202, 205, 14 Sup. Ct. 75. It is well settled that a court of chancery is conversant only with matters of property and the maintenance

of civil rights. The court has no jurisdiction in matters of a political nature, nor to interfere with the duties of any department of government, unless under special circumstances, and when necessary to the protection of rights of property, nor in matters merely criminal, or merely immoral, which do not affect any right of property. *In re Sawyer*, 124 U. S. 200, 8 Sup. Ct. 482; *Luther v. Borden*, 7 How. 1; *Mississippi v. Johnson*, 4 Wall. 475; *Georgia v. Stanton*, 6 Wall. 50; *Holmes v. Oldham*, 1 Hughes, 76, Fed. Cas. No. 6,643. Neither the legislative nor the executive department, said Chief Justice Chase, in *Mississippi v. Johnson*, "can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance." "The office and jurisdiction of a court of equity," said Mr. Justice Gray, in *Re Sawyer*, "unless enlarged by express statute, are limited to the protection of rights of property." To assume jurisdiction to control the exercise of political powers, or to protect the purely political rights of individuals, would be to invade the domain of the other departments of government or of the courts of common law.

Similar views have been repeatedly expressed by state tribunals of high authority. Thus, in *Fletcher v. Tuttle*, 151 Ill. 41, 37 N. E. 683, the supreme court of Illinois say:

"The question, then, is, whether the assertion and protection of political rights, as judicial power is apportioned in this state between courts of law and courts of chancery, are a proper matter of chancery jurisdiction. We would not be understood as holding that political rights are not a matter of judicial solicitude and protection, and that the appropriate judicial tribunal will not, in proper cases, give them prompt and efficient protection, but we think they do not come within the proper cognizance of courts of equity."

In *re Sawyer*, *Georgia v. Stanton*, *Sheridan v. Colvin*, 78 Ill. 237, *Dickey v. Reed*, Id. 261, *Harris v. Schryock*, 82 Ill. 119, and many other cases are cited, and the court continues:

"Other authorities of similar import might be referred to, but the foregoing are amply sufficient to show that, wherever the established distinctions between equitable and common-law jurisdiction are observed, as they are in this state, courts of equity have no authority or jurisdiction to interpose for the protection of rights which are merely political, and where no civil or property right is involved. In all such cases the remedy, if there is one, must be sought in a court of law. The extraordinary jurisdiction of courts of chancery cannot, therefore, be invoked to protect the right of a citizen to vote or to be voted for at an election, or his right to be a candidate for or to be elected to any office; nor can it be invoked for the purpose of restraining the holding of an election, or of directing or controlling the mode in which, or of determining the rules of law in pursuance of which, an election shall be held. These matters involve in themselves no property rights, but pertain solely to the political administration of government. If a public officer, charged with political administration, has disobeyed or threatens to disobey the mandate of the law, whether in respect to calling or conducting an election, or otherwise, the party injured or threatened with injury in his political rights is not without remedy. But his remedy must be sought in a court of law, and not in a court of chancery."

In *Hardesty v. Taft*, 23 Md. 513, where application was made for an injunction to prevent the use of a register of voters prepared for a certain county, the court of appeals of Maryland observed:

"On this branch of the inquiry, it seems to the court very clear that a court of equity cannot be invoked to prevent the performance of political

duties like those committed to the officers of registration under the law. The willful, fraudulent, or corrupt refusal of a vote by judges of election, or a like denial of registration by the officer appointed to register votes, which is the same thing, can be adequately compensated for in damages at law. *Bevard v. Hoffman*, 18 Md. 484. The writ of injunction will not be awarded in doubtful or new cases not coming within well-established principles of equity. *Bonaparte v. Railroad Co.*, *Baldw.* 218, *Fed. Cas.* No. 1,617. Each voter has a separate and distinct remedy for the willfully improper deprivation of his vote; and the joinder of others, like circumstanced or injured, as complainants in equity, on the ground of avoiding a multiplicity of suits, will not avail to afford equitable relief. To interfere in the mode asked for by the complainants would be to stop a popular election in one portion of the state, and thus arrest, as to it, the wheels of government. For irregularities in the conduct of an election, for receiving illegal or rejecting legal votes, and for the correction of consequences resulting therefrom, the law provides appropriate remedies and modes of procedure. Such matters are not the subjects of equitable jurisdiction."

The general doctrine as to public officials is thus stated by the New York court of appeals in *People v. Canal Board*, 55 N. Y. 393:

"A court of equity exercises its peculiar jurisdiction over public officers to control their action only to prevent a breach of trust affecting public franchises, or some illegal act under color or claim of right affecting injuriously the property rights of individuals. A court of equity has, as such, no supervisory power or jurisdiction over public officials or public bodies, and only takes cognizance of actions against or concerning them when a case is made coming within one of the acknowledged heads of equity jurisdiction."

Nor will equity interfere by injunction to restrain persons from exercising the functions of public offices, on the ground of the illegality of the law under which their appointments were made, but will leave that question to be determined by a legal forum. The doctrine is clearly established that courts of equity will not thus interfere to determine questions concerning the appointment or election of public officers or their title to office, such questions being of a purely legal nature and cognizable only by courts of law. *High, Inj.* (3d Ed.) § 1312 et seq., and cases cited. And see *Hagner v. Heyberger*, 7 Watts & S. 104; *Smith v. McCarthy*, 56 Pa. St. 359; *Smith v. Myers*, 109 Ind. 1, 9 N. E. 692; *Peck v. Weddell*, 17 Ohio St. 271; *Kemp v. Ventulett*, 58 Ga. 419. The rule is not otherwise in South Carolina. The supreme court of that state has decided upon a similar application for a like injunction, made, as would appear, by this same complainant, that the relief asked "is not the appropriate remedy for the grievance set out." *Ex parte Mills*, 41 S. C. 554, 19 S. E. 749.

Tested by these principles, this bill of complaint cannot be maintained, for it seeks on behalf of individuals to restrain the exercise of governmental powers, and asserts no threatened infringement of rights of property or civil rights, and no recognized ground of equity interposition. No discrimination on account of race, color, or previous condition of servitude is charged, or pointed out as deducible on the face of the acts in question. No specific application to the defendant as supervisor to register complainant is alleged, but it is said that complainant has failed to register because, in spite of repeated and persistent efforts to that end, he found himself unable

to comply with the provisions of the law in that behalf. In this regard, the gravamen of the bill is that, although the legislature might require registration under reasonable restrictions as proof of the possession of the qualifications prescribed by the constitution, which is, indeed, made the duty of the general assembly by that instrument (Const. S. C. art. 8, § 3), the requirements of these acts are such as to materially abridge and impair the exercise of the elective franchise and impose additional qualifications to those prescribed; and that therefore the acts are invalid, as in contravention of the constitutions of the state and of the United States. But, if this were true, it would not follow that complainant would have a *locus standi* in equity. The bill is brought to restrain the registering officer from discharging, at all, duties imposed upon him by law in respect of the public, lest complainants and other individuals similarly situated might thereafter be deprived of a political right because of alleged inability to comply with legislative requirements, which he contends are invalid for that reason. We repeat that the action sought to be enjoined is political and governmental, and it is not pretended that any right of property or civil right is threatened with infringement thereby.

This being so, we are clearly of opinion that no ground of equitable cognizance exists, and, although the appeal is from interlocutory orders, yet, as we entertain no doubt that such a bill cannot be maintained, we are constrained, in reversing these orders, to remand the cause with a direction to dismiss the bill. And it is so ordered.

HUGHES, District Judge (concurring). This case was heard by the chief justice, Judge SEYMOUR, and myself, on Friday last, the 7th inst. We thought it was of a character to call for an early decision, and it was determined, after adjournment on Friday, that the decision should be announced to-day, and a decree entered. The case was exhaustively argued at the bar, and nothing can be gained by awaiting a further time for the examination of briefs. We are of opinion that the preliminary injunction which was granted in the case ought to be dissolved and the bill dismissed. A decree to that effect, prepared by the chief justice, will be entered at once. The opinion of the court on the important questions presented by the record will be prepared by the chief justice, and filed and reported as soon as practicable. I have thought, that, in the meantime, it was due to the public, and might not be improper in me, to present at once some of the considerations which have led me to the opinion that the injunction of the circuit court below should not have been granted. I therefore submit what follows. I have had no opportunity of presenting it to the other judges who sat with me, and am solely responsible for the views expressed.

This bill is brought by the complainant, on his own behalf, and "on behalf of other citizens of the county of Richland, in the state of South Carolina, and the United States," circumstanced like himself. It sets out that he is 26 years of age, and that he is entitled to be registered as a citizen and voter. It describes, by quotation, in considerable detail, sundry provisions of the registration laws of

South Carolina now in force. It charges that these provisions violate certain clauses of the state constitution, in two respects, viz.: First, by requiring the voter always to be in possession of his certificate of registration, and to present it when offering to vote; and, second, by allowing only 10 days in each year (in the month of March) for the registration of voters who have failed to register at the times provided by law for registration at periods anterior to those 10 days. It charges that the registration laws complained of, by adding a compliance with these two qualifications as necessary to the exercise of the right of suffrage,—these being qualifications which are not required by the state constitution,—thereby violate the state constitution. It adds the charge that these two requirements also violate the constitution of the United States, inasmuch as section 2 of article 1 of that instrument provides that electors for members of congress “in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature.” The bill alleges that complainant failed to register at the times designated by law, or within the 10 days set apart for that purpose in March, 1895, for those who had not previously registered, because, although he had made repeated efforts to become registered, he found himself unable to comply with the unreasonable, unnecessary, and burdensome rules, regulations, and restrictions prescribed by the alleged unconstitutional registration laws as conditions precedent to his right to register. He complains that, in consequence of his having thus failed to be registered, he has never been allowed to vote at any state or any federal election in South Carolina. The bill alleges that the defendant, Green, has been appointed supervisor of registration for Richland county under these unconstitutional laws, is exercising the duties prescribed by them, and intends to deliver to the managers of the election in Richland county the registration books, which he is preparing, to be used by them in deciding upon the right of citizens to vote, among other elections, at the first next ensuing election to be held in South Carolina, which will be one to be held in August next for members of a state convention called to frame a new state constitution. The bill alleges, in general terms, that the registration laws of South Carolina, complained of, violate, as before described, section 2 of article 1 of the national constitution, and are also “in violation of section 1 of article 14, and section 1 of article 15, and of divers other sections and articles of the said instrument.” As there are but seven articles in the original constitution of the United States, the presumption is that the bill has reference to the fourteenth and fifteenth amendments (not articles) of the national constitution. The complainant therefore prays the court to grant a writ of injunction restraining and enjoining the defendant, Supervisor of Registration Green, individually and officially, from the performance of any of the acts required of him by the registration laws complained of, and for other relief. The court below granted an order temporarily enjoining and restraining Supervisor Green from the commission of any of the acts complained of in the bill, and granted at a later day an order restraining and enjoining this supervisor from exercising duties or performing any

acts complained of in the bill until the further order of the court. From this order appeal is taken to this court.

There is nothing in the record to show that the complainant is a man of color, or that those for whom he sues are colored persons. The bill contains no allegation that the provisions of law complained of were devised against the complainant, or those for whom he sues, on account of their race, color, or previous condition of servitude. There is nothing in the averments of the bill from which it may naturally, or must necessarily, be inferred that the complainant, and those for whom he sues, are citizens of color. There are no averments in the bill which show that the case falls within the purview of the fifteenth amendment of the constitution of the United States. Nor does the bill contain any allegations which raise a federal question under that clause of the fourteenth amendment which forbids a state "to deny to any person the equal protection of the laws." It charges that the effect of the provisions of the registration acts complained of is to give unequal facilities of registration to different classes of citizens, but it does not point out how this is so. It leaves the discrimination as to the privilege of registering, if there be discrimination, to inference, and to research in sources other than its own averments. It charges that the provisions of law complained of discriminate, but does not describe the manner of discrimination, or define the classes affected pro or con, nor does it show that the law complained of, in discriminating between classes, as to the privilege of registering granted by them, violate that clause in the fourteenth amendment which forbids a state "to deny to any person within it, the equal protection of the laws." It confounds privilege with protection. The bill has no reference to a federal election, in setting out complainant's case. The gravamen of the bill contemplates only a state election to be held for members of the state convention called to convene in August next. It is not shown that any federal election is to be held in the state of South Carolina before November, 1896. To the bill thus described, and to the orders of injunction granted by the court below in pursuance of its prayers, several objections are urged, in behalf of the state of South Carolina. In what follows I shall consider but one of these.

I regret that I cannot concur in the ruling of the circuit court rendered on circuit in this case, in which it was held that the court had jurisdiction to restrain a county supervisor of registration in the performance of his duties under the election laws of South Carolina. The division of our government into the legislative, executive, and judicial departments is a distinguishing feature of our American polity, and it is essential to its existence that each of these departments shall be independent of the other. This is fundamental and organic. It would be just as dangerous to its stability for the judicial department to override the others as for the executive or legislative department to do so. Hence, while the right of the judiciary to pass upon the constitutionality of laws is undoubted, it has that right simply as an incident to its protection of private rights. It has not that right as a

mere means of settling abstract questions, and, even in the enforcement of private rights, it has not the power to interfere with the discretion vested in the other departments, or with the exercise of the political powers of those departments. It seems to me that it is a dangerous encroachment upon the prerogatives of the other departments of government, if the judiciary be intrusted to exercise the power of interfering with the holding of an election in a state. If the supervisor of one county can be enjoined from the performance of the duties imposed upon him by the election laws of the state from whom he holds his commission, those of the other counties can be also. Thus, a single citizen in each county (and in the case at bar he is not even a qualified voter) can enjoin an election throughout the entire state, and thus deprive thousands of their right to vote. If a court has power to do this, free elections are at an end. If elections are improperly held, there are appropriate means provided by law for questioning their results, and remedying wrongs, without the exercise of this dangerous power by the courts. A candidate who has been defeated may contest; a voter whose right to register has been denied may proceed to compel the enforcement of that right; and these privileges give what the legislature deems sufficient protection to the injured. But, in my judgment, one citizen cannot, in an endeavor to right his own wrongs, disfranchise others. I do not think that a court has jurisdiction to interfere, by injunction or otherwise, with the enforcement of laws by officers holding and deriving their powers from these laws; certainly not to the extent in which it is attempted to be done by this bill. In arriving at this conclusion I have not considered the question whether or not the registration laws of South Carolina violate the federal constitution or laws. I prefer to rest my opinion upon the ground of the independence of the different departments of government; upon the impolicy of interference by the courts in questions which will result in dragging them constantly into the arena of party politics; and upon the general principle that each department of the government, and each officer thereof, high or low, has the right to administer, according to his best judgment, the duties imposed upon him by the laws creating his office. As illustrating these general principles, I refer to the following decisions: *Mississippi v. Johnson*, 4 Wall. 475; *Gaines v. Thompson*, 7 Wall. 347; *Louisiana v. Jumel*, 107 U. S. 711, 2 Sup. Ct. 128; *Hagood v. Southern*, 117 U. S. 52, 6 Sup. Ct. 608; *Ex parte Ayers*, 123 U. S. 443, 8 Sup. Ct. 164; *In re Sawyer*, 124 U. S. 209, 8 Sup. Ct. 482. It is useless to cite the many other cases which bear on the questions arising in this case, and cited so profusely at the bar. In the case of *Mississippi v. Johnson*, which was a bill to enjoin the president of the United States and the military commandant of the military district of Mississippi from carrying into effect certain provisions of the reconstruction acts of 1867, the supreme court said that "an attempt on the part of the judicial department of the government to enforce the performance of the (executive and political) duties of the president might be justly characterized, in the language of Chief Justice Marshall, as 'an absurd and

excessive extravagance.'” “It is true,” says the court, “that in the instance before us the interposition of the court is not sought to enforce action by the executive under constitutional legislation, but to restrain such action under legislation alleged to be unconstitutional. But we are unable to perceive that this circumstance takes the case out of the general principles which forbid judicial interference with the exercise of executive discretion. The congress is the legislative department of the government. The president is the executive department. Neither can be restrained in its action by the judicial department, though the acts of both, when performed, are, in proper cases, subject to its cognizance.” This language of the supreme court is quoted to show that the court was at pains to distinguish between acts of public officers which were political and executive, and those which were merely ministerial, and between duties of officers as officers, and those which belong to persons as mere citizens. These distinctions are carefully adhered to by the supreme court in the subsequent decisions which I have cited. I do not think it necessary to point out how particularly and carefully it has done so, in those cases.

In the one at bar the person enjoined from the performance of duties was an officer of the executive department of the government, and he was enjoined as an officer, and not as a citizen, from performing political functions. The duties which he was discharging were political,—exclusively political,—and did not appertain to him as a private citizen. I think the teaching of the cases I have cited is clear that a court cannot, by injunction, prohibit a public officer generally from discharging political duties imposed by law. If the law be vicious, the remedy must be sought elsewhere than in the courts. Probably the homely way of getting rid of a bad law, recommended by Gen. Grant, is the best, viz. by enforcing it rigidly. I do not think that the fact was so; but let it be admitted, for the sake of argument, that the duties of the registration officer who was enjoined in this case were entirely ministerial, affording no room for discretion. Yet they were strictly political. They dealt with that prime subject in a republic,—the elective franchise. The duties were prescribed by legislation, and the performance of them was an executive act. For the court to enjoin an executive officer generally from discharging those duties was for the judiciary to invade the province of both the other two independent departments at once. It was, so far as the injunction operated, a nullification of legislation, and a prohibition of the performance of important executive duties.

So far as the rights of the individual complainant in the bill were concerned it may have been competent for the court to grant individual relief. The supreme court of the United States the other day granted relief from the payment of an income tax to the individual complainant in the suit before it, but it went no further. On the authority of *Mississippi v. Johnson*, supra, we may assume that it would not have entertained a bill for enjoining internal revenue officers of the government from collecting income taxes generally. The judicial power covered the right to grant individual relief, but did not extend to the general power of repealing the

law imposing the tax, as to the entire public. I repeat that in the case at bar it may have been competent for the court to grant individual relief. But the bill asked more. It asked similar relief for all citizens of the county situated like the complainant. It practically asked relief for a numerous political party, forming a portion of that people to whom the legislature was solely responsible for its laws, and to whom alone the genius of our institutions makes the legislature responsible. Moreover, it brought the court into immediate and active contact with party contestation. It made the court a controlling factor in party strife. I can imagine nothing more pernicious than a direct participation by the judiciary, by judicial action, in the politics of the people. The bill asked, practically, that the process of registration under the laws of the state should be suspended in an entire county during the pleasure of the court, and that all the citizens of a county not then registered as voters should be denied the right of suffrage during that pleasure. It seems to me that the mere statement of this view of the case shows that the injunction was improvidently granted. I think the bill should be dismissed.

GOWDY v. GREEN.

(Circuit Court, D. South Carolina. August 7, 1895.)

CONSTITUTIONAL LAW—AMENDMENTS 14 AND 15—JURISDICTION OF FEDERAL COURTS.

The equity jurisdiction of the federal courts cannot take cognizance of a suit by a colored person, on behalf of himself and others similarly situated, against the officers of the state of which he and such others are citizens, to restrain such officers from acting under a statute of that state, claimed to violate Amend. Const. U. S. arts. 14, 15, by abridging or denying his right to vote, since he has an adequate remedy at law.

This is a bill by Joseph H. Gowdy against W. Briggs Green to restrain the performance of certain acts under the registration laws of the state. Bill dismissed.

Obran & Douglass, for complainant.

Wm. A. Barber, Atty. Gen., Edward McCrady, and Geo. S. Mower, for defendant.

GOFF, Circuit Judge. When the bill in this case was presented for my consideration I deemed it my duty to give the complainant an opportunity to demonstrate that he was entitled, as he claimed, to the relief he prayed for, and to the jurisdiction of this court in order to secure it. My views upon the questions presented by this bill were fully expressed in the opinion I filed in the case of Mills v. Green, 67 Fed. 818. I have given the opinion filed in said cause by the circuit court of appeals for this circuit at the May term of said court, 1895 (69 Fed. 852), and all the cases cited therein, my careful consideration and thorough examination; and I must be permitted to say, with all due respect, that I am unable to find the reason or the authority for and by which the injunction granted in that case

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was dissolved, and the bill dismissed. I think that in the Mills case, as well as in this, the rights claimed by the respective plaintiffs as citizens of the United States, and of the state of South Carolina, have a property value of the highest and most sacred character,—of far greater value and importance than have commodities the values of which are measured by the number of pounds they weigh or the number of yards they contain. These rights, it is admitted, said plaintiffs are deprived of; but it is insisted that they have adequate remedies at law, and that equity, therefore, cannot entertain their complaints. I very much regret that the court of appeals did not indicate the character of the remedy at law alluded to in its said opinion. And I also regret that I am unable, after thorough investigation, to find it. I will not concede that it is proper to close the doors of the courts of the United States to their citizens who are complaining that they are deprived by the states of the rights and privileges guarantied to them by the constitution of the United States, and to advise them that they must seek the jurisdiction of the courts of the states for relief from the outrages imposed by the unconstitutional enactments of such states. I am advised that the full and complete opinion of the court of appeals is yet to be filed, and I indulge the hope that upon this point it will not leave us in doubt. In my judgment, such cases—under the rules distinguishing equity and law causes, applicable to the courts of the United States—should be especially heard on the equity side of such courts, for the reason that said courts are, among other things, established to determine controversies involving conflicts between state and federal constitutions and enactments, and for the further reason that in such cases there is no full and adequate remedy at law. It has been repeatedly held by courts of the United States that equity will interfere when the injury complained of is such that it cannot be fairly compensated for by damages, or if it is continuing or permanent in character. The following cases discuss this question, and indicate the course I have suggested: *Mayer v. Foulkrod*, 4 Wash. C. C. 349, Fed. Cas. No. 9,341; *Gass v. Stinson*, 2 Sumn. 453, Fed. Cas. No. 5,260; *Brown v. Steamship Co.*, 5 Blatchf. 525, Fed. Cas. No. 2,025; *Boyce's Executors v. Grundy*, 3 Pet. 210; *Wylie v. Coxe*, 15 How. 415; *Garrison v. Insurance Co.*, 19 How. 312; *May v. LeClaire*, 11 Wall. 217; *Insurance Co. v. Bailey*, 13 Wall. 616. The fact that there is a remedy at law is not of itself sufficient to deprive equity of jurisdiction, unless it also appears that the former is as complete and effectual as the latter. *Bunce v. Gallagher*, 5 Blatchf. 481, Fed. Cas. No. 2,133; *Crane v. McCoy*, 1 Bond, 422, Fed. Cas. No. 3,354; *Sullivan v. Railroad Co.*, 94 U. S. 806; *Morgan v. Beloit*, 7 Wall. 613. The fact that state laws provide a legal remedy for wrongs committed does not deprive the federal courts of equity jurisdiction over the same in a proper case. *Hay v. Railroad Co.*, 1 Hughes, 168, Fed. Cas. No. 6,254; *Gordon v. Hobart*, 2 Sumn. 401, Fed. Cas. No. 5,609; *Bean v. Smith*, 2 Mason, 252, Fed. Cas. No. 1,174. Nevertheless, while I entertain these views, my great respect for the circuit court of appeals, my desire to properly regard the judicial proprieties, and my duty to give due weight and authority to the decisions and opinions of the appellate courts of

the United States compel me—finding as I do that this case in its material allegations, its true scope and effect, is in fact similar to the Mills case, to which I have referred—to refuse the injunction asked for, and to dismiss the complainant's bill, and such a decree will be now entered.

I have not found it necessary to allude to the preliminary matters raised by defendant in his return to the rule to show cause, and do not propose now to discuss them, other than to say that I have found them without merit.

COQUARD v. INDIAN GRAVE DRAINAGE DIST. et al.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1895.)

No. 225.

EQUITY—JURISDICTION—ADEQUATE REMEDY AT LAW.

Complainant, the holder of a judgment against a drainage district of Illinois, recovered upon its bonds and coupons, brought suit against the district and the commissioners and treasurer thereof, alleging that the commissioners had collected assessments, and failed to apply them on complainant's judgment; that they had received in payment of assessments coupons cut from bonds held by parties who had consented to a compromise agreement, and bought below par; and that the commissioners were chargeable with considerable sums collected,—this allegation being based on the theory that coupons received for taxes were to be treated as cash. The bill prayed that the commissioners be held personally responsible for taxes discharged under their direction, and enjoined from receiving anything but money for taxes. *Held*, that the bill should be dismissed, since, if there was any personal liability of the commissioners, there was an adequate remedy at law, and that, for the failure to collect the taxes in money, the remedy was mandamus.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This was a suit by Louis A. Coquard against the Indian Grave drainage district, F. H. Wissman, L. H. A. Nickerson, James N. Sprigg, and Emeline P. Thompson, administratrix of Joseph Thompson, deceased, for an injunction and accounting. The circuit court dismissed the bill. Complainant appeals. Affirmed.

H. E. Mills, Lee W. Grant, P. R. Flitcraft, and Thomas M. Hoyne, for appellant.

James N. Sprigg, Geo. A. Anderson, and Wm. L. Vandeventer, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The amended bill, after alleging the names and citizenship of the parties, the organization, under the law of May 29, 1879 (Starr & C. Ann. St. p. 919 et seq.), and amendatory acts, of the Indian Grave drainage district, as a municipal corporation, the issue by that body of two series of bonds, and the recovery by the complainant, May 24, 1892, of judgment against the district upon bonds and coupons of the second series for \$10,709.73, to be discharged out of the proceeds of assessments already levied, or thereafter to be levied, on the assessable property within the district, in con-

formity to the statute, and that the judgment remains unappealed from and unsatisfied, charges that all coupons upon the bonds from July 1, 1886, to the bringing of the bill, have remained unpaid; that since that date "the district and the commissioners and treasurer, defendants herein," continually, from year to year, collected a large proportion of the assessments which were made upon the lands in the district, to an amount to the complainant unknown, and that the commissioners and treasurer, disregarding their duty, have applied the assessments to other purposes than the payment of the principal and interest on said bonds; that they have collected sufficient sums to have paid the coupons and bonds upon which complainant obtained judgment, but that, contriving to hinder, delay, and defraud the plaintiff, and for the avowed purpose of compelling him to receive less than the sum due, they have refused to pay his judgment, or any part thereof, and have conceived the purpose of ignoring and repudiating his right or claim to participate in the proceeds of assessments; that there is now in possession of the commissioners and treasurer a large sum of money, the proceeds of collections made by the defendants upon lands within the district; that they are proceeding to collect other sums for the purpose of paying themselves and other creditors of the district to whom they desire to extend favors, to the exclusion of the complainant; that, as the complainant is informed and believes, a large sum has been collected by defendants, as such commissioners, and has been paid out to other coupon holders, complainant being denied any share in the same; "and that the coupons of other coupon holders [have been received] in payment of the assessments and levies due on said lands within said district, for the purpose of evading payment to the complainant, and in denial of his rights," "contrary to equity and good conscience." After propounding a series of interrogatories, the bill further charges that the defendants Nickerson and Thompson and the drainage district, instead of collecting the taxes in cash, directed and encouraged the land holders to present, and did themselves, as to their own lands within the district, present to the treasurer, in payment of their taxes due on the second assessment, coupons detached from certain bonds owned by parties who had consented to a compromise, which coupons the land holders and Thompson and Nickerson obtained for 65 cents on the dollar, and turned into the treasury at par, whereby the lien of the complainant on the second assessment became, to that extent, impaired and destroyed; that complainant is owner of 41 out of 200 bonds secured by the second assessment, and entitled to that proportion of the amount collected for interest thereon; that defendants Nickerson and Thompson are chargeable with the following amounts collected by them and their treasurer, to wit, \$7,821.95, \$7,654.63, and \$7,696.50, as appears by their treasurer's report; that the defendant commissioners received into their possession and canceled coupons from second assessment bonds other than those held by complainant; to the amounts last specified, the same representing the aggregate amount of interest tax on the second assessment, for which receipts were given to land holders within said district. The prayer of the bill is that defendants be decreed to account for and pay over

to complainant all sums which they have collected from assessments on lands within the district, and which they are withholding in violation of his rights; that they be restrained from any further violation; that they be held personally responsible to complainant for all interest tax on the second assessment discharged and receipted for under their direction; and that they pay on his coupons and bonds secured by the second assessment his due proportion, as if the amount received on that assessment in coupons had all been paid in cash. An injunction is also asked, restraining the defendants from further distribution or payment of any funds coming into their hands, the proceeds of the second assessment, and from receiving aught except money from the land holders in said district in payment of that assessment. The answers of the defendants are long, but, in substance, they deny that anything had been done with intent to delay or to thwart payment of the complainant's judgment or bonds and coupons, and set out in full the compromise agreement and order of the county court under which it is alleged that the land holders of parts of the lands in the drainage district obtained and used coupons for the payment of interest taxes for the years 1889, 1890, and 1891, and that, excepting the payments so made, no money had been collected or received of which the complainant had not received his proportion, except the sums of \$168, \$2.32, and \$227.27,—the latter sum being derived, as the proof shows, from the sale of lands for taxes,—but that for his share in each or all these funds the complainant had made no demand.

There is in the evidence no essential discrepancy or conflict, and it is plain that no error was committed against the appellant. He was not entitled to recover in this action a personal judgment against the defendants Thompson and Nickerson because they had used coupons in the payment of the taxes levied upon their own lands. If on that account they became personally liable to him at all, the remedy should be sought in a personal action at law, and not by a bill in equity against the drainage district and its officers in their official character. Indeed, the record shows that, before the filing of the amended bill, Thompson had died, and a writ of scire facias had issued, requiring his widow and administratrix to show cause why she should not appear to and answer the bill; that she demurred to the writ on the ground that the action was not one which survived against her, as administratrix; and that, without any ruling upon the demurrer, the cause was submitted and heard May 8, 1894, and, the argument having been postponed to the 12th, the amended bill was filed on that day,—the name of Thompson, as one of the commissioners, being repeated in the title and body of the bill, without mention of his death. It may be that the appellant is entitled to the whole or a proportionate share of the several sums of cash collected and yet in the treasury; but even if a resort to equity for relief in respect to those items were otherwise necessary or permissible, there is here no right to sue for them, because he made no demand therefor before bringing the suit, and his right thereto does not seem to have been denied. The bill proceeds mainly upon the theory that the coupons received in payment of tax levies should, for the purposes of the suit,

be regarded and be accounted for as cash. If so, it must be on the ground that the acceptance of coupons in lieu of money was illegal and wrongful, and that by reason of their participation in the wrong the defendants became personally responsible to the complainant. But again it is clear, if the proposition were conceded to be tenable, that an adequate remedy could be had at law, as for money had and received, and that for that reason there is no justification for a suit in equity.

Was the appellant entitled to the injunction which he asked against the further acceptance of coupons in discharge of taxes levied for the payment of interest on the second assessment? On behalf of the appellees it is contended that the proper remedy, if the appellant is entitled to relief, is by mandamus to compel the collection under the law, and payment of the amount due him, as if the compromise agreement had not been made. We concur in that view. It is not necessary to decide, but we assume it to be true, that assessments and taxes levied for the payment of assessments and interest thereon, under the drainage act, are payable only in money, and that the compromise in question, though sanctioned by the county court, in so far, at least, as it provided for the acceptance of coupons in discharge of taxes, made as it was without the appellant's consent, was not binding upon him. He is entitled to share pro rata with other holders of bonds and coupons in the proceeds of the assessment in which he is interested, and it follows that collections should be made in such way as to effect that result. His bonds and coupons constitute a certain percentage of the entire amount of bonds and coupons secured upon the second assessment, and that percentage, at least, of the collections made upon that assessment, it seems clear, should be in cash for his use. It is no answer to say that there are unpaid assessments in excess of the amount due him. The proof shows that some of the lands are probably worth less than the levies made or to be made upon them; and the consequences of delay in collecting, and the risk of final failure to collect the entire amount due from delinquents, should fall upon all alike, and not upon the appellant alone. It is only in this way, and to this extent, that the compromise agreement can be upheld and enforced. In so far as it interferes with the appellant's right to have levies made and enforced in the manner provided by law, it is, as we assume, illegal. But it does not follow that an injunction is necessary. Mandamus, it is conceded, is the proper remedy to enforce the collection of taxes; and, if proper levies of taxes are not made, mandamus, it is well settled, is the means of relief. *Walkley v. Muscatine*, 6 Wall. 481; *Heine v. Board*, 19 Wall. 655; *Barkley v. Commissioners*, 93 U. S. 258; *Chicago, D. & V. R. Co. v. Town of St. Anne*, 101 Ill. 151; *East St. Louis v. Underwood*, 105 Ill. 308; 2 Dill. Mun. Corp. § 855. There is here no charge, certainly no proof, that taxes have been collected and misappropriated, and there is no ground for apprehending that collections hereafter made, whether made by command of the court or otherwise, will not be properly applied. If there were, an injunction would doubtless be proper. *Lawrence v. Traner*, 136 Ill. 483, 27 N. E. 197. The decree below is affirmed.

FARMERS' LOAN & TRUST CO. v. NORTHERN PAC. R. CO. et al.

(Circuit Court, D. Washington, N. D. September 2, 1895.)

1. RAILROAD RECEIVERS—APPOINTMENT AND REMOVAL—COMITY BETWEEN FEDERAL COURTS—PRIMARY AND ANCILLARY JURISDICTION.

The circuit court for the Eastern district of Wisconsin appointed receivers of the property of the Northern Pacific Railroad Company, pursuant to a prayer of a creditors' bill which showed that the company was operating certain leased lines within the territorial jurisdiction of that court. Immediately afterwards similar bills were filed in the circuit courts of the various judicial districts traversed by the Northern Pacific Railroad, including the circuit court for the district of Washington; and all these courts, under the rule of comity, appointed the same persons as receivers. A like bill was filed and like action was taken in the circuit court for the Southern district of New York, where the home office of the company was located. The receivers operated the leased lines in Wisconsin for only about a month, when the lease was canceled by the lessor for nonpayment of rent, whereupon, by order of the court, those lines were surrendered by the receivers to their owners. Shortly afterwards another bill was filed in the circuit court for the Eastern district of Wisconsin, praying a foreclosure of various mortgages upon the property of the Northern Pacific Railroad, and in this suit the same persons were appointed as receivers. Like foreclosure suits were filed in all the other circuit courts, and the same receivers were appointed under them. The receivers operated the Northern Pacific Railroad for about two years, and under a decree of the circuit court for the Eastern district of Wisconsin they issued receivers' certificates to a large amount. Thereafter the railroad company made application to the circuit court for the district of Washington for the removal of the receivers, alleging various acts of mismanagement and fraud, and showing that, at the time of the application, no property, either real or personal, belonging to the Northern Pacific Railroad Company, was held by the receivers in the Eastern district of Wisconsin. *Held*, that, in view of this latter fact, the circuit court for the district of Washington was not bound to regard the circuit court for the Eastern district of Wisconsin as the court of primary jurisdiction; that the rule of comity did not apply; and that the former court would therefore assume jurisdiction to pass upon the application upon its merits, and in the exercise of an independent judgment.

2. SAME.

The fact that the Northern Pacific Railroad Company, prior to the receivership, owned shares of stock in various other corporations, which shares were transferred to the receivers, and still stood in their names, was without any bearing on the right of the circuit court for the district of Washington to pass upon the application; for those shares must be presumed to have been held by the company at its home office in New York, and to have been transferred to the receivers under the authority of the circuit court of that district. They were consequently held under the control and direction of that court and were not in the possession or custody of the court for the Eastern district of Wisconsin.

3. SAME—RECEIVERS' CERTIFICATES.

The fact that the receivers' certificates primarily authorized by the circuit court for the Eastern district of Wisconsin were outstanding, in the hands of innocent holders, is no reason why the circuit court for the district of Washington should recognize the former court as the court of primary jurisdiction; for receivers' certificates which have been authorized by the several courts in which the property in receivership is situated are valid liens upon that property. If any have not been so authorized, the action of the court in proceedings to remove the receivers cannot affect the question of their validity. The receivers are lawful appointees of all the courts in the jurisdictions in which the property of the railroad company is situated, and none of their acts within the scope of

their authority, and under the orders of the courts which have control over said property, are invalid.

4. SAME.

It was no obstacle to the proposed action of the circuit court for the district of Washington that it was not the first court to follow the circuit court for the Eastern district of Wisconsin in appointing the receivers, and that such appointment had been previously made by other circuit courts within whose territorial jurisdiction part of the Northern Pacific Railroad actually lay; it not appearing that any of such courts had assumed primary jurisdiction, or intended to do so.

5. SAME.

Actual possession of property of an insolvent railroad company can be acquired by the court which first appoints receivers only to the extent of the property lying within its territorial jurisdiction. The rights accorded to such receivers by other courts are based entirely upon comity. Such comity rests upon the fact that another court is in the actual possession of a portion of property which cannot well be segregated, and which the best interests of all concerned require to be managed as a single system. Per Gilbert, Circuit Judge.

6. SAME.

A court within whose territorial jurisdiction no part of a railroad lies cannot acquire jurisdiction in rem over the same by the appointment of receivers who take into their possession only such assets of the railroad company as money, bonds, and other securities, or even railroad materials, supplies, and cars found on other roads. Custody of things movable, and not indispensable to the operation of the road, will not draw jurisdiction in rem over a railroad situated beyond the boundaries of the court's territorial jurisdiction. Per Hanford, District Judge.

7. EVIDENCE—JUDICIAL NOTICE—LOCATION OF RAILROAD CONSTITUTING NATIONAL HIGHWAY.

The Northern Pacific Railroad being a national highway, provided for by national laws, its location as such is a matter of which the court will take judicial notice; and hence it is not bound to assume a location contrary to the fact, merely because, in another suit between the same parties, in a different court, a decree has been entered which is based upon untrue allegations in respect to such location, and an admission thereof in the answer. Per Hanford, District Judge.

This was an application by the Northern Pacific Railroad Company for the removal of the receivers of its property, on the ground of mismanagement and fraud:

J. N. Dolph, John B. Allen, and Mr. Flanders, for complainant.

Harold Preston, Wilbur F. Sanders, and Silas W. Petit, for defendant.

John C. Spooner, Charles W. Bunn, D. J. Crowley, and John H. Mitchell, for the receivers.

Before GILBERT, Circuit Judge, and HANFORD, District Judge.

GILBERT, Circuit Judge. On August 15, 1893, a bill in equity was filed against the Northern Pacific Railroad Company, in the circuit court of the United States for the Eastern district of Wisconsin, by P. B. Winston, the Farmers' Loan & Trust Company, and William C. Sheldon & Co. The bill described the railroad of the Northern Pacific Company, and the various tributary and connected branch lines operated by it as a part of its system, and set forth the mortgages upon the said road, showing that the funded or secured debt of the company amounted to over \$152,000,000, upon which the annual interest and sinking fund charges aggregated over \$9,000,000,

in addition to more than \$900,000 guarantied annual interest upon contingent liabilities on guaranties of bonds upon the branch lines to the amount of over \$15,000,000, and alleged that the gross earnings of the railroad company were and continued to be insufficient to pay operating expenses and fixed charges, and that the company was insolvent. It set forth the fact that the floating debt of said company amounted to more than \$11,000,000, and that its available assets had been hypothecated to secure loans, and by reason of the decline in value of such collaterals the same would be sold at such a low price as to leave large deficiencies against the company, which would result in numerous actions at law to recover therefor. It further showed that during the fall of 1894, from September to December, large payments would fall due from said railroad company for interest on its several mortgages, and for interest on branch lines, etc., and that the company would be unable to meet the same. Winston was alleged to be an unsecured creditor of the company, and likewise a stockholder. Sheldon & Co. were alleged to be creditors of the railroad company to the extent of \$150,000, for which they were insufficiently secured by collaterals. The bill alleged that the lines owned and operated by the railroad company were in and were subject to the jurisdiction of 10 different states, but that they formed one system, and made one line, and that this fact constituted one of its main ingredients of value, and that its severance would result in ruinous sacrifice to every interest in the property, and that unless the court would deal with the property as a single trust fund, and take it into custody for the protection of those interested therein, individual creditors would assert their remedies in different courts, and that a race of diligence would result, judgments and priorities would be attempted, etc., and thereby the company would be prevented from the discharge of its duties as a public carrier, and a vast and unnecessary multiplicity of suits would ensue. The bill prayed for the protection and preservation of the property, the marshaling of the company's assets, the ascertainment of the liens and priorities existing, and for the appointment of receivers of the entire system of railroad and all the property of the company. The Northern Pacific Railroad Company answered the bill on the day it was filed, admitting the allegations thereof to be true, and consented to the appointment of one or more receivers as prayed therein. On the same day an order was entered in said court appointing the present receivers. Thereafter the same bill and answer were filed in the circuit courts of the United States for the various districts in which said railroad is situate, to wit, in the Western district of Wisconsin, the district of Minnesota, the district of North Dakota, the district of Montana, the district of Idaho, the district of Washington, and the district of Oregon, and in the Southern district of New York, in which is the home office of said corporation; and between the 15th day of August, 1893, and the 17th day of the same month, orders were made in all these courts appointing the same receivers. At the time of filing said bill in the Eastern district of Wisconsin, the Northern Pacific Railroad Company was in the possession of and was operating the Wisconsin Central lines, the larger portion

of which were in said district, under a lease dated April 1, 1890, and running for a term of 99 years. Immediately upon their appointment, the receivers entered into possession of the said Wisconsin Central lines, and operated the same under the lease for more than a month. On September 26, 1893, the lease having been canceled by the lessor for nonpayment of rent, the circuit court for the Eastern district of Wisconsin ordered the receivers to turn back the said lines to the lessor. On the 18th day of October, 1893, the Farmers' Loan & Trust Company filed in the circuit court for the Eastern district of Wisconsin its bill to foreclose the second, third, and the consolidated general mortgages upon the road, alleging that, since the filing of the creditors' bill, defaults had occurred in the payment of interest on said mortgages, and praying for a decree of foreclosure. Winston, Sheldon & Co., and the receivers were made parties defendant. On the day the foreclosure bill was filed the Northern Pacific Company entered its general appearance, and on the same day the court appointed in that suit the receivers formerly appointed in the creditors' suit. Thereafter the foreclosure bill was filed, and similar orders were made in all the circuit courts of the districts before mentioned. The receivers so appointed have since remained in the possession and management of the road and the property of the Northern Pacific Railroad Company, under the direction of the circuit court for the Eastern district of Wisconsin, and under the authority of said court have issued an aggregate of \$5,000,000 of receivers' certificates, which have been sold and are now outstanding. They have also, under the orders of said court, expended money in payment of interest on the first mortgage, have sold railroad lands to various purchasers, have paid indebtedness of said company, and have made leases and traffic contracts with certain branch lines and other carriers. They have also expended money in improvements and in the purchase of railroad material, rolling stock, and supplies, etc.

On the ——— day of August, 1895, the Northern Pacific Railroad Company filed in this court the affidavit of Brayton Ives, its president, stating, in substance: That no part of the railroad or land grant of the Northern Pacific Railroad Company was or ever has been in the Eastern district of Wisconsin, and that at the time of the appointment of the receivers by that court there was no property of said company within the jurisdiction of said court, and that none of the property covered by the mortgages which were sought to be foreclosed in said suit was situate within the said district. That, by the order of this court by which said receivers were appointed of the property in the district of Washington, said receivers were ordered and directed to pay, out of the money which should come into their hands from the operation of said road, current expenses, amounts due for interchange of traffic supplies and materials used, wages, and rentals of rolling stock, and, with the sanction of this court, such amounts as might be necessary for protecting the property of said corporation from sale under mortgage, etc.; and they were also directed to hold the money of said company not so used by them until authorized to dispose of the

same under the order of this court. That the receivers have not complied with the terms of said order, but have deposited the moneys received by them in this district in banks other than those authorized by this court, and, without the sanction of this court, have applied the same to the payment of debts alleged to exist against said company, other than those contemplated by said order, and that they have not filed with or submitted to this court any account of the disposition made by them of any of the property which came into their possession, nor any statement of their receipts and disbursements, nor any reports to this court as, by the order of their appointment, they were directed to make; that they have misapplied divers large sums of money received by them from the sales of lands and other property of the company, and from the operation of said road, by appropriating the same to the payment of alleged debts of said railroad company which were not entitled to be paid in preference to the interest and principal due under the mortgages. That said railroad company has a claim against Henry Villard for \$545,433.42, arising out of a sale made by him, when chairman of the board of directors of said company, of the capital stock of the Northern Pacific & Manitoba Railway Company, in violation of his duty as director, and in fraud of said company; and another claim against said Henry Villard for \$224,800, arising out of a sale by him to said railroad company of the capital stock of the Rocky Fork & Cooke City Railroad Company, made in violation of his duty as a director, and in fraud of his company; and another claim against Henry Villard, Charles L. Colby, and Colgate Hoyt, who were directors of said Northern Pacific Railroad Company, for the sum of \$2,600,000, arising out of the lease of the railroad of the Wisconsin Central Company, the Wisconsin Central Railroad Company, and Chicago & Northern Pacific Railroad Company, in violation of their duties as directors, and in fraud of said Northern Pacific Railroad Company. The affidavit further alleges, in substance: That the said bills so filed in the circuit court of the United States for the Eastern district of Wisconsin were procured to be filed by said Henry Villard, collusively and for the purpose of controlling the suits and naming the receivers to be appointed therein; that he procured his personal counsel to prepare said creditors' bill; and that the said receivers were decided upon as the result of a conference between Thomas F. Oakes, Henry Villard, Charles L. Colby, Colgate Hoyt, and Villard's personal counsel, William Nelson Cromwell, each in his own interest, and Rosewell G. Rolston, as director of the Northern Pacific Railroad Company and president of the Farmers' Loan & Trust Company, for the purpose of protecting the interests of those participating in the transactions and liable to the claims above mentioned. That the receivers selected for their counsel, and intrusted the direction of the legal business of said railroad company to, the said William Nelson Cromwell, who had been counsel for the said Henry Villard in making the sale of said capital stock of the Northern Pacific & Manitoba Railway Company and the Rocky Fork & Cooke City Railroad Company to said North-

ern Pacific Railroad Company, and who continues to act as counsel for said Villard. That the said receivers have been directed by the circuit court of the United States for the Eastern district of Wisconsin to sue the said Henry Villard to recover the sums fraudulently acquired by him from the Northern Pacific Railroad Company, and to sue any of the former directors of said company to recover all sums of money improperly or illegally received by them, yet, in violation of their duty in the premises, they have taken no proceedings whatever to carry out said order. That, notwithstanding the existence of said claims, the receivers have paid to said Henry Villard \$480,000, with interest thereon, in payment of two notes of said Northern Pacific Railroad Company held by said Henry Villard, which debt should have been applied by the receivers in reduction of the debt of said Villard to the company. That the receivers have sold large tracts of land of said company within the state of Washington, and have made no report thereof to this court, and have not accounted to this court for the disposition of the proceeds thereof. That they have entered into divers contracts relating to the custody, management, and disposition of the property of said company within the jurisdiction of this court, without the knowledge of this court or its authority.

Upon said affidavit the receivers were required to show cause before this court why the order entered on the 17th day of October, 1893, appointing them receivers of the Northern Pacific Railroad Company within this district, should not be vacated and set aside. The Farmers' Loan & Trust Company and the receivers now object to the jurisdiction of this court to entertain the motion, and they urge, in support of their objection, that the circuit court of the United States for the Eastern district of Wisconsin is the court of primary jurisdiction,—the court which first appointed receivers and thereby took possession of the property of the Northern Pacific Railroad Company,—and that the well-settled rule of comity requires all other courts within whose jurisdiction the property of said corporation is situated to refer to that court all questions concerning the general management of the property, the custody and preservation thereof, and the appointment and discharge of the receivers; that at the time of filing of both the creditors' bill and the bill to foreclose the mortgages there was situate within the jurisdiction of said court for the Eastern district of Wisconsin personal property of said corporation, consisting of rolling stock, rails, materials, money, and leased railroad lines which it was operating in connection with its own lines; that the appearance of the Northern Pacific Company in answer to said bills gave to that court the jurisdiction to hear and determine said suits, and that the existence of said personal property within said district at that time gave to that court jurisdiction to take the same into its possession by said receivers, and that, notwithstanding the fact that at the present time there may be no property of the corporation within said district, or in the possession of said court by its receivers, yet, the jurisdiction having once attached by reason of the facts existing at the time of the commencement of the suits, it will be and

must remain unquestioned until the final determination of all matters in litigation; and that for this court to now say that the court of the Eastern district of Wisconsin is not the court of primary jurisdiction over the property of the said railroad company in receivership is to collaterally attack the validity of a judgment of that court.

We find in the case no question of an attack upon the jurisdiction of the circuit court for the Eastern district of Wisconsin. It must be conceded that that court had jurisdiction of the bills that were filed, and had jurisdiction to appoint receivers to take into its possession the property of the railroad company that was within its territory, and to remove the same. The question for consideration here is not one of the jurisdiction of that court in the suits pending before it, but it is whether or not that court is to-day the court of primary jurisdiction for the management and control of the property of the Northern Pacific Railroad Company in the hands of receivers, and whether the rule of comity, as settled by the decisions of the courts, requires this court to decline jurisdiction of the motion until the matters here in issue shall have been adjudicated by another tribunal. All of the bills that were filed in the various jurisdictions in which the property of the Northern Pacific Railroad Company is situated were original bills. It is true that each bill filed after the initiation of proceedings in the Eastern district of Wisconsin recited and referred to those proceedings as the basis of action in the other courts; and it is also true that the other courts, in following the rule of comity, appointed in their own districts, without question, the receivers so named by the first court. The actual possession of the property of the insolvent corporation by the first court, through its receivers, however, could extend no further than the territorial limits of that court's jurisdiction. The rights the receivers are accorded in courts whose jurisdiction is exterior to that of initial proceeding have their basis in comity. Such comity rests upon the fact that another court is in the actual possession of a portion of property which cannot well be segregated, and which the best interests of all concerned require to be managed as a single system. Here, however, it is shown that at the time of filing this application to remove the receivers there is no part of the railroad line of the Northern Pacific Company within the jurisdiction of the court that first appointed them, and that there is in that district no personal property held in receivership. All the property that remains to be disposed of is in other jurisdictions. It follows from this state of facts that that court is powerless to make an order which affects in any way the management or possession of any of the property of the corporation. No foreclosure sale of said mortgages can be had, no possession to a purchaser can be given, until the courts which have the actual possession of said road shall consent thereto. In our judgment, the rule of comity which has been invoked in opposition to the motion does not apply to such a case as this. The foundation of the rule is the recognition of a right that exists in another jurisdiction. It is predicated upon the fact that another court has first taken and retained the possession

of property. Its reason consists in the fact that the court of initiatory proceeding has in its possession, and must necessarily administer, a portion of property which a wise policy declares must not be disintegrated. That reason does not exist in this case. Not only does it not exist, but many considerations urge us to believe that a wiser, more satisfactory management of a railroad may be obtained by a court which has jurisdiction over at least some of the territory wherein the same is situated, or in which the home office of the company is located.

Numerous authorities are cited by counsel both on behalf of the motion and in opposition thereto, but no case is found which is direct authority either for or against the conclusion which we have reached. In a well-considered case in the supreme court of Texas (Railway Co. v. Gay, 26 S. W. 599) it was held that the United States circuit court for a district in Louisiana has no jurisdiction to appoint a receiver, and through him to take possession and control of a railroad, no part of which was within that state. Said the court:

"No case can arise in which a court will have power to appoint a receiver unless there be property of which the court may take possession through its receiver; and, if the property be immovable (or movable, but so connected with the immovable as are cars or other like property necessary to and used in operating a railway), then the suit in which a receiver to take possession of them may be appointed is necessarily one local in character, for in such case the court operates directly upon the thing. Such a proceeding is not one strictly in rem, but such is its nature; and, under general rules everywhere recognized, such proceedings can be had only where the thing to be taken into possession is within the territory within which the court has power to act."

It was said by the court in *Young v. Railroad Co.*, 2 Woods, 618, Fed. Cas. No. 18,166, that:

"If there are any adjudged cases which would authorize this court to interfere with the possession of a receiver appointed by another court having jurisdiction, and who is in actual possession of the property, they have never fallen under my observation."

But it is made clear from a consideration of that case that, in declining to interfere with a receiver who was "in actual possession of the property," the court had in mind the fact that in that case the court of initial proceeding had within its jurisdiction and in the custody of its receiver a portion of the road and of the property of the railroad company; and it is evident that such actual possession was considered a necessary feature of the receivership of another court, which, in the opinion of that court, could not be interfered with.

The fact that certificates of stock in other corporations which were held by the Northern Pacific Railroad Company have since the receivership been transferred to the receivers, and stand in their names, has no bearing upon the question under consideration. The situs of such property is not changed by the fact of such transfer. Shares of stock held by the Northern Pacific Railroad Company must be presumed to have been held by it at its home office in the city of New York. If those shares have been transferred to the

receivers, such transfer has been made at the home office, and must have been made under the authority of the circuit court for that district; and, if they are held by the receivers, they are held under the direction and control of that court, and they are not in the possession or under the custody of the court for the Eastern district of Wisconsin.

It is strongly urged against the assumption of jurisdiction by this court to entertain the motion that during the receivership receivers' certificates have been issued to a large amount, and that the same are now held by innocent purchasers, and that to deny the primary jurisdiction of the court for the Eastern district of Wisconsin over the receivership is to hold that those certificates were unlawfully issued. We find no ground for such contention. If the receivers' certificates have been authorized by the courts of the various districts in which the property in receivership is situated, they are valid liens upon that property, irrespective of the question whether the court for the Eastern district of Wisconsin had jurisdiction to order their issuance. If they have not been so authorized, it is not perceived how the action of this court can in any way affect the question of their validity. It must be conceded, in any view of the case, that the receivers are at the present time, and have been since their appointment, the lawful appointees of all the courts in the jurisdiction of which the property of the Northern Pacific Railroad Company is situated. They are the receivers of the railroad, and none of their acts, done within the scope of their authority, and under the orders of the courts which have control over said property, are invalid.

It is further contended that, if the circuit court for the Eastern district of Wisconsin is held not to be the court of primary jurisdiction over the property in receivership, such primary jurisdiction falls either to the circuit court for the Western district of Wisconsin, in whose jurisdiction a portion of the company's railroad lies, and in which receivers were appointed before they were appointed in this court, or to the circuit court for the Southern district of New York, in which is located the home office of the corporation and a large portion of its personal property. It is sufficient to say, in answer to this, that it is not shown that either of said courts has assumed such jurisdiction, or that they will do so. We see, therefore, no ground upon which this court should decline to hear the motion which is presented. The objection to the jurisdiction will be overruled.

HANFORD, District Judge (concurring). The argument against entertaining the present application may all be arranged under two heads: First. As to the foreclosure of the mortgages on the Northern Pacific Railroad, and whatever is incidental thereto, including the receivership, the United States circuit court for the Eastern district of Wisconsin is the court of primary jurisdiction, and, by the rule of comity in such matters, this court, instead of taking original cognizance of a motion to change the personnel of the receivership, should send the parties, to initiate proceedings for such

change, to the court of primary jurisdiction. Second. This application is a collateral attack upon a final judgment of a court of co-ordinate jurisdiction which had complete jurisdiction of the parties and of the subject-matter. Other considerations have been urged upon our attention, such as the vast amount of the aggregate loss by depreciation of the Northern Pacific securities which may result from our decision; but the distinctively legal grounds for rejecting the application of the defendant company for a change of receivership are covered by the foregoing propositions. I find that I can express my individual views more concisely by discussing both propositions together, under the general issue as to the jurisdiction and duty of this court.

This court is not called upon, by the application under consideration, to vacate or modify any order or decree made by the circuit court for the Eastern district of Wisconsin. We are asked simply to remove from office receivers under appointment of this court, and to appoint others in their places, to serve as the receivers of this court, and to exercise such power as it is within the jurisdiction of this court to confer. The only direct effect of granting the application now made by the defendant will be to strip from the receivers now acting such power as they have become vested with by virtue of the orders of this court, and to confer the same powers upon other individuals. Incidentally the effect may be, and probably will be, far-reaching, for such action will be a recognition by this court of its duty to exercise independently, within the territorial boundaries of its jurisdiction, such powers as have been by the laws of the land conferred upon it, and such as parties having rights to be protected may see fit to invoke, and an assertion that the assumption of paramount authority over the railroad, and business transactions in the operation thereof, by a court located at a distance from the situs of its operations, is contrary to sound principles of government, and unjustifiable. But consequences do not change facts. The fact of the matter is, this application is a direct proceeding, relating entirely to matters as to which all the parties to the record must stand committed as having, from the inception of the case, conceded that this court has jurisdiction. The attack now being made is not collateral. It is not directed against a final judgment. The second proposition above stated is based upon false premises, and is untenable for that reason; but if it were not so, and this proceeding could be regarded as being purely an attack upon an adjudication of the circuit court for the Eastern district of Wisconsin, finally determinative of the particular questions, still the defendant has the right to make such an attack, and this court is bound to entertain it, because want of jurisdiction, apparent upon the face of the record, is the ground upon which the attack is made, and on such ground the right of the parties to litigate is not concluded by any decree of the court whose jurisdiction is questioned.

It has been assumed throughout the argument, and I am therefore justified in assuming, that the jurisdiction of the court at Milwaukee over the entire subject-matter of the receivership of the

Northern Pacific Railroad has never been challenged, nor put to the test of an argument there by adverse parties, as it has been upon the argument of this motion. I feel greater freedom in discussing the questions than I should if the able judges of the Seventh circuit, or any one of them, had ever been called upon to define the jurisdiction of that court with reference to this receivership.

In its inception, the present administration of the Northern Pacific Railroad Company's estate and business, through receivers acting under appointment from courts of chancery, was a proceeding in rem. The creditors' bill filed by Winston, Sheldon & Co., and the Farmers' Loan & Trust Company, the answer of the Northern Pacific Railroad Company, and all the papers filed in the original case, and the first order of the court appointing Messrs. Payne, Oakes, and Rouse to be receivers, show that the primary object and purpose of the suit was to place the railroad, its equipments, lands, and all of its assets in the actual and legal custody of the court, and to have the court assume control, and, under such control, continue its operations as an active and going concern. The pleadings raised no issue between the plaintiffs and the defendant. The bill prayed for no relief which the defendant opposed. All the parties had a common object, and that was to shelter the property from judicial writs and process which they anticipated would be sued out by creditors in the different courts having jurisdiction within the numerous counties in which parts of the road and its property are situated. The only adverse parties, in the sense of persons having interests, rights, or claims liable to be damaged, invaded, or prejudiced by any proceedings, order, or decree in the case, were creditors of the defendant, its employes, and parties having contract relations with it, who are not named in the record, and not made parties to the suit otherwise than as in any proceeding purely in rem, in which any person having an interest in property taken into custody may come in and contest for his rights. In such a proceeding, actual manual possession of the res is essential to the jurisdiction. This proposition is elementary, and as undisputable as the proposition that a man cannot grasp things which are beyond his reach. Manifestly, in full recognition of this essential, the parties attempted to create jurisdiction by averring in the bill and admitting in the answer as a fact that part of the Northern Pacific Railroad is situated within the Eastern district of the state of Wisconsin; and we are now told that, this fact having been so averred, admitted, and established by the decree of the court based thereon, it must, for all purposes of litigation between these parties, and in all jurisdictions, be taken as true, although in fact untrue. In refutation of this claim, I deem it proper to say that the Northern Pacific Railroad is a national highway, provided for by national laws, and its location is as much within the judicial knowledge of the court as any other geographical fact. To such facts, which are not dependent for evidence of their existence upon the testimony of witnesses or the preservation of documents, the law of estoppel cannot be properly applied. It would certainly be an absurdity for any court in dealing with im-

portant rights to be controlled by a record in which the parties alleged and admitted, and the court found as a fact, the state of Oregon to be situated within the corporate limits of the city of Tacoma. The facts shown by the record and within the knowledge of the court limit the power of the court at Milwaukee, in the granting of relief prayed for by the original creditors' bill of Winston and others, to the appointment of receivers for the purpose of taking into manual possession and under control such assets of the defendant corporation as were movable and detached from the railroad. The railroad and real estate of the defendant, being immovable, could not be brought within the jurisdiction of that court. Neither could jurisdiction over the same be acquired by taking possession of such assets as money, bonds, and other securities, or even railroad materials or supplies, or railroad cars while migrating over other lines. Custody of things movable, and not indispensable to the operation of the railroad, will not draw jurisdiction in rem over a railroad situated beyond the jurisdiction, any more than it will bring the road itself within the boundaries of jurisdiction. The rule which recognizes as the court of primary jurisdiction the one which is first in point of time in acquiring custody of one part of the line of railroad extending into more than one judicial district, and requires other courts to defer to the court of primary jurisdiction as the court of paramount authority in managing the operations of a railroad so situated, arises from necessity, and is a rule of reason. An accurate statement of the rule itself excludes the idea that any court can be a court of primary jurisdiction, or have supremacy, in the control of a railroad situated outside of the boundaries of its jurisdiction. Necessity, which is the mother of the rule, is absent in such a case. The liabilities, litigation, and contentions arising from the practical operation of a railroad, affecting the employes and patrons of the road, and the community served by it, should, according to American ideas of local self-government, be adjudicated in a forum having jurisdiction at the place where the transactions occur and the subject-matter is situated. Judicial process, to be of any use in protecting an estate and the interests of its owners, must be potential at the place where the estate is. These considerations require each court of the United States to exercise within its district the powers conferred upon it by law for the benefit of the public, and of each individual having rights to be protected, untrammelled, and not controlled except by law and by tribunals having appellate jurisdiction to revise its judgments. To defer to the judgment of a court of co-ordinate jurisdiction in the management of a railroad is justifiable upon the ground that without a head to control it is impossible to operate a continuous line of railroad, and it would be an unseemly spectacle for courts to seize the different ends of a line and engage in a tug of war for mastery over it, and there is no other reason for what is termed the "rule of comity" in such matters. When the reason of the rule is considered, it must be admitted, as a plain proposition, that a railroad extending through different judicial districts, upon going into the hands of receivers, must be controlled

by the court of one or the other of the districts into which it extends, and a distant court, whose process is without virtue where a railroad is situated, and its business transactions take place, is incompetent to manage its affairs. The utter want of power to protect this railroad, or conserve the interests of the people whose capital is invested therein, is shown in a practical way by the fact that when the property was menaced by the so-called industrial army, and afterwards by sympathizers with the American Railway Union strike of 1894, the court sitting at Milwaukee was not called upon to vindicate its authority, but the courts having jurisdiction within the territory traversed by the road were required to exert their power, and did so in numerous instances. As a further test, let it be supposed that the courts of the Eighth and Ninth circuits should assume full control of all of the Northern Pacific property within the territory over which their jurisdiction extends, independent of the proceedings pending in the courts of the Seventh circuit, and then inquire what would be the consequences to the railroad or its business? Would there be a collision of the forces emanating from the different courts? Would any part of the property necessary to the operation of the railroad in its entirety be left unprotected? Would the courts acting thus inharmoniously present the unseemly spectacle of grasping the ends of a single line and engaging in a tug of war? To answer these questions correctly is but to assert that necessity for the joint and harmonious action of the circuit court for the Eastern district of Wisconsin with the courts of the Eighth and Ninth circuits, in order to maintain the integrity and autonomy of the Northern Pacific Railroad, is not necessary.

The fact that the Northern Pacific Railroad Company owns a stub line extending from West Superior to Ashland, in the Western district of Wisconsin, is unimportant, for the reason that the circuit court for the Western district of Wisconsin has never assumed supremacy as a court of primary jurisdiction in the administration of Northern Pacific Railroad affairs, and, so far as the record before us discloses, the proceedings in that court were not in fact commenced anterior to the proceedings in this court. The only fact upon which a reasonable argument in favor of the jurisdiction of the circuit court for the Eastern district of Wisconsin to entertain the creditors' bill can be predicated is this, viz. that, at the time of filing said bill the Northern Pacific Railroad Company was engaged in operating other lines of railroad, extending into the Eastern district of Wisconsin, under a lease from the Wisconsin Central Railroad Company; but this fact is not sufficient to support the jurisdiction. The argument that, because of its control of lines of railroad other than its own line, it was necessary to have its entire property, including leased railways which were being operated as one great railway system, under the management of the same receivers, is fully answered by the fact that, within six weeks from the date of the first appointment of these receivers, it was found to be not necessary for the Northern Pacific receivers to continue in control of the leased lines, and sufficient

reasons were shown for discontinuing their control, and they were actually required, by an order of the circuit court for the Eastern district of Wisconsin, to surrender said leased lines.

The mortgage foreclosure bill filed by the Farmers' Loan & Trust Company in October, 1893, after there had been a default in the payment of interest on bonds secured by the mortgages for which said company is the trustee, has been styled in the argument a "dependent bill," the meaning of which is that the foreclosure suit, being commenced after the property had gone into the hands of the receivers, must necessarily hang or depend upon the case in which the receivers were already proceeding in the administration of the defendant's estate; and it is said that the complainant was compelled to initiate the foreclosure suit in the circuit court for the Eastern district of Wisconsin because the court had acquired complete jurisdiction over the corpus of the defendant corporation by the proceedings in the creditors' suit. It is because of this argument that I have examined closely the grounds for jurisdiction shown by the record in the creditors' suit, and, for the reasons stated, it is my conclusion that the record shows affirmatively want of jurisdiction in that court, because I must regard that suit as a proceeding purely in rem in a court which did not have jurisdiction of the res. The foreclosure suit, viewed as a dependent upon the creditors' bill, adds nothing to the jurisdiction of the court at Milwaukee, for it must certainly fall whenever the original case upon which it is hung falls.

It has been argued that a suit to foreclose a mortgage upon a railroad or other real estate is a transitory action, and the court at Milwaukee acquired jurisdiction of this case by the voluntary appearance of the mortgagor and mortgagee. It is true that a mortgage may be foreclosed by a suit in personam in a court having jurisdiction of the parties, and such a court may, by coercive measures, compel the mortgagor to transfer the title to mortgaged premises situated beyond its jurisdiction. A mortgage may also be foreclosed in a court having no jurisdiction of the person of the mortgagor, by a proceeding in rem, if it has jurisdiction of the res. The proceedings may be of a double nature; that is to say, both in personam and in rem. This argues nothing, for the elementary principle that a purely personal judgment is not valid against a person who has not been by due process or his voluntary appearance brought within the jurisdiction of the court which pronounced it remains in full vigor. And proceedings in rem are impossible in a court having no jurisdiction of the res. Now, as the custody, control, and operation of a railroad through receivers must be pursuant to proceedings in rem, jurisdiction thereof cannot be acquired by a distant court, although it may have jurisdiction to foreclose the mortgage by a suit in personam.

Many authorities have been cited, but none to controvert the foregoing proposition. In the case of *Muller v. Dows*, 94 U. S. 444, the supreme court affirmed the validity of a decree foreclosing a mortgage upon a railroad situated partly in Iowa and partly in Missouri by the United States circuit court for the district of Iowa.

But in that case, although the court rendered a decree foreclosing the equity of redemption, and ordered a sale of the railroad as an entirety, it did not assume to transfer title to that part of the railroad situated in Missouri, but compelled the owner to convey the title; and it was the act of the mortgagor in conveying the title which the supreme court sustained. In commenting upon the law of the case, Mr. Justice Strong uses the following significant language:

"It is here undoubtedly a recognized doctrine that a court of equity, sitting in a state and having jurisdiction of the person, may decree a conveyance by him of land in another state, and may enforce the decree by process against the defendant. True, it cannot send its process into that other state, nor can it deliver possession of land in another jurisdiction, but it can command and enforce a transfer of the title. And there seems to be no reason why it cannot, in a proper case, effect the transfer by the agency of the trustees when they are complainants."

The case in hand is one in which creditors and stockholders first commenced the suit for the avowed purpose of placing the operation of the railroad under control of a court of chancery, and in which, afterwards, the trustee for the mortgage bondholders has commenced a second suit for the purpose of foreclosing the mortgage; but in view of the time which has elapsed since the foreclosure suit has been pending, and the manner in which the case has been suffered to slumber, the court is justified in saying that it has not been intended to really foreclose the mortgage in the usual manner of foreclosing mortgages. It is not the wish or purpose of the parties to sell the mortgaged property as an entirety, at least not until some scheme for reorganization can be perfected. In short, the real purpose of the foreclosure suit is the same as in the original suit of Winston and others. The case of *Muller v. Dows* certainly cannot support the claim of jurisdiction in the court at Milwaukee of that part of this case which is essentially a proceeding in rem.

It is my conclusion that it is the plain duty of this court to take cognizance of the charges made against the receivers and the allegations of the defendant in asking for their removal. Although it is true that this court appointed Messrs. Oakes, Payne, and Rouse, because they had been previously appointed by another court, and did not, in the choice of receivers, exercise its independent judgment, still their appointment stands as the act of this court, and before the court can, consistently with justice, vacate its order appointing them, it must give them an opportunity to make full answer to the allegations of the defendant contained in the affidavit of Mr. Ives. The court therefore orders that the case be set down for further hearing, upon a date to be fixed, as to questions relating to the fitness of the receivers to serve in that capacity, and the grounds for their removal from office set forth in said affidavit, and that, at least 10 days prior to the date of said hearing, they respond to said affidavit, by answer, plea, or demurrer, as they may elect.

UNITED STATES v. FLOURNOY LIVE-STOCK & REAL-ESTATE CO.
et al.

(Circuit Court, D. Nebraska. October 8, 1895.)

1. INDIAN LANDS—ALLOTMENTS IN SEVERALTY—LEASES.

Leases made by members of the Omaha and Winnebago tribes of Indians, of lands allotted to them in severalty, under the acts of congress of February 21, 1863, August 7, 1882, and February 8, 1887, without the authority of the secretary of the interior, are wholly void. *Beck v. Real-Estate Co.*, 12 C. C. A. 497, 65 Fed. 30, followed.

2. EQUITY—JURISDICTION—INADEQUACY OF REMEDY AT LAW.

Equity has jurisdiction of a bill brought by the United States, as trustee for the Indians to whom lands have been allotted in severalty, pursuant to the treaties and acts of congress providing that the United States will hold the land so allotted in trust for the benefit of the allottees, against persons who have illegally secured leases of such lands and taken possession thereof,—such bill seeking to oust such intruders, and to restrain them from inducing the Indians to make further leases, and from interfering with the Indian agent in the performance of his duties,—since the remedy by action of ejectment, even if such action could be maintained, would be inadequate.

3. EQUITY PLEADING—MULTIFARIOUSNESS.

A bill in equity by the United States, as trustee for Indians to whom lands have been allotted in severalty, seeking to oust persons occupying such lands under void leases, and to restrain the making of other such leases, is not multifarious, though exhibited against persons holding under leases from different lessors, and having no common interest in the suit, since the United States have one common interest touching the matter of the bill, arising out of the trust relation existing between them and the Indians in regard to the lands.

This was a suit by the United States against the Flournoy Live-Stock & Real-Estate Company and others to restrain the defendants from leasing and occupying certain Indian lands. The defendants demurred to the bill.

A. J. Sawyer, U. S. Atty., and R. W. Breckenridge, for the United States.

H. C. Brome and Daley & Jay, for defendants.

SHIRAS, District Judge. In the bill filed in this case, it is averred: That the Winnebago tribe of Indians was originally domiciled on lands situated in the state of Minnesota. That by the provisions of the act of congress approved February 21, 1863, the president of the United States was authorized to take steps for the peaceful removal of the tribe from that state, and to set apart for the use of the tribe a tract of unoccupied land, not within the limits of any state, and in extent at least equal to their existing reservation in Minnesota. That in pursuance of this act the tribe was first removed into the then territory of Dakota, and from there, in the year 1865, it was removed into the then territory of Nebraska; and by a treaty made between the Omaha tribe of Indians and the United States, under date of March 6, 1865, the Omaha tribe ceded and sold to the United States a tract of land from the north side of the Omaha reservation, to be used as a reservation for the Winnebagos. See 14 Stat. 667. That by a treaty made under date of March 8, 1865, between the United States and the Winnebago tribe (see 14 Stat. 671), the latter

tribe ceded to the United States all their title, right, and interest in the reservation occupied by them at Usher's Landing, in the territory of Dakota, the cession being made in consideration of the agreement on part of the United States "to set apart for the occupation and future home of the Winnebago Indians, forever, all that certain tract or parcel of land ceded to the United States by the Omaha tribe of Indians on the 6th day of March, A. D. 1865, situated in the territory of Nebraska * * *"; the United States further agreeing "to erect on said reservation an agency building, schoolhouse, warehouse, and suitable buildings for the physician, interpreter, miller, engineer, carpenter, and blacksmith, and a house 18x24 feet, one and a half stories high, well shingled and substantially finished, for each chief."

It is further averred in said bill that in the act of congress, approved February 21, 1863, it was provided that when the tribe should be removed to the new reservation the secretary of the interior might allot to said Indians lands in severalty, which they may cultivate and improve, "which lands, when allotted, shall be vested in said Indian and his heirs without the right of alienation, and shall be evidenced by patent"; it being further declared in said act "that said Indians shall be subject to the laws of the United States and to the criminal laws of the state or territory in which they may happen to reside. They shall also be subject to such rules and regulations as the secretary of the interior may prescribe; but they shall be deemed incapable of making any valid civil contract with any person other than a native member of their tribe without the consent of the president of the United States." And it is alleged that under the provisions of this act, in the year 1871, about 1,000 acres of land were allotted to individual Indians.

It is further averred: That on the 8th of February, 1887, congress passed an act entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations and to extend the protection of the laws of the United States and the territories over the Indians and for other purposes." That under the provisions of this act a large body of land embraced within, and forming a part of, the reservation in Nebraska, has been allotted to individual Indians, such allotments being approved by the secretary of the interior in September, 1893; the patents being issued in December, 1893, and each patent containing the recital that "the United States of America, in consideration of the premises, and in accordance with the provisions of the 5th section of said act of congress of the 8th of February, 1887, hereby declares that it does and will hold the land thus allotted (subject to all the restrictions and conditions contained in said 5th section), for the period of twenty-five years, in trust for the sole use and benefit of the allottee named therein."

It is further averred in said bill: That in the treaty between the Omaha Indians and the United States concluded March 6, 1865, it was provided that all laws passed, or which may be passed, by congress, regulating trade and intercourse with the Indian tribes, shall have full force and effect upon the Omaha reservation, and that no white person, except such as shall be in the employ of the United States, shall be allowed to reside or go upon any portion of said

reservation without the written permission of the superintendent of Indian affairs, or the agent of said tribe, and that no lands assigned in severalty to any Omaha Indian shall be aliened, or otherwise disposed of, except to the United States, or other members of the tribe, under such rules and regulations as shall be prescribed by the secretary of the interior. That on the 7th of August, 1882, congress passed an act providing for allotments in severalty to the members of the Omaha tribe, the sixth section of said act providing "that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs, according to the laws of the state of Nebraska, and that at the expiration of such period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid in fee, discharged of said trust, and free of all charge or incumbrance whatsoever. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance and contract shall be absolutely null and void." That under the provisions of this act a large quantity of the lands in said reservation were allotted to individual Indians of the Omaha tribe, and patents issued therefor, each patent reciting the stipulation contained in the sixth section of said act.

It is further averred in said bill that there was no provision made by treaty, act of congress, or otherwise, for the leasing of any lands assigned or allotted to Indians in severalty, or held in common, other than to native members of their respective tribes, until the passage of the act of congress adopted February 28, 1891, amendatory of the act of February 8, 1887, which conferred power on the secretary of the interior to prescribe rules and regulations for the leasing of lands allotted to Indians whenever, by reason of age or other disability, the allottee was not able to occupy or improve the lands assigned to him.

It is further averred that said Omaha and Winnebago tribes of Indians have always been, and now are, under the charge and control of an Indian agent, who is under the direction of the commissioner of Indian affairs; that the present agent for said tribe is William H. Beck, captain in the tenth cavalry, United States army, who was appointed in June, 1893, by the president of the United States, pursuant to the act of congress of July 13, 1892, which authorized the detailing army officers for such duty and service.

It is then charged in said bill that in the year 1888 one John S. Lemmon, in violation of law, commenced leasing portions of the Winnebago reservation from the Indians to whom allotments had been made; that subsequently the Flournoy Live-Stock & Real-Estate Company was organized, of which corporation said Lemmon was and is president; that Lemmon assigned to the company the leases previously taken by him, and the company proceeded to take a large number of additional leases in the years 1890-91, running from five to ten years, the whole amount thus leased amounting to fully 37,000 acres; that John B. Carey and several other parties named

in the bill have, in violation of law, leased of individual members of the Omaha and Winnebago tribes several thousand acres of lands allotted in severalty under the acts of congress hereinbefore recited; and that these parties, including the Flournoy Live-Stock & Real-Estate Company, have sublet these lands to a large number of persons named in the bill, who are now in actual possession of said lands.

It is further charged that all the leases thus made were taken by the named parties in open violation of law, contrary to the rules and regulations adopted by the interior department relative to the leasing of allotted lands, and against the protests of the present agent of said tribes and his predecessors; that the parties in possession are cultivating the lands for their own benefit; that they refuse to vacate the same, and wholly refuse to recognize the rights and power of the United States over said lands, as trustee for said Indians; that the presence of the named parties upon said lands, under the circumstances detailed, is inimical to the best interests of the Indians, subversive of the just authority of the United States, and a direct interference with the control of the department of the interior, through the commissioner of Indian affairs and the agent for said tribes, over said lands and the reservation of which they form part, and also greatly interferes with the efforts of the United States government to civilize said Indians, and to prepare them for and advance them in the rights and duties of citizens of the United States.

It is further charged in said bill that in an action in equity brought by the Flournoy Live-Stock & Real-Estate Company v. William H. Beck, in the United States circuit court for the district of Nebraska, and thence appealed to the circuit court of appeals for the Eighth judicial circuit (12 C. C. A. 497), it was held and ruled that the leases obtained by the named company were wholly void; that nevertheless the said company, and parties holding under it, continue to assert title to said leased lands, and refuse to vacate the same; that the company continues to sublet the lands unlawfully held by it, and encourages the occupation of the lands in question by the parties to whom it has leased the same. In the bill is to be found a full description of the lands thus claimed to be unlawfully leased and occupied, together with a statement of the several parties in possession of said lands under said leases, thus alleged to be wholly void and illegal. The Flournoy Company and the other parties named, in number 231, are made parties defendant to the bill, and a mandatory injunction is prayed, restraining the defendants from interfering with the Indian agent in the discharge of his official duties in connection with the lands of said reservations set apart for the Omaha and Winnebago tribes of Indians; from in any manner inciting or inducing any of said Indians to lease or otherwise contract about said lands without the consent of the Indian agent, under the rules and regulations of the secretary of the interior; commanding them to immediately vacate all lands held in possession by them; and restraining them from entering upon any of said lands, or from leasing or contracting about them, in violation of law.

To the bill demurrers on behalf of the defendants have been inter-

posed, and upon the questions thus presented the case is now before the court. The grounds of demurrer, briefly stated, are that the plaintiff has a full and adequate remedy at law, and therefore there is not jurisdiction in equity; that the bill is multifarious, in that it is exhibited against a number of defendants, for several and distinct and independent matters; and, finally, that the allegations of the bill do not show that the plaintiff is entitled to the relief sought.

In support of the first ground stated, to wit, that a court of equity has not jurisdiction, because the remedy at law is adequate, it is argued that the United States could institute an action in ejectment against each one of the several named parties in possession of the leased lands, and in that way oust them from possession, in case it were decided that the leases were void. The action of ejectment is one which lies to regain possession of realty, with damages for the unlawful detention. The right of present possession of the lands in question is in the Indians, and not in the United States. The title is held by the government in trust for the Indians, and it is, to say the least, extremely doubtful whether the United States could maintain an action of ejectment based upon the assertion of a right to immediate possession. But, if such action might be maintained, a judgment therein would fall far short of affording the full measure of relief sought for in the present suit. The theory of the bill is that the United States is a trustee for the Indians, and holds the title of the lands in trust for them, and, by force of the treaties with them, is charged with the performance of certain duties towards them, and that there exists a trust relation of a high and delicate character, and that, for the proper performance of these trust duties, it is necessary that the defendants should not only be ousted from the possession of the leased lands, but that the defendants should be restrained from inducing the Indians to make further leases of any portion of the reservation, and from interfering with the Indian agent in the performance of his duties. The bill seeks the aid of the court, as a court of equity, to assist in the proper performance of trust duties and obligations, and to protect the rights of the Indians, and the relief sought to that end is not available in an action at law; and therefore it cannot be held that the equitable jurisdiction is barred because of the existence of an adequate remedy at law. Thus, in *Kilbourn v. Sunderland*, 130 U. S. 505, 9 Sup. Ct. 594, it is said, "The jurisdiction in equity attaches unless the legal remedy, both in respect to the final relief and the mode of obtaining it, is as efficient as the remedy which equity would confer under the same circumstances."

The second ground of demurrer is that the bill is multifarious, because it is exhibited against a large number of defendants who hold under different leases, executed by different lessors, and that there is no common interest justifying the bringing the one suit, instead of separate proceedings against each defendant.

In *Walker v. Powers*, 104 U. S. 245, it is said:

"By multifariousness 'is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected,

against one defendant, or the demand of several matters, of a distinct and independent nature, against several defendants, in the same bill.' Story, Eq. Pl. § 271."

In the case at bar the complainant's right of action is based upon the trust relation existing between the United States and the Indians in regard to the lands in question, and there is therefore a common interest and a common question, as against all the defendants; and therefore the bill will not be held to be multifarious, being within the rule stated in Story, Eq. Pl. § 285, to wit:

"Another exception to the general doctrine respecting multifariousness and misjoinder, which has already been alluded to, is when the parties (either plaintiffs or defendants) have one common interest touching the matter of the bill, although they claim under distinct titles, and have independent interests" (in which event the objection of multifariousness will not be sustained).

The last and principal ground of demurrer is that the plaintiff is not entitled to the relief prayed for upon the showing made in the bill, in support of which it is contended: (1) That the Indians to whom the lands have been allotted in severalty are no longer tribal Indians; are not, therefore, under the control of the agent, either as to person or property; that these Indians are citizens of the United States, and have ceased to be wards of the national government. And (2) that the leases executed by these Indians are valid, and the possession of the defendants, based thereon, is lawful.

In the sixth section of the act of congress of February 8, 1887 (24 Stat. 388), it is declared that every Indian born within the United States, to whom allotment of lands in severalty has been made under the provisions of that or any other act of congress, or under any treaty, shall be deemed to be a citizen of the United States, and entitled to all the rights, immunities, and privileges of citizenship, without in any manner impairing or otherwise affecting the right of such Indian to tribal or other property. The argument in support of the demurrer, in effect, goes upon the theory that citizenship of the allottee is inconsistent with any restraint upon the right of alienation of the lands allotted in severalty. The error of this assumption is clearly shown in the opinion of the court of appeals in the case of Real-Estate Co. v. Beck, already cited. The instances in which the United States has conferred an interest in lands upon citizens, but subject to a restraint upon alienation, are numerous, and it has never been held that a restriction upon the right of alienation is so inconsistent with citizenship that the two cannot coexist. The right to alienate lands is denied to minors, and yet, during their minority, they may be citizens of the United States, with all the privileges and rights conferred thereby. It is to be expected that in the effort to advance the Indian from his semi-savage condition, and to change his tribal condition into individual citizenship, many anomalous situations will arise, which must be viewed in the light of all the legislation upon the same subject, including the treaties made with the several tribes.

The fact, urged in argument, that under the laws of the state of Nebraska the Indians in question, to whom lands have been assigned

in severalty, have the right to vote and to hold office, does not necessarily show that the government of the United States no longer owes them any duty of protection in regard to the reservation lands, and no longer possesses any power of control over them as a tribe. In the act of congress of February 8, 1887, which declares that Indians holding lands allotted in severalty are to be citizens of the United States, we find the express exception that such citizenship shall exist "without in any manner impairing or otherwise affecting the right of any such Indians to tribal or other property." It will also be borne in mind that not all of the Omaha and Winnebago Indians are living upon lands allotted in severalty, nor have all the lands embraced within the boundaries of the reservation been thus allotted. By the express terms of the treaties made with these Indians, the United States assumed the duty of preserving the reservations for the use, occupancy and benefit of the Indians, and this duty is still incumbent upon it; and it is also the fact that the United States still recognizes the continued existence of the Omaha and Winnebago tribes. In the absence of direct congressional action on the subject, it is for the executive branch of the government, acting through its appropriate channels, to determine when a given tribe of Indians, or any portion thereof, has so far advanced in civilization, has so far abandoned the habits of savage, or semi-savage life, and has so far adopted the customs, laws, and mode of life obtaining among the white people, that the United States can safely, and in justice to the inhabitants of the region wherein they dwell, as well as with safety and in justice to the Indians themselves, and with due regard to the treaty obligations assumed to them, terminate all further control over such Indians, and leave them to the protection only of the general laws of the country. It is not for the individual white citizen, living upon the Indian reservation or in its neighborhood, to assume to determine this question, and, having determined it to suit his own views, then to assert his right to deal with the Indian, with regard to the reservation lands, in utter disregard of the rules and regulations of the department, and in direct conflict with the provisions of the acts of congress. Upon the face of the bill it is made clear that the United States still recognizes the existence of the Omaha and Winnebago tribes, and the continuance of the treaty duties assumed to them in the matter of protecting them in the use of the reservation lands; and the court is not justified in holding, as a matter of law, that these duties have been terminated because a part of the Indians have received allotments of lands, and by reason of that fact are recognized as citizens of the United States.

It is further urged in argument that lands allotted in severalty cease to be parts of the "Indian country," as that phrase is used in the statutes of the United States. Whatever may be the relation of the allotted lands to the so-called Indian country, with respect to other provisions of the statutes, such as those regulating the sale of intoxicating liquors and the like, there can be no question that the title of these lands remains in the United States; that they form part of the lands set apart as a reservation for these Indians by the treaties made with these tribes; and that the duty, and consequently

the power, belongs to the United States to take whatever steps are necessary for the proper performance of the obligations existing upon the part of the United States with regard to these lands. It cannot be questioned that the power of the United States government over the Indian tribes is paramount and supreme. *U. S. v. Kagama*, 118 U. S. 375, 6 Sup. Ct. 1109. If the United States, by a treaty duly made with an Indian tribe, has assumed a given duty or obligation to the Indians, the power exists to properly perform this duty within the boundaries of the states, as well as within the territories. The power to enforce its laws, and the treaties made by it, in pursuance of the provisions of the constitution, is paramount and supreme, and rests upon every foot of soil within the national boundaries. *Ex parte Siebold*, 100 U. S. 371; *In re Neagle*, 135 U. S. 1, 10 Sup. Ct. 658; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900. Whether the allotted lands continue to form part of the Indian country,—upon which question I express no opinion,—is a wholly immaterial question. By the express terms of the treaty made with the Indians on the 8th of March, 1865, the United States solemnly stipulated “to set apart for the occupation and future home of the Winnebago Indians, forever, all that certain tract,” etc. If the executive branch of the government deems it necessary, for the proper performance of this treaty stipulation with the Indians, to forbid the occupancy of these lands by white men, it has the right so to do, especially in view of the fact that, in all the legislation touching the same, congress has uniformly prohibited the alienation of the lands, and has expressly declared that all contracts between the Indians and persons not native members of the tribe shall be wholly null and void. Even if it should be the fact that the Indians living upon the allotted lands are no longer to be deemed tribal Indians, but have in fact reached the full measure of citizenship, and if it should be held that the allotted lands no longer form part of the Indian country, it would be no less true that the United States had agreed that these lands should be set apart for the occupancy and benefit of the Indians, and that the congress of the United States, when it authorized the allotment of lands in severalty, had forbidden the alienation of the lands for the period of 25 years, with the modification that in case of the disability of an allottee, by age or otherwise, to cultivate the land allotted, the same might be leased under rules and regulations prescribed by the secretary of the interior; and it is clearly the duty of the United States to prevent the alienation of the lands during the period named, and to preserve them for the use and occupancy of the Indians, and to that end it may rightfully forbid the occupancy of the lands by persons not members of the tribes.

It is also asserted in argument that the leases taken by the Flournoy Company and other defendants from the Indians to whom allotments have been made are valid, and that these lessees, and those holding under them as subtenants, cannot be rightfully dispossessed. It is averred in the bill that the Flournoy Company had brought a bill in equity in this court against William H. Beck, to restrain him from interfering with the possession of these lands under the leases in question, and that the court of appeals for this circuit had held

the leases to be wholly void. The opinion of the court of appeals will be found in 12 C. C. A. 497, 65 Fed. 30, and it is therein held that these leases were taken in open and known violation of the law. It is claimed in argument that an appeal to the supreme court of the United States has been taken from the decision of the court of appeals, and therefore the question cannot be deemed to be finally determined, and especially as against the defendants who do not claim under the Flournoy Company. It is true that, as an adjudication, the ruling of the court of appeals may not be binding upon the defendants who do not hold under the Flournoy Company; but the opinion is an authoritative declaration of the judgment of the court of appeals upon the general question involved, to which due consideration must be given, even if it be true that an appeal may have been taken therefrom. But, if it be true that the question is still open to discussion, I can only say that in my judgment the conclusions reached in that case—to wit, that the citizenship bestowed upon the Indians to whom lands had been allotted in severalty was in no way inconsistent with the restriction imposed upon their title, and that under these restrictions the leases in question are wholly void—are fully sustained by the provisions of the acts of congress hereinafter recited, and that the correctness thereof cannot be successfully questioned. It thus appears that the leases under which the defendants claim the right to the possession of the lands allotted in severalty are wholly void, having been taken in direct violation of the provisions of the acts of congress under which the allotments in severalty were made; that the occupancy of the lands and the cultivation thereof by the defendants is wholly inconsistent with the purpose for which the lands were originally set apart as a reservation for the Indians, and with the object of the government in providing for allotments in severalty; that such occupancy is held contrary to the rules and regulations of the department of the interior, and is held, not for the benefit, protection, and advancement of the Indians, but for the benefit of the original lessees and their subtenants; that such occupancy of said lands by the defendants results in antagonizing the authority and control of the government over the Indians, and is clearly detrimental to their best interests, and materially interferes with the rules and regulations of the department charged with the duty of carrying out the treaty stipulations under which the land forming the reservations was set apart for the benefit and occupancy of the Indians. Having assumed the duty of securing the use and occupancy of these lands to the Indians, and being charged with the duty of enforcing the provisions of the acts of congress forbidding all alienations of the lands until the expiration of the period of 25 years after the allotment thereof, the government of the United States, through the executive branch thereof, has the right to invoke the aid of the courts, by mandatory injunction and other proper process, to compel parties wrongfully in possession of the lands held in trust by the United States for the Indians to yield the possession thereof, and to restrain such parties from endeavoring to obtain or retain the possession of these lands in violation of law. It follows that the demurrer to the bill must be and is overruled upon the merits.

PILGRIM et al. v. BECK et al.

(Circuit Court, D. Nebraska. October 8, 1895.)

INDIAN LANDS—ALLOTMENTS IN SEVERALTY—LEASES.

Leases made by the Indians of lands in the Winnebago Indian reservation, allotted to them in severalty under the acts of congress providing therefor, are absolutely void; and neither such leases, nor occupancy and planting of crops upon the lands by the lessees or their subtenants, give to the occupants any right to restrain the officers of the government from removing them from such lands. *Beck v. Real-Estate Co.*, 12 C. C. A. 497, 65 Fed. 30, followed.

This was a suit by Robert Pilgrim and others against William H. Beck, United States Indian agent at the Winnebago Indian reservation, and others, to restrain him from removing complainants from certain lands. Defendants demurred to the bill.

Daley & Jay and H. C. Brome, for complainants.

A. J. Sawyer, U. S. Dist. Atty., and R. W. Breckenridge, for defendants.

SHIRAS, District Judge. This case was begun in the district court of Thurston county, Neb.,—the petition being filed therein on the 17th day of July, 1895,—and was thence removed into this court upon the petition of the defendants. On behalf of complainants, it is averred that they are residing upon certain lands, which have heretofore been assigned in severalty to sundry members of the Winnebago tribe of Indians; that after allotment had been made the Indian allottees entered into a contract with the Flournoy Live-Stock & Real-Estate Company for the lease of these lands for the period of five years; that said company was a corporation organized under the laws of the state of Nebraska, for the purpose of bringing under cultivation as many as possible of the reservation lands that were tributary to the village of Pender and Emerson; that, in pursuance of the policy of the company, it was made known to the Indians that the company were willing to lease lands along the western part of the Winnebago reservation, with the intention of having the same improved and made more productive and valuable, and put in such condition that the Indian owner might obtain a large annual rental therefrom, and, whether successful in this intention or not, they would pay the Indian owner some small annual rental for his land, which rental would be increased in case the company was successful in re-leasing the lands for agricultural purposes; that the company has obtained leases of lands, from the Indian owners, extending over a distance north and south of 10 miles, and east and west of 15 miles; that the company has secured, as sublessees, a large number of thrifty tenants, who have broken up a large part of their holdings, so that in the year 1895 there are under cultivation about 25,000 acres, covered with luxuriant crops.

The bill, after setting out the names of the individuals in occupancy of the lands as tenants, and the descriptions of the particular parcels occupied by each named tenant, and that many of them are

residing on these lands in houses of their own construction, with barns, yards, and other improvements, then avers that William H. Beck is the duly-appointed acting Indian agent at the Winnebago reservation, having charge of the United States property thereon, and the management of the business transactions between the United States and the Winnebago Indians; that said Beck has great influence over and with many of said Indians; that said Beck has appointed others of the named defendants members of the Indian police, and, through their agency, has already removed some of the tenants from said leased lands, and threatens to remove others; that thereby plaintiffs are put in fear of their lives, and are harassed, annoyed, and delayed in harvesting their crops, the right so to do being claimed under the leases aforesaid, the validity of which is denied by said Agent Beck. The prayer of the bill is to the effect that a temporary injunction be at once granted, to be made perpetual at the hearing, restraining said Beck, and all parties acting under him, from in any manner interfering with the plaintiffs in regard to these lands, or the crops growing thereon; to restrain the defendants from making, or pretending to make, any contracts respecting the occupation and use of said real estate, and from leasing, or exercising any jurisdiction in reference thereto, or from giving any directions to the Indian police in regard to said lands or the crops thereon, or the persons claiming possession thereof. The demurrer presents the question whether, upon the facts recited in the bill, the complainants are entitled to any relief whatever.

The right and equity of complainants are based upon the allegations that the lands in question, being part of the Winnebago reservation, were allotted in severalty to individual Indians, under the acts of congress making provision therefor; that the Indian allottees were induced to lease the lands to the Flournoy Company, who in turn have sublet the same to complainants; that the complainants have put the lands into cultivation, have growing crops thereon, and are entitled to continue in occupancy of the lands until the expiration of their leases, with the right to harvest their crops.

In the case of *U. S. v. Real-Estate Co.* (pending in this court, and just decided) 69 Fed. 886, it is adjudged, following the ruling of the circuit court of appeals for this circuit in the case of *Beck v. Real-Estate Co.*, 12 C. C. A. 497, 65 Fed. 30, that the leases executed by the Indian allottees of lands in severalty in the Omaha and Winnebago reservations are absolutely void, and therefore convey no title, right, or interest to the lessees named therein. It, of necessity, follows that the complainants herein have wholly failed to show any legal right to the occupancy of the lands described in the bill, and their claim based upon alleged or supposed equities is equally without solid foundation. An examination of the treaty made with these Indians, whereby the United States set apart this reservation for the use, occupancy, and benefit of the Indians, and of the acts of congress providing for the settling of the Indians upon lands allotted in severalty, clearly shows that the object and purpose of the government, operating through the interior department, was and is to train the Indians in habits of industry; to teach them

how to cultivate the soil; and thus gradually prepare them for complete personal independence. The performance of this work is primarily committed to the interior department, which in turn operates through the commissioner of Indian affairs and the Indian agents appointed for the different tribes. The primary duty imposed upon the department is to develop the Indian in civilization; to make him self-supporting, and fit him for ultimate absorption into the mass of our people; and it is to this end that the lands of the reservation are placed under control of the interior department. In the bill filed herein it is averred that the Flournoy Company is a corporation organized for the purpose of bringing under cultivation as many as possible of the reservation lands that are tributary to the villages of Pender and Emerson. The mode by which this was to be accomplished was by inducing the Indians to lease their lands to the company, which in turn would place in occupancy thereof persons not members of the tribe. In other words, it is the avowed purpose of this company to lease the lands, so as to place thereon white men, instead of the Indians, thus practically nullifying the main object of allotting lands in severalty to the Indians. If the Flournoy Company should be permitted to carry out the object and purpose for which it was created, according to the averments of the bill, it would result that in a short time all the valuable lands in the reservation would be in the occupancy of white men, and the Indians, instead of being trained in habits of industry, and taught to earn their living by cultivating the soil, would either be reduced to mendicancy, or, if the company should perform its promise to secure the payment of fair rentals to the Indian allottees, would be living on their rentals, in a state of idleness. It would seem, from the averments of the bill, that the complainants entertain the view that the purpose of the government in providing for the allotment in severalty of the reservation lands was to secure the rapid development of the lands; and hence it is averred in the bill that the Indians were without the necessary teams and farming implements for breaking and tilling the land and securing the fullest value therefrom, and therefore the company was organized, not to supply the Indians with the lacking teams and implements, and thus to enable them to cultivate the land, but to supplant the Indian in the occupancy of the lands, in order that they might be made productive. In brief, the purpose of the company was to secure the rapid development of the lands, by placing thereon tenants already civilized and accustomed to cultivating the soil,—such development being for the benefit of the tenants, the company, and the towns of Pender and Emerson,—whereas the purpose of the government was to carry out its treaty stipulations with the Indians, and, further, to develop the Indians in civilization; to educate them into habits of industry; and, by teaching them to properly cultivate the soil and draw their living therefrom, to give the lands allotted in severalty such a practical value in their eyes that ultimately they might be safely invested with the right to dispose of their holdings. The purpose of the Flournoy Company was and is to develop the lands, regardless of the effect upon the Indians.

The purpose of the government is to develop the Indians, and to use the lands for that end. In effect, the theory of the bill is that the Flournoy Company and its sublessees are entitled to the aid of a court of equity for their protection, as against the efforts of the government to carry out its duty to these Indians.

If this bill should be maintained, and the relief therein prayed for should be granted, the practical result would be that the Flournoy Company would be placed in charge of the reservation in question, and the United States would be ousted from all control over the same. When the leases of the allotted lands were taken, the Flournoy Company, and all others following its example, knew that, under the express provisions of the acts of congress providing for the allotments in severalty, an absolute restriction against alienation by the allottees was enacted, and all power to contract about the same was denied, until the lapse of the 25 years of occupancy provided for in the statutes. These parties knew, therefore, that the leases obtained from the Indians were wholly void, and absolutely worthless. When the present bill was filed the decision of the court of appeals in the case brought by William H. Beck et al. against the Flournoy Live-Stock & Real-Estate Company had been rendered, in which it was held that these leases were void; the opinion in that case having been filed December 10, 1894. Under these circumstances, it must be held that when this bill was filed the complainants knew that the leases under which they held had been taken, not only without authority of law, but in absolute defiance of the express provisions of the acts of congress; that the invalidity thereof had been judicially adjudged by a court of competent jurisdiction; that the continued occupancy of the lands by the tenants was without warrant of law, and was in direct conflict with the control over these lands vested in the interior department of the government. This being true, it follows that no equity is created in complainants by the fact that they have cultivated these lands during the season of 1895 which justifies the court in sustaining the present bill for their benefit. It may be true that many of the subtenants have been in fact misled by the representations made by the Flournoy Company, or its officers, in regard to their rights, and that they have relied thereon, but such representations are not chargeable against the United States. The bill not only wholly fails to show any legal right to the occupancy of these lands on part of the complainants, but in fact affirmatively shows that this occupancy, and the leases upon which it is based, are held in violation of the laws of the United States, and in open defiance of the authority of the United States over a subject-matter within the paramount control of the national government; and there is no ground upon which the court can give any consideration to the fact that the complainants have planted and cultivated the crops now growing on these lands. The management and control of these lands for the benefit of the Indians is in the hands of the department of the interior, and it is for the officials of that department to give weight to any equities or considerations of hardship that may exist in favor of any of the complainants

herein. The Indian agent, acting under the instructions of the department, is charged with the duty of protecting the interests of the Indians, and it is not for the court to interfere with his action on the ground of hardship to the complainants. The demurrer is therefore sustained, and the bill is dismissed, as being without law or equity to support it, at cost of complainants.

UNITED STATES v. OREGON & C. R. CO. et al.

(Circuit Court, D. Oregon. September 9, 1895.)

No. 1,982.

1. PUBLIC LANDS—EXCLUSION FROM GRANT.

It is not necessary, in order to exclude lands from the operation of a grant by congress in aid of a railroad company, that title to such lands should have passed to another company, but it is sufficient if such lands have been in any way segregated from the public domain, so as to indicate an intention to exclude them from the grant.

2. SAME.

By an act of July 2, 1864, congress granted lands to the N. P. R. Co., in aid of the construction of a line whose general location was defined in the act. In 1865 the N. P. Co. filed a map of general location, which was rejected by the land office because wrongly supposed to be not sufficiently definite; and in 1870 the company filed another map, which was accepted, and the lands indicated by it withdrawn from entry. *Held* that, by the grant to the N. P. Co., the land within the limits where its road, as defined by the act and by the maps, might possibly be definitely located, was so far segregated from the public domain as to be excluded from a subsequent grant to another company. *Carr v. Quigley*, 13 Sup. Ct. 961, 149 U. S. 652, distinguished.

John M. Gearin and George H. Williams, for the United States.
W. D. Fenton and L. E. Payson, for defendants.

GILBERT, Circuit Judge. By this suit the United States seek to cancel certain patents issued to the Oregon & California Railroad Company of lands within the state of Oregon claimed by said company to have been earned under the terms of the act of congress of July 25, 1866, granting it lands to aid in the construction of a line of railroad beginning at Portland, in the state of Oregon, and running thence south to the southern boundary of the state. It is alleged in the bill that the same lands had been granted to the Northern Pacific Railroad Company in the grant to that company of July 2, 1864, and hence were not within the purview of the later grant. The cause was first heard upon a demurrer to the bill, and many of the questions involved in the suit were at that time considered and disposed of. *U. S. v. Oregon & C. R. Co.*, 57 Fed. 890. The case now comes on to be heard upon the issues thereafter made by the answer of the defendant corporation, and the proofs which were thereupon taken.

It is shown that the map filed by the Northern Pacific Railroad Company on the 13th day of August, 1870, and which, upon the decision of the demurrer, was assumed to be a map of definite location, was not such, but was a map of the general route of the line

of that company's road. Upon that fact, so established by the proof, and not disputed by the complainant, it is now urged by the defendants that the land in controversy in this suit passed to the Oregon & California Railroad Company, by virtue of its grant. Its contention is that the lands never were taken from the public domain by the grant to the Northern Pacific Railroad Company, for the reason that the title never passed to that company, and that such title could never pass until there was a definite location of the road; that by the act of definitely locating the line the grantee of the railroad lands selects the granted lands from the mass of public lands among which it has the right to choose, and designates those to which the title passes, and that, without such definite location of line and consequent selection of lands, no title is vested; that, notwithstanding the settled doctrine of the decisions that the grant is in *præsent*i, it is nevertheless not in *præsent*i, as to any particular lands, until, by the act of the grantee, it is made certain what lands are to be taken. It is proven that there was never a definite location of the branch line of the Northern Pacific Railroad. The lands in controversy in this suit lie within the place limits of a line of road such as that indicated by the maps of general route of 1865 and 1870. The decision of the case on final hearing must therefore depend upon the effect of the language of the act granting land in aid of the branch line, and the filing of the preliminary maps of that line.

It is unnecessary here to repeat the language of the grant, further than to say that it was a grant of public lands, and that it authorized the company to build and operate a continuous road, beginning at Lake Superior, and running thence westerly to some point on Puget Sound, "with a branch line via the valley of the Columbia river to a point at or near Portland, in the state of Oregon, leaving the main trunk line at the most suitable place, not more than 300 miles from its western terminus." There can be no doubt that if, by the terms of the act, the line of the branch road had been definitely fixed as running upon a certain line, or upon a straight line between two designated points, the title would have passed from the date of the grant and its acceptance by the grantee, for there would be no need of further or more definite location. The description of the branch line, as contained in the act, does not, it is true, fix its point of beginning or ending, nor definitely determine the location of any portion thereof. It is evident, however, that the valley of the Columbia river, for a large portion of the route which would necessarily be covered by such a branch line, is so narrow that the road must have followed either the north or the south bank of the river; and it will not be disputed that a road built in compliance with the terms of the grant, and on the line therein defined, would have been confined to a narrow strip of territory. By both the map of 1865 and the map of 1870 it follows the north bank of the river. The company had the right to choose either bank, but it never exercised that right by making a definite location of the road. Were the lands, therefore, under the terms of the act, granted lands, and hence not public lands, from the date of the grant, and

were they on that account excluded from the subsequent grant to the defendant corporation? It is not necessary that the title should have passed to the Northern Pacific Railroad Company, in order that the lands should be placed in such attitude to the public domain as to be excluded from a subsequent grant in aid of another railroad. It is enough if they were in any way segregated from the public lands, so that at the date of the junior grant it will be presumed to have been the intention of congress to exclude them from its operation. I hold that it was such segregation to set apart a larger area within which the lands granted to the Northern Pacific Company were to be selected by it. It was sufficient if the lands in controversy in this suit were subject to the contingency of being within the place limits of the branch line whenever that line should receive its definite location. Said the court in *Bardon v. Northern Pac. R. Co.*, 145 U. S. 538, 12 Sup. Ct. 856:

"By 'public land' * * * is meant such land as is open to sale or other disposition under the general laws. All land to which any claims or rights of others have attached does not fall within the designation of 'public lands.'"

In *Wilcox v. Jackson*, 13 Pet. 513, it was said that:

"Whensever a tract of land shall have once been legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and that no subsequent law or proclamation or sale would be construed to embrace it, or to operate upon it, although no reservation were made of it."

If the Northern Pacific branch road had been located on any possible line within the terms of the act, so as to go by way of the Columbia river valley to a point at or near Portland, the greater portion, at least, of the lands in controversy would necessarily have fallen within its place limits. It is clear that congress did not intend that the grant to the Northern Pacific Company should be abridged or impaired by the subsequent grant to the Oregon & California Company, nor that any portion of the subsidy to the latter company should depend upon the contingency of the failure of the former company to definitely locate its line of road. Nor did it intend to give to the latter company lands that had been set apart for the former,—lands within which the Northern Pacific Company had the right to earn the subsidy given it by the act.

The defendants rely upon the case of *Carr v. Quigley*, 149 U. S. 652, 13 Sup. Ct. 961, to sustain their contention that the whole tract from which the branch-line grant could be satisfied was not set apart from the public lands by the granting act, so as to be without the scope of the subsequent grant to the Oregon & California Railroad Company. In that case the court applied and affirmed the doctrine of *Newhall v. Sanger*, 92 U. S. 761, in which it was held that a grant to a railroad company of lands not sold, reserved, or otherwise disposed of by the United States, and to which a homestead or pre-emption claim may not have attached at the time the line of the road was definitely fixed, and providing that such grant shall not defeat or impair any pre-emption, homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements

of any bona fide settler, did not include lands within the boundary of an alleged Mexican or Spanish grant, which was sub judice at the time the secretary of the interior ordered a withdrawal of the lands along the route of the road; that lands within such boundaries of such alleged grant, being thus under consideration in the courts, are not public lands, within the meaning of the acts of congress in making grants to aid the construction of works of internal improvement. In *U. S. v. McLaughlin*, 127 U. S. 449, 8 Sup. Ct. 1177, the court had under consideration the conflicting rights of the Central Pacific Railroad Company of California, under a grant similar to that of the Northern Pacific Railroad Company in this case, and the grantees under a Mexican grant of a certain quantity of land, to be located within the limits of a larger area. It was held that the fact that the Mexican grant was sub judice at the time of the grant to the railroad company did not exclude the whole of the larger area, from which it was to be taken, from the operation of the railroad grant; but the controlling reason of the decision was declared to be the fact that the right to locate the smaller area within the greater was not vested in the donee of the grant, but remained in the United States, and the further fact that, notwithstanding the grant to aid the railroad company, there still remained within the described area sufficient land to meet the demands of the grant. The court said:

"It is in the option of the government, not of the grantee, to locate the quantity granted; and, of course, a grant by the government of any part of the territory contained within the outside limits of the grant only reduces by so much the area within which the original grantee's proper quantity may be located. If the government has the right to say where it shall be located, it certainly has the right to say where it shall not be located; and, if it sells land to a third person at a place within the general territory of the original grant, it is equivalent to saying that the quantity due to the original grantee is not to be located there. In other words, if the territory comprehended in the outside limits and bounds of a Mexican grant contains 80 leagues, and the quantity granted is only 10 leagues, the government may dispose of 70 leagues without doing any wrong to the original grantee."

In *Carr v. Quigley* the same question was again considered by the court, and the doctrine of *U. S. v. McLaughlin* was expressly approved.

It is contended that the implied doctrine of those decisions is that the rule there announced applies likewise to cases where the right of selection is vested, not in the United States, but in the railroad company. Such is not perceived to be their meaning. It is, rather, the distinct doctrine of those cases that it was only because the United States had the right to make the selection of the granted quantity of land within the larger area called for in the Mexican grant that a portion of the described tract was held to be subject to the subsequent grant of the railroad company, and that otherwise the court would have considered the whole tract, so set apart and subjected to the right of the grantee, excluded from the public lands, and not included within the grant of lands in aid of works of internal improvement. The inference is that if the right of selection had been vested in the grantee of the Mexican grant the

whole tract would have remained subject to his right, and therefore not subject to a subsequent grant, so long as the first right existed. A defined tract of land, out of which a smaller area has been granted, the location of which is to be made by the grantor, is in a widely-different condition, so far as concerns the grantor's right, from a tract in which the right to select the granted portion is vested in the grantee. In the former case a subsequent grant to another of a portion of the described area is only an exercise of the grantor's right of selection. It is his declaration that the portion so subsequently bestowed by him upon another has been eliminated from the described tract, and has been taken from the lands out of which the first grant is to be satisfied. In the case of the Mexican grants this power of selection remained in the United States. Its exercise in no way contradicted or subverted the terms of the grant, or abridged the rights of the grantee thereunder. It is not so in the case of railroad land grants, such as those under consideration in this case. The United States had not the right to locate the lands granted to aid the Northern Pacific Railroad Company. The grant to that company carried to the grantee the right to make selection of the granted lands. It might definitely locate its line in good faith, in compliance with the requirement of the act, and by such location select and acquire the lands within the place limits upon both sides of its line. It is unimportant that the company never exercised this power. The right was established by the act, and it still subsisted when congress, by a later grant, bestowed lands in aid of the construction of the Oregon & California Railroad.

But at the date of the grant to the Oregon & California Railroad Company the lands in controversy herein were not only affected by the fact of the prior grant to aid the branch line of the Northern Pacific road, but that company had upon March 6, 1865, filed in the general land office its map of the general route of its road, and had thereupon asked for a withdrawal of the granted lands within the prescribed area upon both sides of its line. The map so filed, known as the "Perham Map," was not satisfactory to the commissioner of the general land office, and he notified the company that it was disapproved—First, because it did not show the exact location, "indicating by flagstaffs the progress of the survey," nor the "precise portions of each section or smallest legal subdivision cut by the road"; and, second, because it was not filed in the district land offices as well as in the general land office. These were not valid objections. It has never been held that the map of general route must show a line definitely located upon the ground with all the accuracy of a final survey. It has been considered sufficient if "its general course and direction are determined after an actual examination of the country, or from a knowledge of it, and it is designated by a line on the map showing the general features of the adjacent country, and the places through or by which it will pass." *Buttz v. Railroad Co.*, 119 U. S. 55, 7 Sup. Ct. 100. It would have been impossible at that time to have made a map of the branch line, such as was required by the commissioner. The court will take knowledge of the fact that at that date a large portion of the public lands on the line of the road was unsurveyed. By the Perham map the position of the

branch line is indicated with reference to the Columbia river. By the scale of the map, its distance from that river at any point is approximately ascertainable. If a withdrawal of the granted lands within the place limits upon both sides of the general route so selected had been ordered by the commissioner of the general land office, there can be no doubt that the effect of such action would have been to segregate the withdrawal lands from the public lands subject to disposal by subsequent grant, and would have operated to reserve them therefrom. Were the rights of the company affected by the fact that the commissioner of the general land office erroneously found the map unsatisfactory for the reasons above stated, and notified the company of his disapproval? The supreme court has held that:

"When the general route of the road is thus fixed, in good faith, and information thereof given to the land department by filing a map thereof with the commissioner of the general land office or the secretary of the interior, the law withdraws from sale or pre-emption the odd sections, to the extent of 40 miles, on each side." *Buttz v. Railroad Co.*, supra.

While it is true that in the case just cited there is no direct ruling upon the question of the power of the commissioner of the general land office, and the effect of his approval or rejection of a map, the clear import of the language of the opinion is that the commissioner is not clothed with power to affect the rights of the railroad company; and it would seem that upon the filing of a map which in fact complies with the law, and is filed in good faith, the law itself operates to withdraw the granted lands.

It is further urged that the Perham map was defective for reasons other than those stated by the commissioner of the general land office in his letter disapproving the same; that that portion of the line by way of the Columbia river valley does not end at a point "at or near Portland," but continues, in an unbroken line, to the waters of Puget Sound, and that it is not designated upon the map as a branch line; and that, so far as the map indicates, it appears to be a main line. The act gave authority, together with a right of way and a subsidy, to build a main line from Lake Superior to the waters of Puget Sound, and a branch line as heretofore indicated. In the map there is no designation of either line as the main line or the branch line. So far as the map locates the road west of the Rocky Mountains, it complies strictly with the terms of the act, with the exception that the line by the Columbia river valley, instead of ending at a point at or near Portland, proceeds further, and ends at the waters of Puget Sound. The fact that the construction of a road from Portland to Puget Sound was not authorized by the grant does not impair the validity of the location of that part of the road which was authorized, and which was located in compliance with its terms, and it is immaterial that the main line and the branch line are not so respectively designated upon the map. They are in the location called for by the language of the granting act, and it will be presumed that they are located in pursuance thereof. This map had been on file for more than a year when the grant to the Oregon & California Railroad was made, and it not only furnishes evidence of the location of

the general route of the line of the Northern Pacific branch line, and of the consequent segregation of those lands from the public lands by operation of law, but it was notice to the Oregon & California Railroad Company of the prior grant and the prior bestowal of these lands in aid of another road.

But if it is conceded that the map of 1865 was ineffective to accomplish the withdrawal of lands, and that its rejection by the commissioner of the land office is a conclusive adjudication of its insufficiency, the map of 1870 was open to no such objection. Upon its receipt in the land office the withdrawal of lands was made upon the records. No reason is seen why the map of general route which is required by the act, even if filed after the date of the junior grant, does not, so far as the junior grant is concerned, serve to sufficiently identify the lands covered by the prior grant. It is true that, after filing the map of general route of 1870, the Northern Pacific Company still possessed the right to change the line whensoever it should make its definite location thereof, and that it was required by the act to file such map of definite location for the purpose of finally indicating the lands that were to be patented to it. But until such final map was filed the map of general route, whereby the withdrawal was in fact accomplished, served to sufficiently identify the granted lands, notwithstanding the reserved right to alter its location. In the absence of such map of final location, and until the same is filed, it is a reasonable presumption that the granted lands are those which have been withdrawn in pursuance of the filing of the map of general route as required under the terms of the grant.

In any view of the case, I find no warrant for holding that it was the intention of congress to grant these lands to the Oregon & California Railroad Company. A decree will be entered for the United States, as prayed for in the bill.

LANG et al. v. BAXTER et al. (three cases).

(Circuit Court, D. Maine. September 30, 1895.)

Nos. 3, 4, and 5.

PRACTICE—TRIAL BY COURT—ADDITIONAL FINDINGS.

Where a case has been tried by the court upon waiver of a jury, and the court has decided it, and made special findings covering the ultimate facts of the case, additional findings cannot afterwards be made upon the request of a party. *Insurance Co. v. Boon*, 95 U. S. 117, distinguished.

These were three actions at law by Edward M. Lang and others against Clinton L. Baxter and others to recover damages for alleged infringement of patents. Upon trial by the court without a jury, judgment was rendered for the defendants. 63 Fed. 827. Plaintiffs now make an application to the court to make additional findings of fact. Denied.

Price & Stewart and George E. Bird, for plaintiffs.

James A. Allen and Symonds, Snow & Cook, for defendants.

COLT, Circuit Judge. Issues of fact in civil cases in any circuit court may be tried and determined by the court without the intervention of a jury, by filing a stipulation in writing waiving a jury. "The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." When an issue of fact is tried and determined by the court without the intervention of a jury, "the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment." Rev. St. §§ 649, 700. In these cases, which were heard together, a stipulation in writing, waiving a jury trial, was duly filed, and on August 4, 1894, the court rendered a decision, and directed that judgment be entered in each case in favor of the defendants, and judgments were entered accordingly. Finding of facts was made in each case by the court, and filed at the same time. On September 18, 1894, at the request of the plaintiffs, the judgments were vacated, and the plaintiffs were allowed 30 days from September 18, 1894, within which to present a bill of exceptions in each case, and the cases were continued until the next term. The plaintiffs then tendered the court a bill of exceptions in each case, which were exceptions to the finding of facts and conclusions of law made by the court. Subsequently, on October 23, 1894, these bills of exceptions were withdrawn, and the present hearing was had upon the application of the plaintiffs requesting the court to make a further special finding of facts and conclusions of law in each case. These are embodied in separate bills of exceptions. During the progress of the trial no exceptions were taken by either party to the rulings of the court, and therefore there is nothing in these cases, strictly speaking, upon which to found a bill of exceptions. Under these circumstances, the only question before the appellate court is whether the facts set forth in the special finding of the court are sufficient in law to support the judgment, and this may be reviewed on writ of error without any bill of exceptions.

The supreme court, in *Insurance Co. v. Boon*, 95 U. S. 117, 124, said:

"The act of congress which authorizes trials by the court (13 Stat. 500; Rev. St. §§ 649, 700) has enacted that the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury; and that, when the finding is special, the review by the supreme court upon a writ of error may extend to the determination of the sufficiency of the facts found to support the judgment. No bill of exceptions is required, or is necessary, to bring upon the record the findings, whether general or special. They belong to the record as fully as do the verdicts of a jury. If the finding be special, it takes the place of a special verdict; and, when judgment is entered upon it, no bill of exceptions is needed to bring the sufficiency of the finding up for review."

In *Allen v. Bank*, 120 U. S. 20, 7 Sup. Ct. 460, Mr. Justice Gray, speaking for the court (page 30, 120 U. S., and page 460, 7 Sup. Ct.), said:

"When a jury is waived in writing, and the case tried by the court, the court's finding of facts, whether general or special, has the same effect as the

verdict of a jury; and, although a bill of exceptions is the only way of presenting rulings made in the progress of the trial, the question whether the facts set forth in a special finding of the court, which is equivalent to a special verdict, are sufficient in law to support the judgment, may be reviewed on writ of error without any bill of exceptions."

The finding of facts is strictly analogous to a special verdict, and must only state the ultimate facts of the case.

In *Raimond v. Terrebonne Parish*, 132 U. S. 192, 10 Sup. Ct. 57, the supreme court, by Mr. Justice Gray (page 194, 132 U. S., and page 57, 10 Sup. Ct.), said:

"By the settled construction of the acts of congress defining the appellate jurisdiction of this court, either a statement of facts by the parties or a finding of facts by the circuit court is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances which may tend to prove the ultimate facts, or from which they may be inferred."

Although the court has made a special finding of facts in these cases, the plaintiffs' counsel contends that it is within the discretion of the court at this stage of the proceedings to make an additional finding of facts, upon the authority of *Insurance Co. v. Boon*, *supra*. All that was decided in that case (Justices Clifford, Miller, and Field dissenting) was that, where no finding of facts had been made, the court might supply the omission, or might, by an order at a subsequent term, correct the record by incorporating into it *nunc pro tunc* a special finding of the facts upon which the judgment had been rendered; and the power to make this correction was put upon the ground that courts always had jurisdiction over their own records to make them conform to what was actually done at the time. The court, on page 127, said:

"In so holding we do not depart from anything we have ever decided respecting the power of a court to make up a case, after the expiration of a term, for bills of exceptions not claimed at the trial. This is not a case of that kind. It is the case of a correction of the record; not merely an allowance of exceptions never taken, and necessary to have been taken, to bring an interlocutory ruling upon it."

In the finding of facts in these cases I have found what seems to me to be the ultimate facts.

In *Burr v. Des Moines Co.*, 1 Wall. 99, 102, the court said:

"The statement of facts on which this court will inquire if there is or is not error in the application of the law to them is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case."

The application to the court in these cases to make further findings of facts and conclusions of law must be denied, and judgment should be entered in each case for the defendants, and it is so ordered.

LOWENSTEIN v. EVANS et al.

(Circuit Court, D. South Carolina. October 9, 1895.)

1. MONOPOLIES AND TRUSTS—MONOPOLY BY STATE.

The act of July 2, 1890 (26 Stat. 209, c. 647), to protect trade and commerce against unlawful restraints and monopolies, is not applicable to the case of a state which, by its laws, assumes an entire monopoly of the traffic in intoxicating liquors (Act S. C. Jan. 2, 1895). A state is neither a "person" nor a "corporation," within the meaning of the act of congress.

2. SAME—NECESSARY PARTIES—JURISDICTION OF FEDERAL COURTS.

Where a person brings an action under section 7 of the anti-trust law of July 2, 1890, against the officials of a state, to recover damages for acts done under authority of a state statute, which gives the state an entire monopoly of the traffic in intoxicating liquors (Act S. C. Jan. 2, 1895), the state itself is a necessary party thereto, and consequently the federal courts would have no jurisdiction of the action.

This was an action brought under the seventh section of the act of congress of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies."

The complaint was as follows:

The complaint of the above-named plaintiff respectfully shows to this court: (1) That the plaintiff, Julius Lowenstein, is a citizen of the state of North Carolina, and is engaged in business in Statesville in said state, under the name and style of Lowenstein & Co. (2) That the defendants are each and all of them citizens of the state of South Carolina. (3) That the defendants John Gary Evans, D. H. Tompkins, and James Norton, styling themselves a "State Board of Control," and the defendant Frank M. Mixson, styling himself "State Commissioner," together with divers other persons, to the plaintiff unknown, prior to the time hereinafter mentioned, under the pretended authority of a certain act of the legislature of the state of South Carolina, entitled "An act to further declare the law in reference to, and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquids or liquors within the state of South Carolina, and to police the same," approved January 2, 1895, combined to monopolize a certain part of the trade and commerce among the states and foreign nations, to wit, the trade in alcoholic liquids and liquors, including whiskys, brandies, wines, ales, and beer, to prevent the purchase of such whiskys, brandies, wines, ales, and beer from citizens of other states and foreign nations, and to prevent the importation thereof into this state in restraint of the trade and commerce between the states and foreign nations, and to discriminate against the products of other states and the citizens of other states, in favor of the products of the state of South Carolina and the citizens of said state, which said legislative enactment the plaintiff is advised and therefore alleges is null and void, in this: that the same is in contravention of an act of congress entitled "An act to protect trade and commerce against unlawful restraint and monopoly," approved July 2, A. D. 1890, in that the said legislative enactment undertakes to and does create a monopoly in the traffic in alcoholic liquors, and operates as a restraint upon the trade among the states and foreign nations in such traffic. (4) That the plaintiff now is, and was at the time hereinafter mentioned, engaged in the business of a manufacturer and wholesale dealer in spirituous liquors at Statesville, in the state of North Carolina, and in the prosecution and conduct of his said business, and, in the exercise of the right to engage in interstate commerce, he had from time to time sold, shipped, and delivered whiskys and other liquors to persons residing in states, other than the state of North Carolina; that in pursuance of his said business, and in exercise of the rights conferred by and reserved in the constitution and laws of the United States, on the 27th day of May, A. D. 1895, he delivered one barrel of whisky, of the value of fifty-seven and

$\$38/100$ dollars, to the Southern Railway Company, at Statesville, in the state of North Carolina, to be transported by said company and connecting lines to Charleston, in the state of South Carolina, marked and consigned to Thomas Hartigan, but the title to said property still remained in the plaintiff. (5) That on the 29th day of May, A. D. 1895, while the said barrel of whisky was in transit, at Columbia, in the state of South Carolina, and within this district, certain persons, to the plaintiff unknown, without warrant of law, entered the cars of the common carrier so engaged in the transportation of said whisky and of interstate commerce, and then and there took the said whisky, and carried the same away, and thereafter delivered and caused said whisky to be delivered unto the defendant Frank M. Mixson, who thereupon, and in furtherance of said combination and monopoly, and in restraint of the trade and of interstate commerce, received the same, and has retained and detained the same from the plaintiff. (6) That the wrongful and unlawful acts of the said persons unknown, and of the said Frank M. Mixson, as aforesaid, in the seizure and detention of said whisky, was done in pursuance of the combination and in furtherance of the monopoly aforesaid, and by and under the directions of the other defendants, intending thereby to deter and prevent the plaintiff from engaging in trade with the citizens and residents of the state of South Carolina, and to that extent to prevent the plaintiff from engaging in interstate commerce, and for the purpose of monopolizing the trade in spirituous liquors, in contravention of the act of congress aforesaid. (7) That, by reason of the unlawful seizure and detention of said whisky, the plaintiff has been greatly injured, to his damage fifty-seven and $\$38/100$ dollars. Wherefore the plaintiff demands judgment against the defendants for three times the amount of his said damage, to wit, one hundred and seventy-one and $\$4/100$ dollars, for a reasonable attorney's fee, and for his costs, as provided in the act of congress aforesaid.

Murphy, Farrow & Legare, for plaintiff.

Wm. A. Barber, Atty. Gen. of South Carolina, and C. P. Townsend, Asst. Atty. Gen., for defendants.

SIMONTON, Circuit Judge. This is an action brought under the seventh section of the act of congress approved July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies" (26 Stat. 209, c. 647). The section is in these words:

"Any person who shall be injured in his property or business by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained and the costs of the suit, including a reasonable counsel fee."

The act declares:

"Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations is hereby declared illegal."

The cause of action set out in the complaint is on this statute of 1890, and seeks the special remedy provided in the statute. The relief is sought, not because the rights of the plaintiff were violated, but because they were violated in order to enforce and perpetuate a monopoly declared illegal by this statute. The defendants interpose a demurrer on two grounds: First, that on the face of the complaint this court has no jurisdiction of the matters and things forming the subject of this action; second, that from the face of the complaint it does not state facts sufficient to constitute a cause of action cognizable in this court.

The Jurisdiction.

The first ground of demurrer was sustained in argument, because this is an action against the state, and the state is a necessary party thereto. The act of 1890 strikes at contracts, combinations, and conspiracies in restraint of or to monopolize trade and commerce among the several states or with foreign nations. *U. S. v. E. C. Knight Co.*, 156 U. S. 17, 15 Sup. Ct. 249. The complaint charges that the defendants Evans, Tompkins, and Norton, styling themselves a "State Board of Control," and Mixson, styling himself "State Commissioner," together with divers other persons to the plaintiff unknown, under the pretended authority of an act of the legislature of South Carolina, "giving the title of the act," combined to monopolize a certain part of the trade and commerce among the states and foreign nations, to wit, the trade in alcoholic liquids and liquors with citizens of other states and foreign nations, to prevent their importation into this state, and to discriminate against the products and citizens of other states in favor of the products and citizens of the state of South Carolina. This act of the legislature of South Carolina, the complaint avers, is void as in contravention of the act of 1890.

Does this act of the legislature of South Carolina authorize contracts or combinations in form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations? Does it create a monopoly, and in whom? The answer to this question must be found in the act. It is entitled "An act to further declare the law in reference to and further regulate the use, sale, consumption, transportation and disposition of alcoholic liquids or liquors within the state of South Carolina and to police the same," approved January 2, 1895. It is impossible after examining this act to avoid the conclusion that it declares in the state the monopoly in the purchase and sale of alcoholic liquors. Not only so, but it protects this monopoly in the state in every way possible and by the most drastic methods. Every attempt to interfere with this monopoly by the receiving, keeping, vending, giving away, or mercantile use of alcoholic liquors, is made an offense against the state, punishable by criminal proceedings in her name in her courts. The governor, secretary of state, and comptroller general are officially charged with the direction and enforcement of this monopoly. The monopoly is not given to them. They have no pecuniary interest whatever in it. All the profits of the monopoly go to the state, to be used and applied for public purposes,—increase of her revenue. The close analysis made of the act by the counsel for the plaintiff shows that this was their conviction. They find that its manifest object is to raise revenue, and not to prevent the consumption of liquor, except that owned and furnished by the state; that \$50,000 was appropriated from the public treasury for the purpose of purchasing liquors and to enable the state to go into the business of buying and selling intoxicating liquors; that liquors are not contraband, except when not purchased from a dispenser,—that is, one who holds and sells for the state; that the act creates a monopoly. So, also, Chief Justice McIver, speaking for the majority of the supreme court

of South Carolina, in *McCullough v. Brown*, 41 S. C. 220, 19 S. E. 458, dissecting the dispensary law, says:

"The manifest object of the act is that the state shall monopolize the entire traffic in intoxicating liquors, to the entire exclusion of all persons whomsoever, and this, too, for the purpose of profit to the state and its governmental agency. * * * We think it safe to say that it is an act forbidding the manufacture or sale of intoxicating liquors as a beverage within the limits of this state by any private individual, and vesting the right to manufacture and sell such liquors in the state exclusively, through certain designated officers and agents."

This act of the legislature of South Carolina evidently does not create in nor give to any individuals the monopoly. It gives it wholly and entirely to the state.

Now, the question to be decided is not as to the constitutionality of this act, nor whether it be in the lawful exercise of the police power, but whether, in declaring and asserting this monopoly in herself, and in assuming and controlling its enforcement, the state comes within the provisions of the act of congress of 1890. That act, as has been seen, declares illegal every contract, combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states or with foreign nations. But by this act the state makes no contract, enters into no combination or conspiracy. She declares and asserts in herself the monopoly in the purchase and sale of liquors. The section of the act of 1890, sued upon, gives a right of action for any injury by any other person or corporation. The state is not a corporation. A corporation is a creature of the sovereign power, deriving its life from its creator. The state is a sovereign having no derivative powers, exercising its sovereignty by divine right. The state gets none of its powers from the general government. It has bound itself by compact with the other sovereign states not to exercise certain of its sovereign rights, and has conceded these to the Union, but in every other respect it retains all its sovereignty which existed anterior to and independent of the Union. Nor can it be said that the state is a person in the sense of this act. Even were this the case, as the monopoly now complained of is that of the state, no relief can be had without making the state a party, and this destroys the jurisdiction of this court. No opinion whatever is expressed as to the right of the plaintiff for violation of his common-law rights. In this proceeding and under the act of 1890, he must seek his remedy against the holder of the monopoly; and, as in the present case the monopoly is in the state, this court has no jurisdiction. The demurrer is sustained, and the complaint is dismissed.

As this case has gone off on the demurrer, a copy of the complaint is filed as an exhibit to the opinion.

**GLIDDEN & JOY VARNISH CO. OF OHIO v. INTERSTATE NAT. BANK
OF KANSAS CITY.**

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 529.

1. PRINCIPAL AND AGENT—AUTHORITY TO SIGN NOTES.

The G. Co., a manufacturing and trading corporation located in Ohio, had a branch in Missouri, which was conducted by one D., as general agent and manager, and at which a large business was carried on, in the purchase and working up of raw material, and the sale of the finished product over a large territory. D was left in full control of all departments of this business conducted in Missouri, and managed all its affairs, financial and other, with the knowledge and consent of the officers of the G. Co., and generally without directions or oversight by them. He reported to the G. Co. from time to time, and some of his reports showed entries of "bills payable." Upon the trial of an action against the G. Co. upon notes signed in its name by D., as treasurer, the president of the G. Co. testified that he knew that D. was signing all the bills payable made by the Missouri concern for goods purchased; that he supposed it was the natural order of things for D. to procure the discount of bills receivable by indorsing them as treasurer of the G. Co.; and that, if money were required in an emergency, he supposed D. would be expected to make and procure the discount of the company's notes. *Held*, that D., being left in the absolute control and management of the whole business of the G. Co. in Missouri, to act on his discretion, had authority to do whatever a reasonably prudent merchant or manufacturer would do, and, accordingly, to sign promissory notes in the name of the G. Co. Per Caldwell and Thayer, Circuit Judges. Sanborn, Circuit Judge, dissenting.

2. SAME.

Held, that the course of the business, the reports of D. showing notes made by him, and the testimony of the president of the G. Co. were sufficient evidence to authorize a finding that D. was impliedly authorized to sign notes, though, merely as general manager of the business, he would not have such authority. Per Sanborn, Circuit Judge.

**In Error to the Circuit Court of the United States for the Western
District of Missouri.**

This suit was brought by the Interstate National Bank of Kansas City, Kan., the defendant in error, against the Glidden & Joy Varnish Company, the plaintiff in error, an Ohio corporation, on four promissory notes (one dated May 6, 1893, for \$3,000; one dated May 29, 1893, for \$2,000; one dated June 16, 1893, for \$2,000; and one dated July 1, 1893, for \$3,000), each due 90 days after date, and signed, "The Glidden & Joy Varnish Company, Geo. E. Dudley, Treas." These notes are renewals of notes originally given in January, February, March, and December, 1891. The defendant pleaded non est factum. This was the single issue to be tried, and it turned on the question whether George E. Dudley had authority to execute the notes in the defendant's name. There were two corporations,—one, the Glidden & Joy Varnish Company, a corporation of the state of Ohio, and the defendant in this action; and the other, the Glidden & Joy Varnish Company of Kansas City, Mo. The case hinges on the relation these companies bore to the business out of which the indebtedness arose, and on the relation George E. Dudley sustained to each of these companies, and particularly to the defendant company, at the time the notes in suit were executed.

The plaintiff in error, the Glidden & Joy Varnish Company, was organized in Ohio, March 27, 1883, with a capital stock of \$100,000, which was afterwards increased to \$200,000, and was held chiefly by the following persons, in about the amounts named, namely: Francis H. Glidden, \$70,000; F. K. Glidden,

\$50,000; C. A. Grasselli, \$30,000; F. A. Glidden, \$16,000; O. M. Stafford, \$12,500; W. J. Glidden, \$2,600; Emily Meaher, \$7,000; Mary A. McKay, \$5,000; and the rest was held by various persons, in small amounts. The officers of the Ohio company were F. H. Glidden, president; F. A. Glidden, vice president; F. K. Glidden, secretary and treasurer; W. J. Glidden, assistant superintendent; and George E. Dudley was a stockholder, and a member of the board of directors and of the executive committee. The Glidden & Joy Varnish Company of Kansas City, Mo., was organized in Missouri, August 10, 1887, with a capital stock of \$20,000, and its officers were F. K. Glidden, president; William F. Joy (a brother-in-law of F. H. Glidden), vice president; George E. Dudley, secretary and treasurer. Both corporations were organized to conduct the same kind of business. The Ohio company established in Kansas City a branch of its business in 1885, and put George E. Dudley in charge of it, as general agent and manager. He conducted the business at that point and in that capacity until the formation of the Missouri company, in August, 1887, at which time he became a stockholder and director of that company, and its secretary and treasurer, and was made sole agent and manager, for the purpose of conducting its business. The object of incorporating the Missouri company is not very clear. Its stockholders and officers were substantially the same as those of the Ohio company, and it carried on the same business that Dudley had previously carried on as agent and manager of the Ohio company in Kansas City, and conducted it in the same manner. Whatever may have been the object of the Ohio company, or—what is the same—of its stockholders, in organizing the Missouri company, it was afterwards practically, though not technically, dissolved; and the Ohio company acquired all its property, and succeeded to its business, which was thereafter conducted by Dudley, as agent and manager of the Kansas City branch of the Ohio company's business, precisely as it had been before the organization of the Missouri company. These facts appear from the records of the two companies, the correspondence of the Ohio company, and the other testimony in the case.

On January 27, 1891, at a meeting of the stockholders of the Ohio company, this resolution was unanimously adopted:

"The question of purchasing the property of, and absorbing, the Glidden & Joy Varnish Company of Kansas City, was taken up; and after due consideration the following resolution (as stockholders' action) was offered by C. A. Grasselli, and seconded by O. M. Stafford: 'Resolved, that the Glidden & Joy Varnish Company of Cleveland, Ohio, will purchase the property of the Glidden & Joy Varnish Company of Kansas City, Missouri (as shown by balance sheet and record book of Jan. 27, 1891), upon the following terms, viz.: All the capital stock of the Glidden & Joy Varnish Company of Kansas City, Missouri, shall be surrendered and canceled, except one share to each director of that company, the which three shares shall be by each of them transferred to the Glidden & Joy Varnish Company of Cleveland, Ohio, to be held in trust to keep alive the charter of said Glidden & Joy Varnish Company of Kansas City, Missouri. The Glidden & Joy Varnish Company of Cleveland, Ohio, shall then issue to each stockholder of said Glidden & Joy Varnish Company of Kansas City, Missouri, certificates of stock of said Glidden & Joy Varnish Company of Cleveland, Ohio, to the same amount as he shall have so surrendered stock in said Glidden & Joy Varnish Company of Kansas City, Missouri.'"

The directors of the Ohio company on the same day ratified this resolution, in these words:

"The resolution was adopted by the stockholders at their meeting this day recorded, pertaining to purchase of property of Glidden & Joy Varnish Company of Kansas City, having been unanimously indorsed at said stockholders' meeting. It was moved by F. K. Glidden, and seconded by O. M. Stafford, that the directors hereby recognize, ratify, and approve such stockholders' action, and that same be spread upon the records of this company. Unanimously carried.

F. H. Glidden, Pres't.
"F. K. Glidden, Sec'y."

On the same day the stockholders of the Missouri company unanimously passed the following resolution to sell all the property of the Missouri company to the Ohio company:

"Resolution offered by F. H. Glidden, and seconded by F. K. Glidden: 'Resolved, that this company [the Glidden & Joy Varnish Company of Kansas City, Missouri] will sell, and does hereby sell, all its property to the Glidden & Joy Varnish Company of Cleveland, Ohio, upon the following terms: All the capital stock in this company to be surrendered and canceled, except one share to each director, which three shares shall be transferred to the Glidden & Joy Varnish Company of Cleveland, Ohio, to be held in trust to keep alive the charter of the Glidden & Joy Varnish Company of Kansas City, Missouri. The Glidden & Joy Varnish Company of Cleveland, Ohio, shall thereupon issue to each stockholder of the Glidden & Joy Varnish Company of Kansas City stock in the Glidden & Joy Varnish Company of Cleveland, Ohio, to the same amount as he shall have so surrendered in the Glidden & Joy Varnish Company of Kansas City, Missouri. The Glidden & Joy Varnish Company of Kansas City, Missouri, hereby accepts the propositions of the Glidden & Joy Varnish Company of Cleveland, Ohio.'"

In pursuance of this action of the companies, respectively, all the stock of the Missouri company, except 3 shares, aggregating \$300, was canceled and destroyed, and stock in the Ohio company issued therefor to the holders thereof. In this way, Dudley became the owner of 50 shares of stock in the Ohio company. This purchase and transfer of the property of the Missouri corporation to the Ohio corporation was to be treated as made on January 1, 1891, and was actually so treated by both companies, though the date of the consummation of the transaction, as disclosed by the records, was in fact January 27, 1891. All the property of the Missouri company passed to and vested in the Ohio company; being entered on the books of the latter company as its own property, and thereafter carried thereon as its assets. Prior to this sale the books of the Missouri company were kept at Kansas City, where its office and place of business was fixed by its articles of incorporation; but, after the sale of its property and business to the Ohio company, its books were taken to Cleveland, Ohio, and after that time there were no more meetings of the stockholders or directors of the Missouri company.

At a meeting of the directors of the Ohio company on the 27th day of January, 1891, the following proceedings took place:

"Minutes of directors' meeting of the Glidden & Joy Varnish Company of Cleveland, Ohio, held at the office of the company on the twenty-seventh day of January, 1891, immediately after the adjournment of the stockholders' meeting [this was the stockholders' meeting at which the property of the Missouri company was purchased]: There were present F. H. Glidden, C. A. Grasselli, O. M. Stafford, F. K. Glidden, F. A. Glidden, G. E. Dudley, all of whom have duly qualified as such directors since the foregoing stockholders' meeting. Moved and seconded that F. H. Glidden be chairman of the directors' meeting, and F. K. Glidden secretary of same. Carried. There being present a quorum for the transaction of business, it was unanimously decided to proceed with the election of officers for 1891. It was moved by C. A. Grasselli, and seconded by O. M. Stafford, that the officers of this company as of 1890 be re-elected for the year 1891. Unanimously carried. * * * It was also moved and seconded that the executive committee of 1890 be re-elected for the year 1891, and that Geo. E. Dudley be added to the same. Same was carried. * * * Moved by F. A. Glidden, and seconded by C. A. Grasselli, that the salary of George E. Dudley, as manager of the Kansas City, Missouri, branch, be fixed at \$2,000 for the year 1891."

At a directors' meeting held July 7, 1891, the following, among other, proceedings were had:

"It was further moved and seconded that the matter of taxation of corporations in Missouri, as mentioned in Geo. E. Dudley's letter of July 1, 1891, as pertaining to the Kansas City department, be referred to the executive committee of this [Cleveland] company, for the purpose of taking legal advice on the subject. Same was carried.

F. H. Glidden, Pres't.
"F. K. Glidden, Sec'y."

"At a directors' meeting held January 26, 1892, at which F. H. Glidden, F. K. Glidden, W. J. Glidden, George E. Dudley, C. A. Grasselli, and O. M. Stafford, by his proxy, F. K. Glidden, were present, the following, among other, proceedings were had: Moved by C. A. Grasselli that salary of Geo. E. Dudley, as manager of Kansas City branch, be fixed at \$2,500 for the year 1892. Carried.

F. H. Glidden, President.

"F. K. Glidden, Sec'y.

"W. J. Glidden, Act'g Sec'y."

Numerous letters were put in evidence, from which it appears that, when Western customers applied to the Ohio company, they were invariably referred to "our Kansas City office," "our Kansas City department," or "our Kansas City branch." The following is a sample of one of these letters:

"The Glidden & Joy Varnish Company. Cable Address, Copal, Cleveland.
Branches: Baltimore, Boston, Chicago, Kansas City, New
Orleans, St. Louis, New York.

"Cleveland, O., Mar. 10, 1893.

"J. J. Wiley, Foreman Painter, International & Great Northern R. R. Co., Palestine, Texas—Dear Sir: We are in receipt of your favor without date, requesting sample of our Surfacene. We have referred your letter to our Kansas City office, from which point the matter will have attention. * * *

"Yours, truly,

The Glidden & Joy Varnish Co.,

"F. K. Glidden, Sec'y."

It will be observed that, in the enumeration of its branches on its letter heads, the defendant names Kansas City as one of them.

After the absorption of the Missouri company by the Ohio company, Dudley, as manager of the Kansas City branch, made reports of the business he was conducting for that branch to the Ohio company, from time to time, which reports showed, among the liabilities of the Kansas City branch, "bills payable." Dudley had complete charge of the funds of the company at Kansas City. He made all purchases and sales, received and paid out all moneys, discounted notes, and performed all the functions of local treasurer of the Ohio company for the Kansas City branch. He was in fact the local treasurer of the Ohio company at Kansas City. He acted as such, and signed his name as such. The following are excerpts from the testimony of F. H. Glidden, president of the Ohio company: "Q. Who stayed out here, up to January 27, 1891, running the Missouri business? A. Mr. Dudley did. Q. Who had charge of the bank accounts at Kansas City? A. Mr. Dudley. Q. Who drew all the checks that were drawn? A. Mr. Dudley. Q. Who signed all the bills that were payable by the concern out here, in Missouri? A. Mr. Dudley. Q. Did you know he was signing them? A. Yes, sir. * * * Q. Who was there here, at Kansas City, to sign the paper for the company, if a paper was necessary to be signed? A. George E. Dudley. Q. None of the officers back there in Cleveland pretended to ever sign a paper, did you, during that time, for the Kansas City concern? A. I think not. * * * Q. Now, then, after this transfer in January, 1891, how did you do the business,—the same way? A. After 1891? Q. After January, 1891, when you made this transfer? A. We conducted the business the same way, up to the assignment. Q. It was just run along in the same way? A. Yes, sir. Q. Dudley was left out here again, with full swing? A. Yes, sir. Q. If there was anything about the Kansas City branch that needed signing, who was the man that signed it? A. Mr. Dudley. * * * Q. After January, 1891, so far as any dealings with the Kansas City concern is concerned, Dudley was doing it just as he was doing it before? A. So far as I know, he was. * * * Q. Now, then, when the statement of February, 1892, came, there was on that the words, 'Bills payable, \$2,020.50'? A. Yes, sir. Q. That showed that the Glidden & Joy Varnish Company, the Kansas City concern,—however we may differ about whether it is a Missouri or a Cleveland company,—the Kansas City concern owed that much in notes? A. Yes, sir. Q. Who was there to make these notes? A. They were made by Geo. E. Dudley. Q. There wasn't anybody else to make them? A. Nobody else to make them. He had the management. Q. When you got that account

sent on to you, with that information, that was notice to you that Dudley had made that amount of notes? Now, here is a statement of July 1, 1892, 'Bills payable, \$3,519.25.' A. I see it. Q. That showed that the Kansas City concern, out here, owed that much money in notes? A. Yes, sir. Q. There was nobody to make those notes, except George E. Dudley? A. No, sir. Q. Here is, 'August, 1892, bills payable, \$1,219.29'? A. Yes, sir. Q. The same observation applies to that? A. Yes; it also shows there is \$5,000 cash. * * * Q. Of necessity, a concern of this kind, doing business in Kansas City, and extending a line of credit to customers, had to have a bank and bank account? A. It did. Q. And the ordinary way to keep a bank account is to have a check book, with stubs to show what checks are drawn? A. Yes, sir. Q. During all this course of years, did your people in Cleveland send out here, to look through those stubs of checks, to see what was becoming of the money drawn from the bank? A. I think my son was out here. Q. You never came? A. I never came for that purpose. I have been here. Q. When you were here, did you ever undertake to do that? A. No, sir; I did not. Q. When you were here, did you ever undertake to examine the bank accounts? A. I did not. * * * Q. You knew they were doing business with some banks? A. I did, of course. * * * Q. I would like you to define to the jury what you think Dudley could do and could not. A. The jury understands very well, and I guess you do, that you cannot conduct a business without having some treasurer or manager of that business; and, if he did any business, it was for the purpose of making money, I suppose, and in order to make money he would have to make those terms that all people do in mercantile business. He would have to sell his goods on credit and time to his customers. He would do the same as he would in Ohio, to get all the bills receivable he could, that we might use them if we had occasion to. That is what he did. When Dudley got those notes, and wanted money, I suppose it was in the natural order of things to take them to the bank, and put the indorsement on as treasurer of the Glidden & Joy Varnish Company, and discount them, and get the proceeds; but to make new notes and get loans from the bank, we never knew he ever got a dollar. Q. I suppose, in your mercantile business, as you said a little while ago, that if you got along to the time you had to pay a coal bill, and didn't have any customers' paper, and needed a little money, you would go to the bank, and have the money advanced? A. We would, at home. Q. Would he, out here? A. I think he would. Q. No one else was here, and Dudley was the man that was expected to do it? A. I think so." There was much other testimony tending to show that, after the purchase of the property of the Missouri company by the Ohio company, the Kansas City business was conducted as a branch of the business of the Ohio company by Dudley, as manager for that company. F. K. Glidden, then secretary of the Ohio company, and who had been president of the Missouri company, came to Kansas City early in August, 1893, and found that Dudley had left the city, and was behind in his accounts. While he was in Kansas city, Dudley returned, and with his usual signature, "The Glidden & Joy Varnish Company, Geo. E. Dudley, Treas.," drew a check in Glidden's favor on the bank account in the Interstate Bank. Thereupon, Glidden sued out an attachment in favor of the Ohio company, and against the Missouri company, and seized all the property of the concern in Missouri, which consisted of \$12,000 merchandise and \$25,000 in accounts. After suing out this attachment, as president of the Missouri company, he made an assignment for the benefit of its creditors to his brother-in-law, James K. Meaher. The assignee took possession of all the property in Missouri, and sold it at assignee's sale, and one of the Gliddens became the purchaser for the sum of \$5,000. The jury found the issue for the plaintiff. There was judgment on the verdict, and the defendant sued out this writ of error.

R. E. Ball and J. E. Runcie, for plaintiff in error.

Frank Hagerman and Henry Wollman (Alexander New, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

CALDWELL, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Waiving the technical objections to the sufficiency in form of the exceptions taken at the trial and of the assignments of error in the brief, we will proceed to dispose of the case on its merits.

For some reason, which we are unable to comprehend, objections were taken all through the trial to the introduction of all evidence tending to show that it was the Ohio, and not the Missouri, corporation that was doing business at Kansas City after January, 1891. Objection was also taken to all evidence tending to show that Dudley had authority, as manager of the Ohio company's Kansas City branch, to borrow money and execute negotiable notes therefor. One ground of this objection was that Dudley's authority, as manager, to execute notes for borrowed money, could only be shown by some formal order or resolution of the stockholders or board of directors of the defendant company. A further ground of this objection was the erroneous assumption of fact that the notes sued upon were not executed in the name of the defendant company. This assertion is made all through the brief of the counsel for the plaintiff in error, but it is an error of fact. The charter name of the Missouri company was the "Glidden & Joy Varnish Company of Kansas City, Missouri." The charter name of the Ohio company was the "Glidden & Joy Varnish Company," and the notes sued on are executed in this name.

The alleged error discussed at greatest length, and the one apparently chiefly relied upon, is that the court refused, at the close of all the evidence, to give the jury a peremptory instruction to return a verdict for the defendant. The contention of the plaintiff in error is (1) that it was the Missouri, and not the Ohio, company that was doing business at Kansas City; and (2) that, even if the Ohio company was carrying on the business at Kansas City, its manager, Dudley, had no authority to borrow money and execute negotiable notes therefor, in the name of that company. These questions of fact were properly submitted to the jury, under instructions to which, as a whole, no just exceptions can be taken. Upon a careful reading of all the evidence on these issues, it is obvious that the court below did not err in refusing to instruct the jury to return a verdict for the defendant. There was abundant evidence, we think, which necessitated the submission of the case to the jury. It is indisputable, from the evidence, that after the sale of its property to the Ohio company, and the cancellation of all its stock, except a nominal sum, "to keep alive" its charter, the Missouri company did no business in Kansas City or elsewhere. It had no property, no capital, no credit, and no manager. The business at Kansas City, from and after the date of this transaction, was the business of the Ohio company, and was conducted by Dudley, as its manager. After that time, Dudley was the manager of the Ohio company. That company fixed and paid his salary as manager, and it was to that company that he made his reports and returns. After the sale of its property and the cancellation of its stock, the Missouri company was nothing more

than a dummy. It had probably a technical legal existence, through the three shares of uncanceled stock held by the Ohio company, not as capital stock for any business purposes, but "in trust to keep alive the charter" of the company. Its business career was closed. If not dead, it was in a comatose condition, closely bordering on death. It remained in this condition until 1893. In that year it was discovered that the Kansas City branch of the Ohio company, owing to the general depression in business then prevailing throughout the country, or to the mismanagement or dishonesty of Dudley, or from some other cause, was so much involved that its assets were probably insufficient to pay its debts. So long as the business of this branch was prosperous and profitable, the Ohio company received and appropriated the profits, and nothing was heard of the dormant Missouri company; but, when it was discovered that the business of this branch was likely to entail a loss, the Ohio company at once denied that it was a branch of its business, and disclaimed responsibility for its debts. It set up the claim that it was the Missouri company that had been conducting the business at Kansas City all the time, and that that company alone was responsible for the debts of the concern; and, claiming itself to be a creditor of the Missouri company, it attached all the property in Missouri, as the property of that company. Immediately following this attachment, F. K. Glidden, then secretary of the Ohio company, and the last president of the Missouri company, but who had performed no official act as president of that company since it sold its property to the Ohio Company, in 1891, appeared in Kansas City, and, assuming that the property there was the property of the Missouri company, proceeded, as president of that company, to make an assignment of the property for the benefit of the creditors of that company, of which the Ohio company was alleged to be one. It is needless to say that the attachment of its own property, and the assignment of property that did not belong to the assignor, did not strengthen the claim of the plaintiff in error. As we have seen, the Ohio company retained, as trustee, the three shares of uncanceled stock of the Missouri company, "to keep alive the charter" of that company. For whom the Ohio company was to act as trustee, in respect of these three shares of stock, does not appear, and the nature of the trust is not disclosed, further than that it was "to keep alive the charter." But it can make no such use of that charter as is here attempted. It cannot, when it is prosperous, claim the Kansas City business as its own, and, when it is unprofitable, claim that it is the business of the Missouri company. The law will not countenance any such thimblerrigging. One corporation cannot avoid the payment of its just obligations by putting forward as the debtor another corporation, similar in name, which, if it has a legal existence at all, exists only in name, and as a mere dummy or scapegoat for the debtor corporation. The Ohio company is now seeking, not only to resuscitate the Missouri company, but to give to that resuscitation a retroactive effect, so that the debts and obligations created by the Ohio company while it carried on the Kansas City business and the Missouri company slept shall be treated as the

debts and obligations of the latter company. One corporation cannot keep another corporation under its management and control, and use it as a scapegoat for its debts whenever it finds it desirable or profitable to do so. The liability of the plaintiff in error for the debts of the Kansas City branch does not arise from the fact that it or its stockholders owned the uncanceled stock of the Missouri company, or, for that matter, all the stock of the Missouri company. Its liability is grounded on the fact that after the sale of its stock and property to the Ohio company the Missouri company went out of business, and that thereafter the Ohio company owned the property, and conducted the business through its manager, Dudley. It is quite immaterial to the decision of this case what was the legal effect of the transaction between the two companies, whereby the Ohio company acquired the property of the Missouri company, and the stock of the latter company, save a nominal amount, was canceled. The question here is not whether that transaction was valid, or whether it disabled the Missouri company from further conducting business; but the question is, did that company in fact continue to conduct and carry on the business at Kansas City after the sale of its property to the defendant and the cancellation of its stock? Upon that question there is no room for contention. It is perfectly clear, upon the evidence, that from the date of that transaction the Ohio company carried on the business at Kansas City, and that it is responsible for the debts contracted by its manager in the control of that business, and that the circuit court should have so told the jury.

The remaining controverted question of fact, namely, whether Dudley, as manager of the Kansas City business for the Ohio company, had authority to borrow money, and execute the negotiable promissory notes of the defendant company therefor, is equally clear, upon the evidence. From the time the defendant company established a branch house in Kansas City, in 1885, down to the time the business was closed out, in 1893, Dudley was the sole manager of that business. His relation, as sole manager and director of the business, was the same, whether the business was carried on for the Ohio company or for the Missouri company. He had all the time the entire and absolute control and management of the business. The officers of the company who resided at Cleveland, Ohio, never exercised any control or supervision over the business, and only visited Kansas City at long intervals. Dudley borrowed money, discounted paper, executed all contracts, hired and discharged all employes, attended to the banking business, and signed all notes and checks. No one was over him. None of the officers of either company, who resided in Cleveland, Ohio, ever paid any attention to the business at Kansas City. A more absolute and exclusive management and control of a business cannot be conceived of than that exercised by Dudley. The business was important and extensive. It involved the purchase and manufacture of raw materials, and the sale of the manufactured product. There were four traveling salesmen, who were employed by Dudley, and received their orders and instructions from and reported to him. These traveling salesmen knew of no other person having authority

in or about the business. The territory allotted to the Kansas City branch embraced substantially all the country west of the Mississippi river to the Pacific coast. An agent and manager left, as Dudley was, in the sole and exclusive management, direction, and control of such an extended manufacturing and commercial business, must necessarily exercise very large powers. It is conceded that he might buy and sell on credit, and discount bills receivable to raise funds to pay debts and purchase goods. Mr. Glidden, the president of the Ohio company, says that, when Dudley got notes for goods sold, "I suppose it was in the natural order of things to take them to the bank, and put the indorsement on as treasurer of the Glidden & Joy Varnish Company, and discount them, and get the proceeds." But it is contended he could not borrow money for any purpose, however pressing the necessity therefor. It is conceded that he might lawfully execute the company's negotiable notes for stock or materials, and make them payable in bank. Suppose, upon the maturity of such notes, he had no funds in hand to meet them, and could not raise funds for that purpose by the discount of bills receivable, or that he had no bills to discount. Was he bound to let the notes go to protest, although he could borrow the money from the bank to pay them, for the asking? Or suppose a favorable opportunity offered to buy stock at advantageous figures for cash. What would a prudent man, whether owner or manager, conducting a large mercantile or manufacturing business, do under like circumstances? Universal usage among all classes of business men engaged in manufacturing or commercial pursuits answers the question. Mr. Glidden himself admits that, in an emergency, Dudley had the right to apply to the bank for cash advances; and, if he had this right, he had, of course, the right to give a note for the advance. Left as he was in the absolute control and management of this whole business, to act according to his own best judgment and discretion, Dudley had authority to do whatever a reasonably prudent merchant or manufacturer would have done under like circumstances and conditions. His powers were commensurate with the reasonable and necessary requirements of the business committed to his sole and exclusive management. Among the highest duties imposed upon him by his position was the duty of upholding and maintaining the credit of the concern. The protest of the paper of a manufacturing and commercial corporation, like that for which Dudley was manager, would instantly destroy its credit, if it did not throw it into bankruptcy. Dudley was sole manager of the financial as well as all other departments of the Kansas City branch. The contention that the general agent and manager of a commercial and manufacturing business, such as Dudley was conducting, has no power to borrow money, and execute notes therefor, to avert such disasters, does not deserve serious consideration. If such an agent, having it in his power to borrow money to maintain the credit of the concern and avert insolvency, should neglect or refuse to do so, he would be guilty of a gross dereliction of duty to his principal. A general manager, having the exclusive management and conduct of a manufacturing and commercial business, and admittedly having the power to purchase stock, contract

debts, and discount notes, may, when there is occasion for so doing, borrow money to pay debts or purchase goods, and give his principal's negotiable note therefor. The authority of such a manager to borrow money does not have to be shown by an express order or resolution of the stockholders or board of directors of the company. It may be implied from the general powers of such a manager, and the necessities and usages of the business. This implication would seem to be well-nigh conclusive, when, as in this case, the manager has the sole and exclusive control and management of a branch house of a mercantile and manufacturing corporation whose domicile is in a distant state, and whose officers never assumed to manage or conduct the business of the branch house, or to place any limitations on the powers of its manager, in any respect. In *Scofield v. Parlin & Orendorff Co.*, 10 C. C. A. 83, 61 Fed. 807, where the defense was similar to that set up in this case, the court said:

"The rulings of the court to the contrary, and, presumably, the sworn denial of the execution of the contract, proceeded upon the theory that, in order to bind the corporation, a contract must be shown to have been executed or authorized by a formal corporate act, such as an order or resolution of a board of directors. But the business of modern mercantile and manufacturing corporations is not always, or even generally, conducted in that way, but is committed to agents and managers, whose powers are limited, practically, only to the lines of business for the prosecution of which the corporations were formed."

And in the case of *Merchants' Nat. Bank of Gardiner v. Citizens' Gaslight Co.*, 159 Mass. 505, 34 N. E. 1083, the court said:

"Upon consideration of the decisions cited, we think it fair to say that the making and indorsing of negotiable paper is to be presumed to be within the power of the treasurer of a manufacturing and trading corporation, whenever, from the nature of its ordinary business, as usually conducted, the corporation is naturally to be expected to use its credit in carrying on commercial transactions. Such paper is the usual and ordinary instrument of utilizing credit in commercial dealings, and it is for the interest of the corporation and of the community that the best instrument should be employed. It is no less for the interest of all that, if negotiable paper is to be employed, its validity should not be open to objections which would impair its usefulness by requiring at every step an inquiry into the authority by which it is issued. * * * Although such companies [gas companies] manufacture only as they deliver, and so have no occasion to hold large quantities of manufactured goods for a market, there are features of their business which make it necessary for them to have control of large amounts of money at certain seasons. Coal—their chief raw material—is uniformly at its lowest price in the summer, and, away from the seaboard, is usually taken in large quantities at that season. Gas is uniformly sold upon time, and the bills collected monthly or quarterly. The work of extending and repairing street mains, and other work upon the manufacturing plant, can be done to the best advantage during only a portion of the year. A business so conducted affords abundant scope for the advantageous use of the credit of the corporations engaged in it, and they would naturally be expected to use their credit in the transaction of their ordinary business."

In the case of *Moore v. Manufacturing Co.*, 113 Mo. 106, 20 S. W. 975, the court said:

"The power of an agent or officer of a corporation to bind his principal is governed by the law of agency; and, where an officer has been permitted to manage all the business of a corporation, his authority to bind it will be implied from the apparent power thus conferred upon him."

And see *Mahoney Min. Co. v. Anglo-California Bank*, 104 U. S. 192; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428; *Manufacturing Co. v. Soxman*, 138 U. S. 431, 11 Sup. Ct. 360; *Bell v. Bank*, 57 Fed. 821; *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 144, 17 S. W. 644; *Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. 372; *Merchants' Nat. Bank of Boston v. State Nat. Bank of Boston*, 10 Wall. 604.

We have carefully examined each error assigned, and are satisfied none of them has any merit, in the light of the facts of the case. The judgment of the circuit court is therefore affirmed, with costs, and with interest thereon from the date of its rendition by the circuit court at the rate of 10 per cent. per annum.

SANBORN, Circuit Judge (concurring). I concur in the result in this case on the ground that the course of business at Kansas City shown in this record, the reports made by Dudley to the plaintiff in error of the existence of bills payable he had made as its agent, and the testimony of its president that, if Dudley needed money to pay a coal bill, he thought he was expected to and would go to the bank, and have the money advanced to pay it, constituted sufficient evidence to warrant a jury in drawing the inference that the corporation knew that Dudley was making promissory notes on its behalf, and impliedly authorized him to do so. But I cannot concur in the view, which I understand to be expressed in the opinion of the court, that the general manager of the business, or of a local branch of the business, of a manufacturing and trading corporation, who is authorized to buy and sell goods, to carry on the manufacturing business, and to take and discount promissory notes for his principal, is thereby vested with the implied power to borrow money on its behalf, and to execute its notes therefor. I do not understand the rule of law to be that such a general agent is presumed to have the same authority to borrow money on and to execute notes in behalf of his principal that a reasonably prudent merchant or manufacturer has to make notes and borrow money for himself. I think the true rule is laid down in section 398 of *Mechem on Agency*, in these words:

"An agent having general authority to manage his principal's business has, by virtue of his employment, no implied authority to bind his principal by making, accepting, or indorsing negotiable paper."

Tiedeman, in his work on *Commercial Paper*, at section 77, says that the presumption of law is more strongly opposed to an implied authority to execute and negotiate commercial paper than to do anything else, and that even where there is a general authority "to transact all business," or "to do all lawful acts concerning all the principal's business, of what nature or kind soever," it is very generally held that the power to execute bills and notes is not included.

In *New York Iron Mine v. First Nat. Bank*, 39 Mich. 644, 651,—a case in which the stock of the mining corporation was held by Samuel J. Tilden and W. L. Wetmore, and the latter had had the entire management and control of the mining business which was carried on by the company in the state of Michigan, had expended more than three million dollars, and had lawfully discounted the bills receivable of the corporation,—the supreme court of Michigan held that all of this

was insufficient to warrant the inference that Wetmore had implied power to borrow money and to issue the promissory notes of the corporation. Judge Cooley, in delivering the opinion of the court, said:

"The issuing of promissory notes is not a power necessarily incident to the conduct of the business of mining, and it is so susceptible of abuse, to the injury, and, indeed, to the utter destruction, of a corporation, that it is wisely left by the law to be conferred, or not, as the prudence of the board of directors may determine."

In my opinion the same rule, and for the same reason, governs the agencies of commercial and trading corporations. *McCullough v. Moss*, 5 Denio, 567; *Murray v. East India Co.*, 5 Barn. & Ald. 204; *Benedict v. Lansing*, 5 Denio, 283; *The Floyd Acceptances*, 7 Wall. 666; *Perkins v. Boothby*, 71 Me. 91.

HOMESTAKE MIN. CO. v. FULLERTON.

(Circuit Court of Appeals, Eighth Circuit. September 16, 1895.)

No. 537.

1. NEGLIGENCE—QUESTION FOR JURY.

In an action for personal injuries, it appeared that plaintiff, one F., was employed by the H. Mining Co., as engineer, to operate the engine which drove shafting in a tunnel in the mine, and to see that the bearings of the shafting were properly oiled. The shaft ran in a narrow and dark tunnel, supported on timbers which were placed at such a height as to make it necessary to stoop under them to reach the several bearings; and it was formed of two pieces, which were coupled together, at a distance of about 12 inches from one of the supporting timbers, by nuts and bolts which projected from the shaft. F. was examining the bearing of the shaft while it was revolving rapidly, and, when in the act of rising to an upright position, after stooping under the supporting timber, was caught by the projecting bolts, whirled round the shaft, and seriously injured. There was some evidence that F. was not required to pass through the tunnel, or examine the bearings, while the machinery was in motion; that he might have reached the point to which he was going by a safer route; and that he was careless in rising from under the timber near the coupling. But there was also evidence that F. was required to examine the bearings, and that he went to the place by the usual way. *Held*, that the questions of the negligence of the mining company, and the contributory negligence of F., were for the jury, and that it was not error to refuse to instruct the jury that the latter was, and the former was not, established.

2. MASTER AND SERVANT—RISKS OF EMPLOYMENT.

It also appeared that one T. was the foreman of the H. mine, which was owned by a corporation having large interests in sundry places under the general charge of a superintendent; that T. had power to hire and discharge men, direct their work, and generally to control all the ordinary daily operations at the mine, and on one occasion, upon complaint of F., had promised to remove a dangerous obstruction in the tunnel, and had afterwards caused it to be removed. There was evidence that F. had complained to T. of the danger from the projecting bolts on the revolving shaft, and that T. had promised, a few days before the accident, to have the coupling covered with a box, for protection. *Held*, that it was within the apparent scope of T.'s authority to promise to make the coupling safe, and that F. did not, by continuing in the company's employment in reliance on such promise, assume the risks arising from the dangerous position of the coupling.

3. SAME—DUTY TO FURNISH SAFE APPLIANCES.

Held, further, that the rule that a master is not bound to replace an appliance, such as is in common use, because it is possible to get a better one, did not apply to relieve the H. Co. from the duty of protecting the exposed coupling by putting a suitable guard around it.

4. EVIDENCE—CROSS-EXAMINATION.

F. having been asked, on cross-examination, whether he had been told by his counsel that his whole case depended on his swearing that he had complained to T., and having answered "No," was asked whether he did not know that his whole case depended on his so swearing. The court excluded the question. *Held* no error.

In Error to the Circuit Court of the United States for the District of South Dakota.

This was a suit in which William Fullerton, the defendant in error, sued the Homestake Mining Company, the plaintiff in error, in the circuit court of the United States for the district of South Dakota, for personal injuries sustained by him while working as an engineer for the defendant company at its mine near Lead City, in the state of South Dakota. The material facts, other than those hereafter mentioned in the opinion, which the evidence tended to establish, are as follows: For two years and two months prior to February 3, 1890, the plaintiff had been in the employ of the defendant company, in various capacities, at its mines in the state of South Dakota. On the latter date he had charge of a stationary steam engine which supplied the power to run a Gate's rock crusher. This crusher was located underneath the ground at the west end of a tunnel, some six feet wide by seven feet high, which had been excavated through solid rock. Power was communicated to the Gate's crusher by means of a line shaft some four inches in diameter, which ran from east to west lengthwise of the tunnel, and was supported at six points by timbers or supports placed crosswise of the tunnel, to the tops of which were bolted suitable metal bearings to carry the shaft. The shaft was about 30 feet long, and at the east end thereof were two pulley wheels, which were fastened to the shaft. The stationary engine was located some distance to the south of the east end of the shaft, and on a higher plane. A belt descending on an incline from the fly wheel of the engine passed around one of the aforesaid pulley wheels, and turned the line shaft at the rate of about 250 or 300 revolutions per minute when the Gate's rock crusher was in full operation. The other pulley wheel attached to the shaft was used, as it seems, to communicate power, by means of another belt, to another rock crusher, that was located some distance north of the line shaft. The line shaft was composed of two sections, of about equal length, which were coupled together, by means of nuts and bolts, at a point within the tunnel not more than 12 inches from one of the cross timbers which supported the shaft. The shaft was laid about in the center of the tunnel, and was elevated for some distance above the floor by means of the cross timbers or supports on which it rested. It was a part of the plaintiff's regular duty, as engineer in charge of this engine, to see that the journals of the Gate's rock crusher, and that all the bearings in which the line shaft turned, were kept properly oiled. When the accident occurred this was a duty which necessitated a frequent examination of the metal bearings supporting the line shaft, as the shaft was new, and had only been placed in position about a month previous to the accident, for the purpose of operating the Gate's crusher. The Gate's crusher was also a new piece of machinery. The plaintiff took charge of the engine which ran the Gate's crusher on January 11, 1890. Part of the time between January 11, 1890, and February 3, 1890, he had worked on the day shift, and part of that time on the night shift. He had also been off duty for some days during the same period, on account of illness. On the morning of February 3, 1890, the plaintiff oiled the journals of the crusher and the bearings of the line shaft, and then started the engine. Shortly afterwards he went into the tunnel again for the purpose of examining the machinery while it was in motion, and especially for the purpose of examining the bearings of the line shaft. To reach these bearings he descended from the engine room on an

incline alongside of the belt leading from the engine to the line shaft, then turned at right angles into the tunnel and walked by the side of the shaft in the direction of the crusher, examining each bearing as he approached it. When he reached the bearing in close proximity to the coupling, he found it necessary to stoop or crawl underneath the cross timber which supported the shaft. He was at the time incumbered with his lantern and some material for oiling the bearings. As he was in the act of rising to an upright posture, after stooping or crawling underneath the timber, his clothing was caught by the protruding bolts in the coupling, and he was rapidly whirled around the shaft, his lower extremities coming in contact with the rock floor of the tunnel at each revolution of the shaft. As a result of the accident the plaintiff lost both of his feet, which were badly broken and mangled. He also sustained other very severe and painful bodily injuries. There was testimony before the jury which tended to show that on one occasion, at least, prior to the accident, the plaintiff had complained to Joseph Treweek, the defendant company's foreman, of the condition of the cross timbers in proximity to the coupling of the line shaft, and of the risk necessarily encountered by the engineers in charge of the engine in being compelled to stoop or crawl under said cross timber whenever, in the discharge of their duty, they found it necessary to go through the tunnel to examine or oil the bearings. There was evidence which tended to show that when such complaint was made to the foreman he was requested to have the rock cut away at one side of the tunnel, so that a person could pass around the end of the cross timber, or to have the coupling covered with a suitable box, to protect persons from being caught by the protruding bolts; that the foreman refused to cut away the rock, but at the same time promised to see the carpenters and have the coupling boxed; that in reliance on such assurance the plaintiff continued to discharge his duties in the usual way for two or three days thereafter, until the accident occurred. In view of the instructions given by the court, and the verdict of the jury subsequently rendered, these latter facts must be accepted as proven. The complaint, which was in the usual form, charged that the defendant company was guilty of culpable negligence in allowing the line shaft to remain uncovered for its full length, and especially at the place where the two sections were coupled together. There was a verdict in favor of the plaintiff, and against the defendant company, for \$23,000.

G. C. Moody and A. B. Kittredge (C. H. Winsor, on the brief), for plaintiff in error.

John E. Carland, for defendant in error.

Before CALDWELL and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the close of all the evidence the defendant, by its counsel, moved the court to direct the jury to return a verdict in its favor for the following reasons:

"First, that the uncontradicted evidence in the case shows that there was no negligence on the part of the defendant; second, that the uncontradicted evidence in the case shows that the negligence of the plaintiff contributed to his injury; third, that there is no evidence in the case tending to show that Joseph Treweek, whom the plaintiff claims made the promise to plaintiff to box the shaft, had any authority from the defendant to make any such promise, or showing that Treweek was either a general or special vice principal of the defendant for the purpose alleged in the complaint."

The refusal of the court to grant this request presents the principal questions that we have to determine.

With reference to the first of the three propositions embodied in the foregoing instruction, it is sufficient to say that we entertain the

opinion that the proposition in question was clearly untenable, and that the court would have erred, had it undertaken to declare, as a matter of law, that there was no evidence tending to show, or from which a jury could rightfully infer, that the defendant had been guilty of a want of reasonable or ordinary care. It must be borne in mind that the line shaft was located in a narrow and dark tunnel; that it revolved with great rapidity; that the coupling with protruding bolts was very near to one of the cross timbers; that a person required to pass at intervals through the tunnel, and to stoop or crawl under this cross timber, would be inevitably exposed to the risk of having his clothing caught by the coupling, and of being horribly injured,—a risk that could easily have been avoided without expense to the defendant company, and without interfering with the operation of its machinery, by simply covering the coupling. These facts were amply sufficient, we think, to warrant a jury in finding that the defendant company was not without fault, and that in the exercise of ordinary care, in view of the location of the line shaft and coupling, it ought to have boxed the coupling, or to have made a passageway so that its employes could have passed that point in the tunnel without encountering on every occasion the peculiar danger above described. No error was committed, therefore, in submitting the issue of the defendant's negligence to the jury, and in refusing to decide it as a question of law.

The second proposition contained in the instruction,—that the uncontradicted evidence in the case showed that the plaintiff was guilty of contributory negligence,—in our judgment, was likewise untenable, and was properly overruled. The defendant seems to have contended, in the course of the trial—First, that the plaintiff was not required or expected, in the discharge of his duties as engineer, to pass through the tunnel, either to oil or examine the bearings of the line shaft, when the machinery was in motion; second, that a safer way had been provided by the defendant company to reach the particular bearing that the plaintiff was attempting to reach when he was hurt than the one actually taken; and, third, that the plaintiff was guilty of carelessness at the moment he attempted to rise to an upright posture after crawling under the cross timber next to the coupling. Considerable testimony was offered to support the first two of these propositions. On the other hand, considerable evidence was introduced which tended to prove that the defendant did both expect and require its engineers to examine and oil the bearings while the line shaft was in motion; that the actual operations of the machinery could be best observed when it was in motion; that the route taken by the plaintiff on the occasion of the accident to reach and examine the bearings was, as the defendant well knew, the one usually taken by its engineers for that purpose; and that on the occasion of the accident no other mode of reaching the back bearings, which the plaintiff desired to reach, was known to him. None of the alleged facts above mentioned, on which the defendant predicated its charge of contributory negligence, can be said to have been undisputed. On the contrary, the specific facts on which the

charge in question was based were contested, and the evidence was conflicting. Under these circumstances, the circuit court submitted to the jury, by instructions which are not subject to criticism, the several issues, whether it was plaintiff's duty to examine the bearings of the shaft while it was in motion, whether he took the proper route to make such examination, and whether he acted at the moment of the accident with a due degree of care and circumspection. The finding of the jury on each of these issues must have been in favor of the plaintiff, and it goes without saying that such findings are not subject to review by this court.

This brings us to a consideration of the third proposition stated in the foregoing instruction, namely, that there was no evidence that Joseph Treweek, the foreman of the mine, had authority to give the assurance or make the promise that the shaft coupling should be covered or boxed. The circuit court not only refused to give this instruction, but it charged to the contrary thereof, as follows:

"If the jury believe from the evidence that the plaintiff, William Fullerton, after discovering or recognizing the danger of passing the coupling on the shaft in question, complained to the proper officer of the Homestake Mining Company (and the court charges you, as a matter of law, that, under the evidence in this case, Joseph Treweek was such officer) of the dangerous condition of the shaft and coupling by which plaintiff had to pass in oiling and examining the bearings on said shaft, and the jury further finds from the evidence that said Joseph Treweek promised the plaintiff, William Fullerton, that the dangerous character of said shaft and coupling would be remedied, and the jury further find that said William Fullerton continued to perform the services in which he was engaged in reliance on said promise, then the plaintiff, William Fullerton, is entitled to recover damages for any injury inflicted upon him, without his fault, by reason of the dangerous condition of said shaft and coupling, within any period after said promise was made which would not preclude all reasonable expectation that the promise would be kept."

As an exception was taken to the action of the trial court in both of the respects last stated, it will be proper to consider them together. The main proposition stated in the foregoing instruction is not disputed, namely, that a servant may successfully maintain an action for injuries sustained by using defective machinery or appliances after he became aware of the defect therein and the danger incident thereto, provided it appears that he notified the master of the defect prior to the injury, and the latter directed him to continue using such machinery, and at the same time promised to repair it, and provided, further, that the servant exercised due care, and that the defect complained of did not render the machinery so imminently and immediately dangerous that he should have declined to use it at all until it was repaired. It is not denied, as we understand, that this principle has become firmly embedded in the law of negligence by numerous decisions of courts of last resort. *Hough v. Railway Co.*, 100 U. S. 213, 225; *Clarke v. Holmes*, 7 Hurl. & N. 937, 938; *Gowen v. Harley*, 12 U. S. App. 574, 586, 6 C. C. A. 190, 56 Fed. 973; *Laning v. Railroad Co.*, 49 N. Y. 521; *Stephenson v. Duncan*, 73 Wis. 404, 41 N. W. 337; *Patterson v. Railroad Co.*, 76 Pa. St. 389; *Greenleaf v. Railroad Co.*, 33 Iowa, 52; *Railway Co. v. Watson*, 114 Ind. 20, 27, 14 N. E. 721, and 15 N. E. 824; *Greene v. Railway Co.*, 31 Minn. 248, 17 N. W. 378;

Railroad Co. v. Young, 1 U. S. App. 96, 1 C. C. A. 428, 49 Fed. 723; Rothenberger v. Milling Co. (Minn.) 59 N. W. 531.

The contention is, however, that there was no evidence that the complaint made by the plaintiff relative to the dangerous condition of the coupling was addressed to the right person, and for that reason it is insisted that the promise made by Treweek to cover or box the coupling was of no avail to the plaintiff as an excuse for continuing in the defendant's service, and continuing to pass by the uncovered coupling, after he became aware of the danger incident thereto, and that by so remaining in its service he assumed all the known risks of the employment. We apprehend that if it was fairly within the scope of Treweek's authority, as foreman, to cause a board covering to be placed over the coupling of the line shaft, then a promise made by him to a subordinate servant to cover the coupling, in response to a complaint that it was dangerous, must be given the same effect as a like promise made by the defendant itself. And it must be conceded that a like promise made by the defendant would serve to rebut the presumption that the plaintiff intended to assume the risk which he had pointed out. The question is not whether Treweek was a vice principal in such sense that the defendant company would be liable to its employes for all of his negligent acts, but whether his functions were such that he had the right, in the discharge of his duties and in the exercise of his judgment and discretion, to cause the shaft coupling to be covered. If he had such right, then we think that the plaintiff could properly address his complaint to Treweek, and rely on the latter's promise to remedy the existing defect without preferring his complaint to, or seeking a promise from, any one higher in authority. Now, the undisputed facts which have a bearing on the question last suggested were as follows: The defendant company was a corporation of California, having its chief office in that state. It owned and operated five or six mines in the state of South Dakota, and, among others, the Homestake Mine, where the injuries complained of were sustained. It had an agent in the latter state, by the name of Grier, who had general charge of the defendant company's business in South Dakota, and was termed its "general superintendent." The operations of the defendant company were so extensive that it found it necessary to maintain and operate a machine shop in South Dakota, both for the construction and repair of such mining machinery as was needed and used at its several mines. This shop was in charge of a master mechanic by the name of Spargo, who, in addition to his duties as master mechanic, had general charge, as it seems, of the machinery of the Black Hills & Ft. Pierre Railroad Company. Joseph Treweek was day foreman of the Homestake Mine, and in that capacity had power to hire and discharge men, to direct them where and how to work, and generally to control all the ordinary daily operations at the Homestake Mine. When on duty at the mine he seems to have been the representative of the defendant company, with whom all the employes who were engaged in taking out, handling, and crushing ore came immediately in contact, and from whom they received

their orders. The testimony showed that on one occasion, shortly before the accident, the plaintiff had requested Treweek to remove a projecting piece or point of rock at the entrance of the aforesaid tunnel, which rendered it difficult and dangerous for the engineers to pass by the belting when they had occasion to enter the tunnel to examine the bearings of the line shaft, and that Treweek, as foreman, promised to remove the rock, and immediately thereafter caused it to be removed. In view of these facts, we think it is manifest that Treweek had the right to cause an ordinary board covering to be placed over the coupling of the line shaft, for the purpose of rendering it more safe, without consulting the company or any of its superior officers. It was an act that did not require a previous conference either with the general superintendent or the master mechanic, because it did not involve any alteration of the machinery, or interfere to any extent with its operation. When the defendant company appointed Treweek as its foreman, it no doubt intended that he should exercise his judgment and discretion with respect to the propriety of placing a covering over exposed parts of the machinery, of which complaint was made to him that they endangered the safety of those employes who frequently had occasion to pass in close proximity to the same. Unless he had such authority in his capacity as foreman, he would be powerless to guard the company's interests as it is doubtless expected that they would be guarded. At all events, we entertain no doubt that it was within the apparent scope of Treweek's authority to hear complaints touching such a defect as was pointed out by the plaintiff, and that it was also within the apparent scope of his authority to promise that it should be remedied. It results from these views that no error was committed by the trial court in charging the jury as it did on this branch of the case, and in refusing to charge as the defendant company requested.

It is further contended by counsel for the defendant company that, notwithstanding the promise made by its foreman to cover the exposed coupling, the plaintiff should nevertheless be held to have assumed the risk incident thereto, because the promise in question was not a promise to repair an existing defect in machinery, but rather a promise to supply a new or additional appliance, which the company was under no obligation to furnish, no matter how necessary the same might have been for the protection of its employes. We think that this proposition is wholly untenable. It is doubtless true that a master is not bound to abandon the use of a particular machine or appliance, which is in common use, and in a proper state of repair, merely because there are other machines or appliances in use that are better adapted for doing the work, or that may be handled with greater safety. *Marsh v. Chickering*, 101 N. Y. 396, 5 N. E. 56; *Burke v. Withersbee*, 98 N. Y. 562; *Railway Co. v. Linney*, 19 U. S. App. 315, 7 C. C. A. 656, 59 Fed. 45. In view of the undisputed fact that the kind of coupling appliance which was attached to the line shaft when the accident occurred was then in very general use, the doctrine invoked, and the authorities cited by the defendant in support of its last-men-

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tioned contention, would doubtless relieve it from liability for using that kind of coupling appliance, although a safer and better coupling appliance might have been used to connect the line shaft. But the doctrine in question cannot be successfully invoked for the purpose of relieving an employer of the duty of placing a suitable guard around a piece of machinery or an appliance which is of that nature, or so located, that it is a constant menace to the safety of those who, in the discharge of their duties, are frequently compelled to pass in close proximity to it. In such a case the obligation of the master to place a suitable guard around a dangerous piece of machinery is no less imperative than his duty to remedy a defect in the machine itself.

Passing to another branch of the case, complaint is made that the trial court refused to permit the plaintiff, William Fullerton, to answer the last three of the following questions which were propounded to him in the following order on his cross-examination:

"Q. Have you not been told by your counsel that your whole case depended on your swearing that Joseph Treweek made you this promise? A. No, sir. Q. Don't you know the fact that your whole case depended upon it? Q. Don't you know, Mr. Fullerton, that your whole case depends—and did you not know before you brought this suit—upon proving, or convincing the jury, that Joseph Treweek made certain promises about boxing in that coupling? Q. Do you not know now, Mr. Fullerton, and are you not conscious, that your whole case depends upon your stating what Joseph Treweek, the day foreman of the mine, promised you with reference to boxing that coupling shaft?"

These questions were obviously asked for the purpose of impeaching the credibility of the witness. From a critical standpoint, they were objectionable in form, and the objection thereto was doubtless sustained, because they called upon the witness to declare, as a matter of law, upon what ground the right to recover depended. As the questions, taken literally, were founded on the assumption that the controversy over the alleged promise to box the coupling was the sole issue in the case, possibly the jury might have been misled if the questions, in that form, had passed unchallenged. By altering the form of the questions so as to inquire concerning the belief entertained by the witness at the time of bringing his suit and at the time of giving his testimony, the objection interposed would have been obviated. And if the questions had been modified as last suggested, and the trial court had then declined to permit the witness to answer, the exception would have been entitled to more weight. Trial courts should be allowed a liberal discretion in determining the latitude to be given to a cross-examination, and particularly in determining the form in which questions should be propounded to a witness which are simply designed to impeach his credibility. We are not prepared to say, therefore, that the trial court exceeded its discretionary powers in sustaining the objection to the several questions above quoted. Moreover, as the court permitted the witness to answer the first of the above questions, we feel satisfied that its refusal to permit the remaining questions to be answered had no material effect on the ultimate issue of the trial.

Complaint is also made that the court refused to give certain other instructions which were asked by the defendant company. But a careful examination of the charge given by the trial judge satisfies us that

the substance of all the refused instructions was given, in so far as they were proper instructions, and were not calculated to mislead the jury. The jury seem to have been very fully instructed on all the salient features of the case, and it would have served no useful purpose to have given a number of instructions that were asked by the defendant which were perhaps unobjectionable. One instruction asked by the defendant requested the court to declare, in substance, that it was the duty of the plaintiff himself to have boxed the coupling, if he considered it dangerous and if he could have boxed it in connection with the discharge of his other duties, and that by failing to do so he assumed the risk of getting hurt. No error was committed, however, in refusing this request. The work of boxing the coupling pertained to the carpenter department. The foreman, Treweek, recognized that fact when the danger was pointed out to him, by promising to send the carpenters to cover it. The plaintiff, we think, was under no obligation to turn aside from his ordinary duties, and construct a box to cover the coupling, especially after the foreman's attention was called to the alleged defect, and he had promised to send the carpenters to cover it; and he cannot be said to have assumed the risk of injury because he failed to do so. The danger complained of could not be remedied by merely driving a nail or inserting a screw to render a simple tool or appliance more secure, but it involved the selection of materials, and the expenditure of some time, labor, and skill, to wholly obviate the danger.

It is finally insisted by the defendant that the damages assessed by the jury are excessive, and that the verdict ought to be set aside for that reason. The circuit court had an undoubted right to set aside the verdict and order a new trial, and it should have exercised that power if, in view of the amount of the recovery, it was satisfied that the jury had been influenced by prejudice or passion, or that they had made a gross mistake of fact in assessing the damages. It is needless to say, however, that we are not possessed of any such revisory power, inasmuch as the damages assessed are less than the sum alleged and claimed in the complaint. This court is limited to the inquiry whether the jury was properly directed as to the mode of assessing the damages. *Railroad Co. v. Fraloff*, 100 U. S. 24, 31; *New York, L. E. & W. R. Co. v. Winter's Adm'r*, 143 U. S. 60, 75, 12 Sup. Ct. 356; *Lincoln v. Power*, 151 U. S. 436, 14 Sup. Ct. 387. The charge of the court on that branch of the case was as follows, and we are not able to say that it was substantially erroneous:

"If you find for the plaintiff, you will allow him what lawyers call 'compensatory damages'; that is, damages for his loss of limbs, loss of time, and for the pain endured by the accident. You are the sole judges of this amount. There is no rule to govern you in such cases but your own good judgment and sound discretion. A great and wise judge has said, there is no price current for human pain and suffering. You cannot give any exemplary damages. If this plaintiff is entitled to recover, his recovery is limited to compensatory damages. Your verdict should not be influenced by passion or prejudice. The defendant has the same rights that any private individual has."

Finding no error in this part of the charge, nor in the record, considered as a whole, which, in our opinion, would warrant us in disturbing the verdict, the judgment of the circuit court must be affirmed.

AETNA LIFE INS. CO. v. FLORIDA.

(Circuit Court of Appeals, Eighth Circuit. September 16, 1895.)

No. 624.

LIFE INSURANCE—CONTEMPLATION OF SUICIDE—MISSOURI STATUTE.

A statute of Missouri (Rev. St. 1889, § 5855) provides that, "in all suits on policies of insurance on life, * * * it shall be no defense that the insured committed suicide, unless it shall be shown * * * that the insured contemplated suicide at the time he made his application for the policy." *Held*, that the word "contemplated," as used in such statute, is equivalent to "intended" or "had resolved," and that it is not sufficient to show that the insured, at the time of his application, had considered the subject of suicide, without any definite purpose to commit suicide.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Frank M. Estes, for plaintiff in error.

L. R. Wilfley (W. F. Boyle and E. B. Adams, on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This action was brought by Nancy L. Florida, the defendant in error, against the Aetna Life Insurance Company, the plaintiff in error, to recover the amount of two life insurance policies issued by said company on the life of Alonzo K. Florida, the plaintiff's husband. Both of said policies were made payable to the plaintiff as beneficiary. One of them was executed on July 30, 1891, for the sum of \$5,000; the other was executed on July 12, 1892, for the sum of \$10,000. The plaintiff's husband committed suicide on April 27, 1893, and a demand was thereafter made on the defendant company for payment of the policies. Payment was refused, and the present suit was thereupon instituted.

On the trial of the case the circuit court instructed the jury, in substance, that it was conceded by the defendant company that the plaintiff was entitled to recover on the policies, "unless, at the time Alonzo K. Florida made application for them, he was in contemplation of committing suicide at some future time, so that by such acts of self-destruction the insurance company would be defrauded of the sum so insured"; and, as no exception was taken to this instruction, we must assume, for the purpose of this decision, that the only defense intended to be relied upon by the defendant company was the defense pleaded in its answer, as follows:

"Defendant states * * * that on the 27th day of April, 1893, and within two years from the date of said policies, said Florida committed suicide; and the defendant alleges the fact to be that said Florida, at the time that he made his said applications to the defendant for said policies, contemplated suicide; that, at the time of making said applications for said insurance, said Florida contemplated and intended to secure the said contracts of insurance from this defendant with the intention soon thereafter to take his own life; that the said purpose and intention of said Florida was not known to the defendant, and was purposely concealed by him in order that he might secure said policies of insurance, and thereafter, by taking his own life, enable his representatives to secure the benefits accruing under said policies; that the

said acts of said Florida were a fraud upon this defendant; and that, by reason of said acts of said Florida, said policies of insurance became wholly void."

It should be stated in this connection that the policies in question were executed and delivered in the state of Missouri, and that at the date of their execution the following statutes were in force in that state:

"No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury." Rev. St. Mo. 1889, § 5849.

"In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide, unless it shall be shown to the satisfaction of the court or jury trying the cause, that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void." Rev. St. Mo. 1889, § 5855.

In the circuit court of the United States for the Eastern district of Missouri, where the case was tried, the plaintiff recovered a judgment for the full amount of the policies; and the case was brought to this court for review on a writ of error sued out by the defendant company. The errors assigned relate to the exclusion of testimony and to the charge of the trial court. There are numerous assignments of the former kind, but it would subserve no useful purpose to review them in detail, as most of the questions propounded which were excluded were obviously improper questions, because they were calculated to elicit hearsay or secondary evidence, or the conclusions of witnesses rather than the facts on which such conclusions were based, or because the questions were designed to establish the existence of particular facts by common rumor, or because the questions asked were too vague and general, or a mere repetition of questions that had already been asked and answered. We shall forego any discussion of the several assignments of error to which the last remark applies, confining ourselves to those exceptions taken which seem to us to be most tenable.

At one stage of the trial, counsel for the defendant company offered in evidence what purported to be the will of Alonzo K. Florida, deceased, for the purpose, as stated by him at the time, of showing the condition of the testator's mind. It was objected to and excluded, and an exception was saved. We cannot decide whether this ruling of the trial court was right or wrong, because the alleged will is not found in the bill of exceptions, and, without examining it, it is impossible to say what it may have tended to show with respect to the testator's purpose or mental condition. The defendant also appears to have offered in evidence a large number of claims which had been filed in the probate court of the city of St. Louis against the estate of Alonzo K. Florida. These were objected to, the claims were excluded, and an exception was saved. The claims in question appear to have been excluded because the circuit court was of opinion that they had no tendency to show the financial condition of the deceased

at or prior to the taking out of the policies in suit. Whether that ruling was erroneous or otherwise cannot be determined, because the claims are not contained in the record. The ruling of the trial court must be presumed to have been correct. A witness for the defendant company was also asked the following question: "What was Mr. Florida's financial condition during the winter of 1892 and 1893? I will put it this way: Do you know what his financial condition was during the winter of 1892 and the beginning of 1893?" The answer to this interrogatory was excluded, on the ground that it could have no tendency to show the financial condition of the deceased in July, 1891, and in July, 1892, when the policies were taken out, and that no attempt had been made to furnish authentic evidence of his financial condition at the latter dates. We cannot say that there was any material error in this ruling, although the testimony would doubtless have been competent, and would probably have been admitted if counsel had undertaken to show that the indebtedness existing against the deceased in the winter of 1892 and 1893 had its origin prior to the issuance of the policies, or either of them. Without pursuing this branch of the case at any greater length, it will suffice to say that none of the errors assigned on account of the exclusion of testimony appear to us to be tenable.

The question in the case of paramount importance is whether the circuit court properly defined the words "contemplated suicide," as used in Rev. St. Mo. § 5855, *supra*. On this subject the court charged the jury as follows:

"The fact of suicide is no defense, unless it be the culmination of a purpose formed at the time application was made for the respective policies. Unless, therefore, you believe from the weight of the evidence that on the 30th day of July, 1891, at the time of making application for the policy of that date, Alonzo K. Florida contemplated thereafter committing suicide, and thereby enabling his wife to collect the amount named in the policy, then your verdict upon the first count must be for the plaintiff. * * * Unless you believe from the weight of the evidence that on the 12th day of July, 1892, at the time of making application for the policy of insurance of that date, Alonzo K. Florida did so with the contemplated, well-formed purpose of thereafter committing suicide, and thereby enabling his wife to collect the amount named in the policy, your verdict must be for the plaintiff upon the second count of the petition. * * * The fact, if from the evidence you believe it to be a fact, that Alonzo K. Florida committed suicide, constitutes in itself no defense on the part of the insurance companies under this clause. In order to make a defense out of such fact, you must believe from the preponderance of the evidence that Alonzo K. Florida, at the time he made application for either or both of the policies of life insurance involved in this suit, contemplated suicide; and by contemplated is meant there was a complete, well-formed purpose of taking his own life, and that purpose culminated by actually killing himself, with a view and for the purpose of defrauding the defendant company out of the money stipulated in the policy to be paid."

The objection made to this part of the charge, and the only objection thereto, is that the court declared that the word "contemplated" meant the same as the word "intended." It is insisted that there is a material distinction between the words "contemplated" and "intended"; that the former word means "attentively considered," "thought about," whereas the latter word signifies "a more determinative state of mind," a well-formed purpose; and that the legislature must be

presumed to have used the word "contemplated" in the sense above suggested. The proposition maintained by the defendant company is thus concisely stated by its counsel:

"It was not necessary for the defendant to show that Florida effected this insurance with the deliberate purpose to commit suicide; it was sufficient to show that he was 'considering with attention' the project of suicide, and effected the insurance with the design that, in case his contemplation should ripen into actual perpetration of suicide, then his beneficiaries should be provided for out of the proceeds of the insurance. * * * Hence it follows that the theory expressed throughout the several portions of the charge bearing on this point, that 'contemplated suicide' meant a predetermined, well-formed purpose of suicide, is erroneous, and those portions of the charge expressing this conception were erroneous."

It is no doubt true that the primary signification of the word "contemplate" is to consider attentively or to meditate; but it is equally true that a secondary meaning of the word is to "intend"; and in ordinary conversation the word "contemplate" is frequently used as a synonym for the word "intend,"—that is, to express a well-formed purpose. Moreover, instances are not wanting where the word "contemplate" has been held to be synonymous with the words "expect" or "intend." Thus, in *Buckingham v. McLean*, 13 How. 151, 167, the words "in contemplation of bankruptcy," as used in the bankrupt act of 1841 (5 Stat. 442, c. 9, § 2), were held to be tantamount to the expression "expecting or intending to commit an act of bankruptcy." See, also, *Jones v. Howland*, 8 Metc. (Mass.) 377.

We think, however, that the sense in which the legislature intended to use the word "contemplated" in the statute now under consideration, can be best determined by considering the statute itself and the connection in which the word occurs. The statute was primarily designed to prevent the plea of suicide from being thereafter interposed as a defense to an action on a policy of life insurance. It declares that, "in all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide." The subsequent clause, "unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy," was not intended to create or afford to life insurance companies a new defense to such actions, but rather to state an exception to the general rule first enunciated. The legislature was, doubtless, aware of the fact that at common law, without the aid of any statute, it was competent for an insurance company to show, by way of defense to an action on a life insurance policy, that the assured had taken out the policy with the preconceived intent of thereafter committing suicide, and that such purpose was subsequently executed. It, doubtless, intended by the concluding clause to preserve the right to still make that defense. *Smith v. Society*, 123 N. Y. 85, 25 N. E. 197. This seems to us to have been the manifest purpose of the concluding paragraph of the statute. It recognizes the existence of a defense well known to the law, to wit, the defense of fraud, and authorizes the insurer to make that defense. It must be borne in mind that the general purpose of the statute was to curtail the rights of insurance companies rather

than to enlarge them, wherefore it cannot well be presumed that the legislature intended to create in their favor a new statutory defense consisting in the fact that the assured, prior to his application for insurance, had considered the expediency of committing suicide in a given emergency, although he had formed no fixed resolution to do so. We think, therefore, that the contention that the legislature used the word "contemplated" to signify a state of mind in which the assured had considered or thought about the subject of suicide without having any well-defined purpose or intent, is not tenable.

Another objection to the construction sought to be placed upon the statute by the defendant company is that it renders the law too uncertain and difficult of application. If we adopt the defendant's definition of the word "contemplated," and assume that it was used by the legislature in that sense, then the inquiry immediately arises, when can a person be said to have so far considered the subject of suicide, or to have so had that thought in mind, as to vitiate a policy of life insurance? In the practical administration of the law, courts will find it difficult to answer this question to the comprehension of a jury. The line must necessarily be drawn somewhere between that amount of thought or contemplation which will and that which will not defeat a policy, because a subject may be considered with different degrees of intensity or attention, and it will hardly do to say that any amount of thought on the subject of suicide as a future possibility, at the time of taking out a policy, will serve to avoid it if the assured eventually dies by his own hand.

Upon the whole, therefore, we conclude that the statute should be construed to mean that hereafter it shall be no defense to a suit upon a life insurance policy that the insured committed suicide, unless it shall be proven to the satisfaction of the court or jury that the insured intended or had resolved to commit suicide at the time when he made his application for the policy. This, as we understand the charge, was the view that was entertained by the trial court and substantially expressed in its instruction, and in thus declaring the law no error was committed. The judgment of the circuit court is therefore affirmed.

FROST v. OREGON SHORT LINE & U. N. RY. CO.

(Circuit Court, D. Montana, S. D. September 24, 1895.)

No. 1.

RAILWAY COMPANIES—NOTIFYING CHANGE OF TIME—DELEGATION OF AUTHORITY—FELLOW SERVANTS.

It is the duty of a railway company to establish the time for running trains, their arrival at stations, and speed, and to exercise reasonable care to bring the time table and any temporary changes in it, caused by delays or otherwise, to the notice of all persons who are charged with operating trains on its track; and the duty of establishing such time table and giving notice thereof, or of any changes therein, cannot be delegated to any subordinate, so as to absolve the company from responsibility for his negligence. Accordingly, where an engineer on the defendant railway company's road had been killed in a collision, caused by the negligent omission of a telegraph operator to transmit the order of the train dispatcher

relative to a change of running time, *held* that the defendant railway company could not escape liability on the ground that the engineer and telegraph operator were fellow servants.

This was an action by Hattie Frost, as administratrix of the estate of James W. Frost, against the Oregon Short Line & Utah Northern Railway Company to recover damages for the death of the intestate. Plaintiff recovered a verdict. Defendant moved for a new trial. Denied.

F. T. McBride and Geo. W. Stapleton, for plaintiff.
J. S. Shroshire and H. J. Burleigh, for defendant.

KNOWLES, District Judge. James W. Frost was an engineer in the employ of the Oregon Short Line & Utah Northern Railway Company. He was killed while in such employ, and his wife, as administratrix of his estate, brought this suit, alleging that he was killed through the negligence of said company, and asked damages. The action was authorized under the provisions of sections 981 and 982 of the Compiled Statutes of Montana, which read as follows:

"Sec. 981. Whenever the death of a person shall be caused by the wrongful act, neglect or default of another, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages, then and in every such case the person who, or the corporation or company which would have been liable if death had not ensued, shall be liable for an action for damages, notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.

"Sec. 982. Every such action shall be brought by and in the name of the personal representatives of such deceased persons, and the amount received in any such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate, and in every such action the jury may give such damages, not exceeding twenty thousand dollars as they shall deem a just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased. Provided that every such action shall be commenced within three years after the death of such person."

The evidence in the case showed that said James W. Frost, on the 1st day of February, 1891, was an engineer on one of defendant's passenger trains, termed "No. 5," and which train was running north on the railroad track of defendant towards the city of Butte, Mont. On that date there was also another train on said track belonging to defendant, running south from said city of Butte to Dillon, in said state. This train was termed "No. 32." On said day train No. 5 was running on schedule time, and train No. 32 was behind time. The train dispatcher of said company, having his office at Pocatello, Idaho, finding that train No. 32 was behind time, sent an order by telegram to the conductor of said train No. 32, directed to a station on the line of said road called Glenn, to go to Dillon using the time of train No. 5. At the same time he sent an order to Dillon to the conductor of train No. 5 to stop at Dillon 2:45 P for train No. 32. The telegraph operator, Stuerer, at Dillon, did not give the conductor of said train No. 5 this order, as he was required, and he did not

change the signals at the Dillon station, as required by the rules of the company. Signal white, which was displayed, signified that the track was clear. Had he displayed red, as he should have done, it would have indicated that the train was to stop for orders. In consequence of this failure to give the conductor of train No. 5 the order of the train dispatcher, and of his failure to display the signal red, train No. 5 proceeded north from Dillon on the regular schedule time, and at a short distance north from said place collided with said train No. 32, and on account of this collision Engineer Frost received such injuries as caused his death. It seems that the telegraph operator, Stuerer, received the said dispatch from the train dispatcher at Pocatello, repeated the same back to said train dispatcher, and received the dispatch "O. K.," which indicated that the order received at Dillon was correct. Under these circumstances there can be no doubt but that the said Frost was killed on account of the negligence of said telegraph operator at Dillon.

The defendant asked the court to instruct the jury to bring in a verdict for defendant, on the ground that the company was not liable for the negligence of its telegraph operator, under the circumstances presented, as he was a fellow servant of the deceased, Frost. The court refused to give this instruction, and charged upon this point as follows:

"As you have heard me state in deciding the motion in this case, the railroad company, in changing the time of the running of trains, was required to notify the engineer and conductor of the railroad train that the time had been changed, and, if they failed to do so, that was negligence upon their part. If they intrusted—the railroad company intrusted—to any one else to give that notice, and that person, through negligence on his part, failed to give that notice, why, then, the company was liable for that negligence. It was the duty of the company to give that notice, and, if it intrusted that duty to the telegraph operator, the acts of that telegraph operator were the acts of said company. If he was negligent in this matter, that was the negligence of the company."

Counsel for defendant excepted to the refusal of the court to give the above instruction asked by it, and to the giving of the above portion of the charge the court gave to the jury. The jury found a verdict for plaintiff. Defendant petitioned the court for a new trial, and assigned the above rulings as a ground therefor. Plaintiff's counsel insist that there were other matters presented to the jury which would have justified the verdict they found. If the court erred in refusing the instruction asked by defendant, or in giving the portion of the charge above named, it committed errors which are sufficient to justify the court in awarding a new trial. The point involved in the position taken by the court is: Was the telegraph operator at Dillon a fellow servant of Frost, or was he, in the matter of notice of a change of running time of the train upon which Frost was an engineer, performing a duty which the said railway company was required to perform itself, and could not intrust to another without said other person representing the said company, and acting for it? If the said operator was only a fellow servant of Frost in the matter of giving notice of the change of the time of running trains, then the company was not liable for his negligence. Frost,

as an employ  of the said railway company, undertook, as one of the risks of his employment, that he would suffer the consequences arising from the negligence of a fellow servant in a common employment with him, and that the railway company should not be responsible therefor. It is conceded that it was the duty of the railway company to establish the time for running trains, the hour of their departure and arrival at stations, and their speed. This is usually done by the train dispatcher establishing what is termed a "time table." This is the act certainly of the company. If a time table is changed temporarily, this must be done by the train dispatcher. He acts in both cases in the name of the superintendent of the company or of its road. A railway company, however, does not perform its whole duty to its employ s when it establishes a time table, either general or temporary. It should exercise reasonable care, under all the circumstances, to bring this time table to the notice of all persons who are charged by it with the operating of trains on its railway track. The notice of a temporary change in a time table is as necessary as the notice of the general time table. The temporary change is made by the train dispatcher using the name of the superintendent of the road. There is more danger to be apprehended from the establishment of a temporary time table when a general one has been in use than from the establishing of a general time table in the first place. It is admitted in *Railroad Co. v. Camp*, 13 C. C. A. 233, 65 Fed. 952, 960, that a train dispatcher, in establishing a general, temporary, or special time table, acts as a representative of the company, and that the duty devolves upon the company of giving notice of these several time tables to those who are to operate trains on its track. It is said in the same case by the court:

"It is the further duty of the company to promulgate the rules and time table, and to see to it that they are brought to the knowledge of their employ s engaged in running their trains. Whenever the time table is disregarded, and trains are run upon telegraphic orders, this is but the establishment of a temporary time table by the company."

The cases cited by the court in that case fully maintain this rule.

When the act to be performed is one which it was the duty of the railway company, as master, to execute, can it in any way transfer this duty to another, and exonerate itself from liability in case this other person is negligent in its performance? I think, under established federal authority, it cannot. In the case of *Hough v. Railway Co.*, 100 U. S. 213, the supreme court, after stating that the duty was cast upon a railroad corporation of providing suitable machinery and appliances to be used by its employ s, held:

"Those, at least, in the organization of the corporation who are invested with controlling or superior authority in that regard, represent its legal personality. Their negligence, from which injury results, is the negligence of the corporation. The latter cannot, in respect to such matters, interpose between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent, who, in exercising the master's authority, has violated the duty he owes as well to the servant as to the corporation."

In the case of *Railroad Co. v. Herbert*, 116 U. S. 642, 6 Sup. Ct. 590, the supreme court approved of the rule above announced. In that

case the defendant in error was a brakeman on one of the trains of plaintiff in error, and was injured in the Northern Pacific Railroad Company's yard at Bismarck, Dak., on account of a defective car. The court, after stating that if the railroad company appointed no one to look after its cars and keep them in repair, it was guilty of negligence, said:

"If, however, one was appointed by it, charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company; his negligence was its negligence, and imposed a liability upon it."

So far as the providing and maintaining suitable machinery and appliances for his employes, these two cases establish the rule that a master cannot, by delegating his authority in regard thereto, escape liability for the negligence of such person, that such person acts for him, and is his representative.

The case of *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, was one which was undoubtedly fully considered. In it the rules of law applicable to the duty of a master towards his servants was quite fully stated. In it the court said:

"Again, a master employing a servant impliedly engages with him that the place in which he is to work, and the tools or machinery with which he is to work or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and the machinery, and when he employs one to enter into his service he impliedly says to him that there is no danger in the place, the tools, and the machinery than such as is obvious and necessary. Of course, some places of work and some kinds of machinery are more dangerous than others, but that is something which inheres in the thing itself, which is a matter of necessity, and cannot be obviated. But within such limits the master who provides the place, the tools, and the machinery owes a positive duty to the employe in respect thereto. That positive duty does not go to the extent of a guaranty of safety, but it does require that reasonable precautions be taken to secure safety; and it matters not to the employe by whom that safety is secured or the reasonable precautions therefor taken. He has the right to look to the master for the discharge of that duty; and if the master, instead of discharging it himself, sees fit to have it attended to by others, that does not change the measure of obligation to the employe, or the latter's right to insist that reasonable precaution shall be taken to secure safety in these respects. Therefore it will be seen that the question turns rather on the character of the act than on the relations of employes to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then negligence in the act is the negligence of the master."

In addition to the duty of the master to provide proper tools and machinery for the use of his servants, we have the additional duty stated in this case that he must exercise reasonable care in providing a safe place for his servant to work in. Under what head of the list of duties required of a master towards his servant shall we place the duty of a railroad company to establish time tables, and give notice thereof to those engaged in managing and running trains? I apprehend we must class that duty under the head of the obligation of the master to provide a suitable place for his servant to work in. This being the case, the duty of giving notice to those running a train devolves upon the railroad company, and those who undertake or are intrusted with this office personally represent it. As is shown by

the above authorities, a master cannot delegate the duty of providing a safe place in which his servant is called upon to work, so as to escape responsibility, if there is a want of proper care in providing such place. In the case of *Railroad Co. v. Camp*, supra, it is sought to make a distinction between the duty of the master as to giving notice of a general time table and his duty as to a temporary time table. It is claimed that when a general time table is established ample time is afforded for giving notice thereof, but that a different state of facts exist when a temporary time table is established. In this case, however, it is admitted that the establishing of a temporary time table is the work of the railroad company, and the duty of giving notice of any time table, general or temporary, devolves upon it. How can it be claimed then that in one case more than another this duty of the master can be turned over to a fellow servant of those who are operating his trains, and be relieved from liability? The duty of giving notice in both classes of time tables is the duty of the master, and the master cannot delegate his duty to another without being responsible for his negligence. That is the rule undoubtedly established by the supreme court. The character of the act determines the duty of the master. In this case of *Railroad Co. v. Camp* the court quotes this approvingly from *Slater v. Jewett*, 85 N. Y. 62:

"It is not true that on an occasion like this it is the duty of the master, or a part of his contract, to see to it as with a personal sight and touch that notice of a temporary and special interference with a general time table comes to the intelligent apprehension of all those whom it is to govern in the running of trains. It is utterly impracticable so to do, and a brakeman or a fireman on a train knows that it is, as well as any person connected with the business. He knows that trains will often and unexpectedly require to be stopped, and that such orders must, from the nature of the case, be given through servants skilled in receiving and transmitting them. If there is due care and diligence in choosing competent persons for that duty, negligence by them in the performance of it is a risk of the employment that the employé takes when he enters the service."

This language might be used in regard to many matters in managing a railroad which are classed as the duties of the company owning the same. It cannot be expected that the company as with a personal sight and touch will examine every car wheel and truck of a railroad train it operates on its track, and it is evident that the examination of such appliances must be made by an employé. The same remarks may be made in regard to a railroad track. It cannot be expected that every railroad company can as with personal sight and touch examine every rail of iron or steel or every bridge or trestle along its road. Yet it has been held that whoever performs these duties acts for the company, and his negligence is that of the company.

In the case of *Railway Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, a wheel of one of the Union Pacific Railway Company's freight cars, at its station known as Green River, was out of repair. The allegations in the complaint were that the defect in the wheel, which was a crack, could have been discovered by proper inspection at that station, which was an inspecting station. It could not be contended that every master as with a personal sight and touch could examine

every car and car wheel at such a station as Green River in so long a line as that of the Union Pacific Railroad. It is evident that such a service must be performed by an employé skilled in such matters. The Union Pacific Railway Company was held liable in the above case, and the supreme court sustained the judgment on the ground that it was the duty of the railroad company to provide and maintain suitable appliances for the use of its employes.

In the case of *Railroad Co. v. Charles*, 2 C. C. A. 380, 51 Fed. 562, the circuit court of appeals for the Ninth circuit held that under certain circumstances a telegraph operator was not a fellow servant of a section hand injured while upon a hand car of the company, going to his work, on account of a collision with a train of plaintiffs in error. In that case the complaint, among other matters, sets forth:

"That at said date [28th of August, 1886] defendant had in its employ at Cheney a telegraph operator whose duty it was to know the time of passing trains over defendant's road in the vicinity of Cheney, and the times of their arrival and departure therefrom, and to inform defendant's servants and employes, where safety and welfare might be endangered thereby, of the times of the running of such trains."

The complaint was demurred to, and the point as to the position of the telegraph operator in giving notice to employes came up for consideration, and the court said:

"We are aware that there are decisions holding that a telegraph operator does not occupy the position of a train dispatcher merely because he transmits or delivers the orders of the movement of the trains, and that his negligence cannot be said to be the negligence of the company; but it is not necessary in this connection to determine the actual duty or responsibility of a telegraph operator. All this is covered in the present case by the allegations of the complaint, and upon the question involved in the demurrer these allegations must be accepted as true. The point is that the duty of keeping the employes on the section informed as to the movement of trains over that section was a positive duty, devolved upon the company, and, where injuries are sustained by reason of negligence in the performance of that duty, the company is liable."

This decision is controlling upon this court. It would seem that in principle it decided the case at bar. If it was the duty of the railroad company to give notice of a temporary change in a time table, that was its duty as much as it was the duty to give notice to section hands in the last-named case of the running of trains. In this case it is apparent that the court held to the view that any positive duty of the master could not be delegated to a fellow servant of those operating trains, so as to escape liability for his negligence. Of course, the master in all cases is only required to exercise reasonable care depending always upon the circumstances of the case presented in performing those duties the law assigns him. But when he assigns his duties to another, that person acts for him as his agent, his representative, and he must be held responsible for his negligence. Under this rule the telegraphic operator Stuerer at Dillon must be considered as representing the company in the duty assigned him of giving notice of the temporary change of the time table, or in transmitting the notice intrusted to him to deliver to the conductor of train No. 5 of the change in the time table. In doing this duty he was not a fellow servant of those operating the road,

but a personal representative of the company, for whose negligence the company was responsible. The motion for a new trial is therefore denied.

WEST PLAINS TP., MEADE COUNTY, v. SAGE et al.

(Circuit Court of Appeals, Eighth Circuit. September 16, 1895.)

No. 531.

1. MUNICIPAL BONDS—FRAUDULENT ISSUES—ESTOPPEL.

A statute of Kansas (Laws 1879, c. 50) provides that every county, city, township, etc., may compromise and refund its indebtedness and issue new bonds, with interest coupons, in payment for the sum so compromised, the bonds to be signed and to contain certain recitals provided in the act, and to be issued by the proper officers to the holders of the indebtedness, and a record to be kept by the county clerks of the bonds issued in the several counties, showing the date, number, and amount, and to whom and on what account issued. Certain bonds were issued by the township of W., which purported to be issued under this act, and contained recitals that all its requirements had been complied with. The records of the governing board of the township showed that all the proper steps had been regularly taken, and that the bonds were issued to refund certain scrip held by one G., and were delivered to him. In fact, the bonds were issued to the owners of a sugar factory, to induce them to locate it in the township, and the scrip held by G. was issued to him, without consideration, to create an apparent debt to be refunded. A proposal by the owners of the factory to locate it in the township, in consideration of the bonds, and an agreement reciting the delivery of the bonds were copied into the record book of the governing board of the township, but formed no part of the records of the meetings at which the bonds were authorized, and were not mentioned or referred to in those records. *Held*, that as against a bona fide purchaser of the bonds, without notice of the falsity of the record and the recitals in the bonds, and of the illegal purpose for which they were in fact issued, the township was estopped to deny that the bonds were issued to refund its indebtedness. Per Sanborn and Thayer, Circuit Judges. Caldwell, Circuit Judge, dissenting.

2. BONA FIDE PURCHASER—NOTICE.

Held, further, that the existence, in the record book of the township board, of the copies of the offer and agreement of the sugar company, outside the records of the meetings at which the bonds were authorized, did not charge the purchasers of the bonds with notice of their illegal character. Per Sanborn and Thayer, Circuit Judges. Caldwell, Circuit Judge, dissenting.

3. MUNICIPAL CORPORATIONS—NEGOTIABLE BONDS—KANSAS STATUTE.

Held, further, that, under the statute aforesaid, the township was not restricted to issuing bonds payable to the holder of the indebtedness to be refunded, but might issue negotiable bonds. Per Sanborn and Thayer, Circuit Judges. Caldwell, Circuit Judge, dissenting.

4. CONSTITUTION OF KANSAS—TITLE OF STATUTE.

Held, further, that the act authorizing the issue of the bonds, which was entitled "An act to enable counties, municipal corporations, boards of education of any city and school districts, to refund their indebtedness," did not violate section 16, art. 2, of the constitution of Kansas, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title, though it authorized "municipal townships," which are quasi municipal corporations, to refund their indebtedness. Per Sanborn and Thayer, Circuit Judges. Caldwell, Circuit Judge, dissenting.

5. MUNICIPAL CORPORATIONS—NEGOTIABLE BONDS—KANSAS STATUTE.

The Kansas statute of March 10, 1879 (Laws 1879, c. 50), authorizing counties, etc., to issue new bonds to refund their indebtedness, does not

authorize the issue of negotiable bonds, but only bonds payable to the individual holders of such indebtedness. Per Caldwell, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the District of Kansas.

The township of West Plains, in the county of Meade, state of Kansas, the plaintiff in error, brings this writ of error to reverse a judgment rendered against it, and in favor of Henry W. Sage and others, defendants in error, upon certain coupons cut from refunding bonds issued by it under the provisions of chapter 50 of the Laws of Kansas of 1879. The case was tried by the court upon an agreed statement of facts. The bonds were payable to bearer, were in the usual form of such securities, and were duly executed by the proper officers of the township. Each bond contained the following recitals: "This bond is one of a series of fifteen bonds of one thousand dollars each, and issued by virtue of and in accordance with the provisions of sections one, two, and three of chapter fifty of the Laws of 1879; being an act of the legislature of the state of Kansas entitled 'An act to enable counties, municipal corporations, the board of education of any city and school districts to refund their indebtedness,' which said act took effect March 10, 1879. And it is certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been done, happened, and performed in regular and due form, as required by law." The defendants in error were bona fide purchasers of the bonds and coupons before maturity, without notice of any irregularity in their issue, except such as they were lawfully charged with from the public records, the law and the face of the bonds themselves.

The provisions of chapter 50 of the Laws of Kansas of 1879 that are material to the issues in this case are:

"Section 1. That every county, every city of the first, second or third class, the board of education of any city, every township, and every school district, is hereby authorized and empowered to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever, upon such terms as can be agreed upon, and to issue new bonds, with semi-annual interest coupons attached, in payment for any sum so compromised; which bonds shall be issued at not less than par, shall not be for a longer period than thirty years, shall not exceed in amount the actual amount of outstanding indebtedness, and shall not draw a greater interest than six per cent. per annum.

"Sec. 2. * * * Bonds issued by any township shall be signed by the trustee, attested by the township clerk, and countersigned by the township treasurer. * * * Such bonds may be in any denominations, from one hundred to one thousand dollars, and made payable at such place as may be designated upon the face thereof, and they shall contain a recital that they are issued under this act.

"Sec. 3. When a compromise has been agreed upon, it shall be the duty of the proper officers to issue such bonds at the rate agreed upon to holder of such indebtedness in the manner prescribed in this act. * * *

"Sec. 4. A record shall be kept by the different county clerks of all bonds issued in such counties under this act, showing the date, number, amount thereof, to whom and on what account issued, and when the same become due."

The governing board of the plaintiff in error was the township board, which consisted of the trustee, clerk, and treasurer. On October 23, 1889, that board held a special meeting, and made a record of its proceedings. That record recites that all the members of the board were present; that W. C. Gould appeared at the meeting, "he being the owner of \$15,000 of outstanding scrip of said township of West Plains," and offered to surrender the "scrip" for cancellation, and to receive an equal amount of "bonds to be issued in accordance with the laws of the state of Kansas, authorizing the refunding of outstanding indebtedness"; that the township board "decided that it is for the best interests of the township of West Plains that the proposition be

accepted, and a special election is hereby ordered," at a proper time and place, for the purpose of submitting the proposition to the electors of the township, "all for the purpose of refunding the outstanding indebtedness of said township, as provided by * * * sections 1, 2, and 3" of chapter 50, supra; that the form of ballot to be used at the election should be, "For the issuing of 15 bonds, of the denomination of \$1,000 each, to refund the outstanding indebtedness of the township of West Plains, county of Meade, and state of Kansas," and "Against issuing 15 bonds, of the denomination of \$1,000 each, to refund the outstanding indebtedness of the township of West Plains, county of Meade, and state of Kansas"; and that the clerk was ordered to post and publish a proper notice of the election. On November 2, 1889, the board held a meeting, and made an official record of that meeting, which recites that an election had been held on that day pursuant to the notice the board had prescribed; that the board canvassed the vote at that election, found that 52 votes had been cast for, and 14 against, the proposition of Gould, and declared it carried; that thereupon Gould surrendered to the board "all and each of the outstanding indebtedness indicated by township scrip which he was the holder and owner of, amounting to \$15,000"; that this was burned; that thereupon the trustee, clerk, and treasurer, who composed the board, "did then and there execute and deliver to said W. C. Gould, in lieu of the \$15,000 township scrip that had been destroyed, 15 bonds," which were described by date, amount, number, to whom and on what account issued, and when due, as prescribed by sections 3 and 4 of chapter 50, supra; and that, "no further business appearing, the board adjourned." These are the material facts, and all the material facts, disclosed by the records of the meetings of the township board with reference to these bonds. The facts were, however, that on October 23, 1889, before the proceedings of the board were had, which appeared in the record of the meeting of that day, the American Sugar Company, a corporation, submitted to the board at its special meeting a written proposition to construct a sugar factory in the township if \$15,000 of refunding bonds were donated to it by the township. The township trustee and township clerk, at the request of the president of the sugar company, thereupon executed and delivered to W. C. Gould \$15,000 in scrip, in the form of orders on the treasurer, without any consideration whatever, and for the purpose of creating an apparent debt of the township to be converted into refunding bonds. After the bonds were executed, they were not delivered to Gould, as the record of the meeting of the board of that day shows, but were delivered to the president of the sugar company; and that company made a written agreement with the township, which is dated on that day, and recites an acknowledgment of the receipt of the bonds. The records of the meetings of the board do not disclose any of these facts tending to show that the bonds were issued for a sugar factory and not for the purpose of refunding the outstanding indebtedness of the township; but the proposition of the sugar company was on October 23, 1889, copied into the clerk's book in which the proceedings of the meeting of the board of that day appear before the record of that meeting, and the agreement made by the sugar company, dated November 2, 1889, was copied into the same book just after the record of the meeting of that day. These copies in the record book do not appear to be any part of the records of the proceedings of the meetings, and neither of them nor their originals are mentioned or referred to in those records. The complaint is that upon this state of facts the court below erred in rendering a judgment against the plaintiff in error.

J. T. Herrick, for plaintiff in error.

W. H. Rossington and Charles Blood Smith, for defendants in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

v.69F.no.10—60

May a municipal corporation make a false certificate and official record that its negotiable bonds were issued for a lawful purpose, and, after they have been bought by innocent purchasers for value in reliance upon this certificate or record, defeat them by the plea that the certificate and record were false, and that the bonds were in fact issued for an unlawful purpose? This is the question presented by the first objection to this judgment. It is that although the official record of the meetings of the township board that issued these bonds, and the recitals made by that board in the bonds themselves, show that they were issued for the lawful purpose of refunding an outstanding indebtedness of the township in accordance with the provisions of sections 1, 2, and 3 of chapter 50 of the Laws of Kansas of 1879, yet they were in fact issued for the unlawful purpose of procuring the erection of a sugar factory. Defenses of this character are unfortunately not novel. In answer to a like plea in *National Life Ins. Co. v. Board of Education of City of Huron*, 10 C. C. A. 637, 62 Fed. 778, 784, this court said:

"Nor is it any defense to such bonds, as against bona fide purchasers, that the citizens and officers of a municipal corporation, with the intention to use the proceeds of the bonds for an unlawful purpose, took the necessary steps to issue them for a lawful purpose, certified on the face of the bonds that they were issued for such lawful purpose, and then appropriated the proceeds to the unlawful purpose. Corporations are as strongly bound to an adherence to truth in their dealings with mankind as are individuals, and they cannot, by their representations or silence, induce others to part with their money or property, and then repudiate the obligations for which the money was expended, and which their statements represented to be valid."

Omaha Bridge Cases, 10 U. S. App. 101, 189, 2 C. C. A. 174, and 51 Fed. 309; *Paxson v. Brown*, 10 C. C. A. 135, 61 Fed. 874, and cases cited; *Moran v. Commissioners*, 2 Black, 722; *Hackett v. Ottawa*, 99 U. S. 86, 90; *Ottawa v. National Bank*, 105 U. S. 342, 345; *Zabriskie v. Railroad Co.*, 23 How. 381.

The plaintiff in error, in the records of the meetings of its township board in which the bonds were directed to be issued, in the call for and the form of the vote at the election which authorized their issue, and in the bonds themselves, declared that they were issued for the lawful purpose of refunding the outstanding indebtedness of the township. The defendants in error purchased and paid for them with no notice that they were issued for any other purpose, and in the full belief that these declarations were true. It is no defense for this township, against the action of an innocent purchaser who has invested his money in these bonds, that the township board, and the voters of the township who authorized the board to issue them, knew that the township had no indebtedness to refund, and that all these records and declarations were false, and were made to evade the law. Against a bona fide purchaser the township is estopped to deny that these bonds were issued to refund its outstanding indebtedness.

But counsel for the plaintiff in error contends that the defendants in error were not bona fide purchasers. No claim is made that they had any actual notice that the bonds were not issued and used for

the purpose shown by the recitals they contain. The contention is that the copy of the proposition of the sugar company to build a factory for \$15,000 in refunding bonds, and the copy of the agreement of the sugar company to do so (which contains a receipt for 15 refunding bonds), which have been found in the same book in which the records of the meetings of the township board were recorded, charge all purchasers of these bonds with constructive notice that the records of the meetings of the board and the recitals in the bonds were false, and that the bonds were issued for an unlawful purpose. This position is untenable. The recitals in the bonds themselves are fatal to it. They declare that the bonds were issued for a lawful purpose. Each bond contains a recital that it was issued by virtue of, and in accordance with, the provisions of the statutes, for refunding the indebtedness of municipal corporations to which we have referred, and the further recital that "all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been done, happened, and performed in regular and due form as required by law." The township board was the governing body of this township. It had been authorized by a vote of the electors to issue these bonds to refund the indebtedness of this township. It was vested by the statutes with the power, and the duty was imposed upon it, to determine the existence and amount of the indebtedness for which the bonds should issue. It found the scrip held by Gould to be an outstanding indebtedness of the township, and directed these bonds to be issued to refund it. They issued them. They inserted a recital in them that they were issued for that purpose. Every member of the township board signed the bonds which contained this recital as an officer of the township. The subsequent purchase of these bonds by the plaintiffs in error for value made the estoppel of the township to deny this recital complete. No proposition is now better settled than that "where the municipal body has lawful authority to issue bonds or negotiable securities, dependent only upon the adoption of certain preliminary proceedings, and the adoption of those preliminary proceedings is certified on the face of the bonds by the body to which the law intrusts the power, and upon which it imposes the duty, to ascertain, determine, and certify this fact before or at the time of issuing the bonds, such a certificate will estop the municipality, as against a bona fide purchaser of the bonds, from proving its falsity to defeat them." *National Life Ins. Co. v. Board of Education of City of Huron*, 10 C. C. A. 637, 62 Fed. 792, and cases there cited; *City of Cadillac v. Woonsocket Inst. for Sav.*, 7 C. C. A. 574, 578, 58 Fed. 935. Moreover, the copies of the offer and agreement of the sugar company in the record book of the board would not have been constructive notice of the attempted fraud and malfeasance of the township officers in the absence of these recitals. The presumption is that township officers tell the truth in their record, and perform their official duties. To charge a purchaser with notice that these bonds were unlawfully issued on account of the copies of this proposition and agreement found in the record book, would require him to presume from them that all these

officers had violated their official oaths and made the official records of their meetings a tissue of falsehood. No purchaser of the bonds was charged by these copies with any such notice. They constituted no part of the official record of the meetings of the board, and they were not referred to therein. No one was bound to go further than to examine the record of those meetings. That record exhibited a perfect compliance with the statutes; and the copies of these statements outside the record charged a purchaser who knew nothing of them with no constructive notice of anything, whether they appeared in the same book with the records of the board or elsewhere.

The objection that the act under which these bonds were issued gave no authority to the township to issue negotiable bonds is, in our opinion, untenable. In the cases of *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441; *Hill v. Memphis*, 134 U. S. 198, 10 Sup. Ct. 562, and *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, cited in support of this objection, and in the cases referred to in the opinions in those cases, none of the acts there under consideration authorized the municipal bodies to issue bonds at all; and the extent to which those decisions go is to hold that the power to issue negotiable bonds is not to be implied from the limited power to borrow money or to incur indebtedness. The act under consideration in this case authorized this township to "issue new bonds," without any restriction as to their negotiability. This grant of power to a municipal body to issue bonds must be interpreted to give that body power to issue municipal bonds in the usual form of such securities. The usual—nay, it may almost be said the universal—form of such securities is that of a negotiable bond payable to bearer; and, in our opinion, it was bonds in this form, and in no other, that the legislature of Kansas had in mind and intended to give this township power to issue by this act. *City of Cadillac v. Woonsocket Inst. for Sav.*, 7 C. C. A. 574, 576, 58 Fed. 935; *Ashley v. Supervisors*, 60 Fed. 55, 66, 8 C. C. A. 455.

To the suggestion that the bonds were required to be payable in the name of the holder of the indebtedness compromised, the answer is that there is no such express provision or restriction in the act. The only provision on this subject is that "it shall be the duty of the proper officers to issue such bonds * * * to the holder of such indebtedness in the manner prescribed in this act." It goes without saying that the issue to the holder of such indebtedness of bonds payable to bearer would be as exact and complete a compliance with this provision as to issue to him bonds payable to himself.

To the argument that the intention of the legislature must have been that the bonds should be payable to the order of the holder of the indebtedness compromised, and not to bearer, because the act required the county clerks to keep a record of all bonds issued in their respective counties, the date, number, and amount thereof, to whom and on what account issued, and when the same became due, and that these county clerks could only learn to whom such bonds were issued in case the bonds themselves were payable to the order of the party to whom they were issued, it is a complete answer that the

record of the township clerk, which in this case shows, as it should show in every case, the facts which the county clerk is bound to record, is the best evidence of those facts,—the evidence upon which the county clerk is bound to rely in preference to the floating bonds, many of which may never be presented to him. And it goes without saying that the record of the township clerk could show with equal facility and truth to whom the bonds were issued, whether they were payable to bearer or to the order of the holder of the prior indebtedness.

Another objection to this judgment is that these bonds were unauthorized, because the act under which they were issued was, in so far as it authorizes municipal townships to issue refunding bonds, in violation of section 16, art. 2, of the constitution of the state of Kansas, which provides that, "no bill shall contain more than one subject, which shall be clearly expressed in its title," because the subject of refunding the indebtedness of municipal townships was not expressed in its title. The title of the bill was: "An act to enable counties, municipal corporations, boards of education of any city, and school districts, to refund their indebtedness." The contention is that townships are not municipal corporations proper, but quasi municipal corporations, like counties, boards of education, and school districts; and, inasmuch as the title of the bill especially mentioned these quasi municipal corporations, the presumption is that no quasi municipal corporations were referred to by the term "municipal corporations." This argument is more ingenious and plausible than convincing. It goes without saying that there is a marked difference between the powers and duties of municipal corporations proper, such as incorporated cities and villages, and those of quasi municipal corporations, such as counties and townships. Nevertheless, where this distinction is immaterial, quasi municipal corporations are thought of, spoken of, and treated as municipal corporations. In the thought and speech of lawyers, legislators, and courts, they are treated as a species of the genus municipal corporations. Ordinarily, the term "municipal corporations" is used to distinguish public political corporations from private corporations, and it generally includes within its meaning all public political corporations, whether municipal or quasi municipal. The object of the constitutional provision under consideration is to require the title of a bill to give notice to the legislature of the subject treated in it. There was nothing to call the attention of the legislators to the rather nice distinction between municipal and quasi municipal corporations in the enactment of this law, which confessedly empowers some classes of both municipal and quasi municipal corporations to refund their indebtedness; and it is more probable that the term "municipal corporations" in the title to this bill, gave notice to the legislature that the bill treated of authority for all public political corporations of the state to refund their indebtedness, than that it gave notice to them that it excluded municipal townships from the exercise of that authority.

This view is strengthened by a glance at some of the language used by the legislature and by the supreme court of the state of Kansas in treating of these townships.

In the General Statutes of Kansas of 1868 (chapter 110, art. 1) this provision is found:

"Each organized township in the state shall be a body politic and corporate, and, in its proper name, sue and be sued; may appoint all necessary agents and attorneys in that behalf, and may make all contracts that may be necessary and convenient for the exercise of its corporate powers."

In section 1, c. 168, of the Laws of Kansas of 1885, the legislature provided that:

"The township trustee, clerk and treasurer of each municipal township in the state shall constitute a board of commissioners of highways, and township auditing board for the respective townships."

In section 1, c. 235, of the Laws of 1887, the legislature provided that:

"Any municipal township in any county in this state is hereby authorized to provide and secure to the inhabitants thereof, within such township, parks and cemeteries in the manner and form hereinafter designated."

In *Riley v. Township of Garfield*, 38 Pac. 564, the supreme court of Kansas, in speaking of a township in that state, said: "That township is, as a public municipal corporation, the successor of Garfield county."

It is difficult to come to the conclusion that a legislature that had declared townships to be bodies corporate, and had repeatedly called them "municipal townships," would not have been notified that they were referred to by the term "municipal corporations." Moreover, the article of the constitution under consideration should not be enforced in a narrow or technical spirit. Unless it clearly appears that the subject under consideration was not so expressed in the title that the legislature was thereby notified of its proposed consideration, the law ought not to be stricken down by the court as unconstitutional. *Travelers' Ins. Co. v. Township of Oswego*, 7 C. A. 669, 676, 59 Fed. 58; *City of Eureka v. Davis*, 21 Kan. 580; *Philpin v. McCarty*, 24 Kan. 402; *State v. Barrett*, 27 Kan. 217; *Commissioners of Cherokee Co. v. State*, 36 Kan. 337, 13 Pac. 558; *In re Pinkney*, 47 Kan. 94, 27 Pac. 179.

In view of the common use of the term "municipal corporations" to distinguish public from private corporations, of the declaration of the legislature of Kansas that townships in that state are bodies corporate, of the repeated use by the legislature of the term "municipal township" to describe one of them, and of the reference to one of them as a "public municipal corporation" by the supreme court of that state, it is not so clear that the legislature was not notified by the term "municipal corporations" in this title that municipal townships would be considered in the bill, that any portion of this law should be declared unconstitutional.

Finally, it is argued that these bonds are void because chapter 50, *supra*, authorized the refunding of indebtedness that had matured or was maturing at the date when it took effect, on March 10,

1879, only, and that the township of West Plains was not then in existence, and the defendants in error were charged with notice of that fact. But the supreme court of the state of Kansas has held that this statute authorized the refunding of any indebtedness, whether it was created prior or subsequent to the passage of the act. *Riley v. Township of Garfield*, 38 Pac. 560. In the absence of any question of commercial law, and of any question involving a violation of the national constitution, laws, or treaties, the federal courts follow the construction of state statutes given by the highest judicial tribunal of the state in the interest of uniformity of decision and harmony of action between the national and state systems of jurisprudence. *Traveler's Ins. Co. v. Township of Oswego*, 7 C. C. A. 669, 673, 674, 59 Fed. 58, and cases there cited. Moreover, independent consideration of this question has led us to the same conclusion reached by the supreme court of Kansas.

The judgment below must be affirmed, and it is so ordered.

THAYER, Circuit Judge (concurring). I concur in the foregoing opinion. The chief objection to a recovery on the bonds in suit is that they were issued under a law of the state of Kansas (Act March 10, 1879, *supra*) which did not contemplate or authorize the issuance of negotiable securities, and that the purchasers of the bonds were bound to take notice of the true construction of said act, and were not innocent holders. Whatever weight attaches to this argument is derived, in my judgment, from expressions found in *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, and in *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, which were not decided for more than 10 years after the act of March 10, 1879, was passed, and therefore could have had no influence whatever on the legislature of Kansas in framing said act. It is safe to say that prior to March 10, 1879, municipal bonds aggregating millions of dollars had been executed and sold under the sanction of laws which, like the act now in question, authorized an issue of bonds with semi-annual coupons attached, without specifying whether they should be made negotiable in form or otherwise. It is doubtful whether a single bond had ever been put in circulation under such laws that did not contain words of negotiability, and more doubtful whether bonds not containing words of negotiability would have proven to be a marketable security. In 1879 it was the generally accepted view that a power conferred on a municipality to issue bonds, or simply to borrow money, carried with it, by necessary implication, a power to issue negotiable bonds. Bearing in mind these facts, a due respect for the legislature requires us to presume that if that body was solicitous of preventing frauds by making bonds issued under the act of March 10, 1879, nonnegotiable, it would have declared that they should be nonnegotiable in plain and direct terms, instead of employing language that was then deemed amply sufficient to warrant the execution of negotiable securities. I have no doubt that the legislature of Kansas intended by the act of March 10, 1879, to authorize the various municipalities named in that act to issue negotiable bonds, and, in my judgment, the language

of the act was adequate for that purpose, notwithstanding the decisions in *Merrill v. Monticello* and *Brenham v. Bank*, *supra*. The distinction between those cases and the one at bar is clearly pointed out in the foregoing opinion. According to well-settled rules of construction, the act of March 10, 1879, should be held to have conferred a power upon the defendant township which it was clearly intended to confer, and which the legislature had an undoubted right to grant. I concur in the order affirming the judgment.

CALDWELL, Circuit Judge (dissenting). It is obvious that no recovery can be had on the bonds in suit if we apply to the facts of this case the well-settled rules of law relating to the power of municipal corporations to issue bonds, and the rules which determine when such corporations are, and when they are not, precluded from availing themselves of meritorious defenses to such obligations.

Some of the rules on this subject are well summarized by the supreme court in the case of *Barnett v. Denison*, 145 U. S. 135, 12 Sup. Ct. 819. In this case, Mr. Justice Brown, speaking for the court, said:

"It is the settled doctrine of this court that municipal corporations are merely agents of the state government for local purposes, and possess only such powers as are expressly given, or implied, because essential to carry into effect such as are expressly granted (1 Dill. Mun. Corp. § 89; *Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361); that the bonds of such corporations are void, unless there be express or implied authority to issue them (*Wells v. Supervisors*, 102 U. S. 625; *Claiborne Co. v. Brooks*, 111 U. S. 400, 4 Sup. Ct. 489; *Concord v. Robinson*, 121 U. S. 165, 7 Sup. Ct. 937; *Kelley v. Milan*, 127 U. S. 139, 8 Sup. Ct. 1101); that the provisions of the statute authorizing them must be strictly pursued; and that the purchaser or holder of such bonds is chargeable with notice of the requirements of the law under which they are issued (*Ogden v. County of Davies*, 102 U. S. 634; *Marsh v. Fulton Co.*, 10 Wall. 676; *South Ottawa v. Perkins*, 94 U. S. 260; *Northern Bank v. Porter Tp.*, 110 U. S. 608, 4 Sup. Ct. 254; *Hayes v. Holly Springs*, 114 U. S. 120, 5 Sup. Ct. 785; *Merchants' Exch. Nat. Bank v. Bergen Co.*, 115 U. S. 384, 6 Sup. Ct. 88; *Harshman v. Knox Co.*, 122 U. S. 306, 7 Sup. Ct. 1171; *Coler v. Cleburne*, 131 U. S. 162, 9 Sup. Ct. 720; *Lake Co. v. Graham*, 130 U. S. 674, 9 Sup. Ct. 654)."

In the case of *Brenham v. Bank*, 144 U. S. 173, 12 Sup. Ct. 559, the supreme court said:

"It is easy for the legislature to confer upon a municipality, when it is constitutional to do so, the power to issue negotiable bonds; and, under the well-settled law that any doubt as to the existence of such power ought to be determined against its existence, it ought not to be held to exist in the present case."

And the court held that express authority conferred on a city by its charter to borrow money did not authorize it to issue negotiable bonds for the money borrowed, and that a bona fide holder of such bonds could not recover thereon against the city.

In *Hill v. Memphis*, 134 U. S. 194, 10 Sup. Ct. 562, the supreme court, speaking by Mr. Justice Field, said:

"The inability of municipal corporations to issue negotiable paper for their indebtedness, however incurred, unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers, has been affirmed in repeated decisions of this court."

In *Merrill v. Monticello*, 138 U. S. 673, 11 Sup. Ct. 441, the court said:

"It is admitted that the power to borrow money or to incur indebtedness carries with it the power to issue the usual evidences of indebtedness, by the corporation, to the lender or other creditor. Such evidences may be in the form of promissory notes, warrants, and perhaps, most generally, in that of a bond. But there is a marked legal difference between the power to give a note to a lender for the amount of money borrowed, or to a creditor for the amount due, and the power to issue for sale, in open market, a bond, as a commercial security, with immunity, in the hands of a bona fide holder for value, from equitable defenses. The plaintiff in error contends that there is no legal or substantial difference between the two; that the issuing and disposal of bonds in market, though in common parlance, and sometimes in legislative enactment, called a 'sale,' is not so in fact; and that the so-called 'purchaser' who takes the bond, and advances his money for it, is actually a lender, as much so as a person who takes a bond payable to him in his own name. * * * It does not follow that, because the town of Monticello had the right to contract a loan, it had therefore the right to issue negotiable bonds, and put them on the market as evidences of such loan. To borrow money, and to give a bond or obligation therefor which may circulate in the market as a negotiable security, freed from any equities that may be set up by the maker of it, are, in their nature and in their legal effect, essentially different transactions. In the present case, all that can be contended for is that the town had the power to contract a loan, under certain specified restrictions and limitations. Nowhere in the statute is there any express power given to issue negotiable bonds as evidence of such loan. Nor can such power be implied, because the existence of it is not necessary to carry out any of the purposes of the municipality. It is true that there is a considerable number of cases, many of which are cited in the brief of counsel for plaintiff in error, which hold a contrary doctrine. But the view taken by this court in the cases above cited and others seems to us more in keeping with the well recognized and settled principles of the law of municipal corporations."

Let application be made of these well-settled doctrines to the facts of this case.

At an early date in the history of the state of Kansas, issuing negotiable municipal bonds seems to have been one of the leading industries of the state. Under authority from the legislature, counties, cities, towns, school districts, and townships engaged in the business on an extensive scale, and issued their bonds to aid in building railroads, courthouses, jails, bridges, schoolhouses, and for other purposes. The business was carried on to an almost incredible extent.

Mr. Justice Miller, in his opinion in the case of *Marcy v. Township of Oswego*, 92 U. S. 637, says:

"In the case under consideration, this provision of the statute was wholly disregarded. I am not sure that the relative amount of the bonds and of the taxable property of the towns is given in these cases with exactness, but I do know that in some of the cases tried before me last summer in Kansas it was shown that the first and only issue of such bonds exceeded in amount the entire value of the taxable property of the town, as shown by the tax list of the year preceding the issue."

The acts authorizing the issue of these bonds commonly imposed conditions upon their issuance intended for the security and protection of the municipalities against an illegal or fraudulent exercise of the power; but notwithstanding these conditions, either through the ignorance or dishonesty of the officers of the municipalities intrusted with the exercise of this power, a large percentage of the bonds issued

under these acts were illegally or fraudulently issued. In very many cases the taxpayers received no consideration whatever for the bonds thus issued. A bond honestly issued for a full consideration was the exception, and not the rule. The acts referred to authorized the issue of negotiable bonds which, under the operation of the rule of decision of the supreme court of the United States, became fixed liabilities on the municipalities issuing them, notwithstanding no consideration was received for them. These liabilities were greater than the taxpayers of the municipalities affected could pay. A compromise and scaling of these obligations became a necessity. The act of March 10, 1879, was the result of this necessity. Profiting by past experience, the legislature sought to surround the power to issue these compromise bonds by every possible safeguard. The one essential thing to prevent frauds was accomplished by not making the bonds negotiable. The power of each of the municipalities named to issue bonds was restricted to the issue of bonds "to compromise and refund its matured and maturing indebtedness of every kind and description whatsoever."

The third section of the act provides that:

"When a compromise has been agreed upon, it shall be the duty of the proper officers to issue such bonds at the rate agreed upon to the holder of such indebtedness, in the manner prescribed in this act; but no bonds shall be issued under this act until the proper evidence of the indebtedness for which the same are to be issued shall be delivered up for cancellation: provided, that no compromise by any township or school district shall be of any validity unless assented to by the legal voters of such township or school district, at an election or school meeting called for such purpose; of which election or school meeting at least ten days' notice shall be given." Laws March 10, 1879, c. 50, § 3.

The fourth section provides that:

"A record shall be kept by the different county clerks of all bonds issued in such counties under this act, showing the date, number, and amount thereof, to whom and on what account issued, and when the same become due; and all bonds or other evidences of indebtedness refunded under this act shall have the words 'Paid in full' marked in a plain manner across the face of each bond and coupon so refunded, and such canceled obligations shall be carefully preserved in the office of the county clerk, or destroyed by the county commissioners; a register of the number, amount and date of issue of the same having first been made by the county clerk." Laws March 10, 1879, c. 50, § 4.

It will be observed (1) that under this act bonds can only be issued for the purpose of compromising previously existing indebtedness; (2) that the bonds issued for this purpose are to be issued "to the holder of such indebtedness"; and (3) that a record is to be kept by the county clerk of all bonds issued under the act, "showing the date, number, and amount thereof, to whom, and on what account issued, and when the same become due."

The object of these requirements, as was said by the supreme court in *Hoff v. Jasper Co.*, 110 U. S. 53, 3 Sup. Ct. 476, was to provide "additional guaranties against fraudulent and irregular issues." Much of the old indebtedness of these municipalities represented no value received whatever, but had been fastened on municipalities by the fraudulent issue of negotiable bonds under acts which authorized the issue of such bonds, and it is morally certain the legislature never

intended to afford to the officers of every county, city, town, school district, and township in the state an opportunity to repeat the frauds by again empowering them to issue negotiable bonds. The act expressly requires that the new bonds shall be made payable to the holder of the old indebtedness without words of negotiability. That this is the proper construction of the act is rendered absolutely certain by the requirements that the new bonds shall be issued "to the holder of such indebtedness," and that the registration of the bonds by the county clerk shall show "to whom and on what account" the bonds were issued. It is obvious that such registration is impossible where the bonds on their face do not show "to whom and on what account" they are issued. These requirements of the act are not directory, but mandatory. They were intended to protect municipalities from precisely such frauds as this case discloses. Authority to issue bonds in the name of the holder of prior indebtedness does not confer on the officers of the municipality authority to issue bonds payable to bearer. If the legislature had intended that the bonds issued under this act should be "negotiable," that term would have been used in describing the bonds, or the requirement that the bonds should be made payable to the holder of old indebtedness would have been followed by words of negotiability. The legislature was evidently striving to pass an act that would preclude the officers of these municipalities from perpetrating the frauds upon the taxpayers which had been common under other acts which did authorize the issue of negotiable bonds. To prevent the perpetration of fraud, the act required the bonds to be payable to the holders of the old indebtedness without words of negotiability, and also required that they should be registered in the county clerk's office and that such registration should show "to whom and on what account" the bonds were issued. Bonds issued under this act are not complete or perfect instruments until they are registered in the clerk's office in the manner required by the act. By necessary implication, the duty of having this registration made is imposed upon the officers of the municipality issuing the bonds. But, conceding that one to whom the bonds were issued might procure the registration to be made, that could only be done when the bonds on their face disclosed the facts essential to enable the clerk to make the registration required by the act. To do this the bonds must be made payable to some person by name, and they must state on their face on what account they were issued. These requirements of the act were disregarded in the issue of the bonds in suit. A copy of the bond as issued is here given in the note.¹

¹ No. 1.

United States of America.
West Plains Township Refunding Bond.
West Plains Township, County of Meade,
State of Kansas.

\$1,000.00

Know all men by these presents, that the township of West Plains, in the county of Meade, state of Kansas, acknowledges itself indebted to the bearer in the sum of one thousand dollars, lawful money of the United States of America, to be paid in thirty years from the first day of July, A. D. 1889, with interest thereon at the rate of six per cent. per annum, payable semi-annually, on the first days of January and July, in each year, upon the

These bonds could never be registered as required by law, because no payee was named therein, and the account upon which they were issued is not stated.

To escape the force of the argument founded on the requirements of the act quoted, the majority opinion states:

"It is a complete answer that the record of the township clerk, which in this case shows, as it should show in every case, the facts the county clerk is bound to record, is the best evidence of those facts,—the evidence upon which the county clerk is bound to rely in preference to the floating bonds, many of which may never be presented to him."

It is a sufficient answer to this suggestion to say that the act requires this record to be kept by the county clerk, and not by the township clerk, and that any record of the township clerk, so far as relates to the requirements of the act under which the bonds were issued, is extraofficial, and has no legal sanction whatever.

In *Barnett v. Denison*, *supra*, the supreme court say:

"It is certainly a reasonable requirement that the bonds issued shall express upon their face the purpose for which they were issued. In any event, it was a requirement of which the purchaser was bound to take notice, and, if it appeared upon their face that they were issued for an illegal purpose, they would be void. If they were issued without any purpose appearing at all upon their face, the purchaser took the risk of their being issued for an illegal purpose; and, if that proved to be the case, they are as void in his hands as if he had received them with express notice of their illegality. Ordinarily, the recital of the fact that the bonds were issued in pursuance of a certain ordinance would be notice that they were issued for a purpose specified in such ordinance (*Hackett v. Ottawa*, 99 U. S. 86), and the city would be estopped to show the fact to be otherwise (*Ottawa v. National Bank*, 105 U. S. 342). But, where the statute requires such purpose to be stated upon the face of the bonds, it is no answer to say that the ordinance authorized them for a legal purpose, if in fact they were issued without consideration, and for a different purpose."

In *Anthony v. County of Jasper*, 101 U. S. 693, the court say:

"There can be no doubt that it is within the power of the state to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed, they create no legal liability. Other circumstances may exist which will give the holder of them an equitable right to recover from the municipality the money which they represent, but he cannot enforce the payment or put them on the market

presentation of the coupons hereto attached as they become due; both principal and interest being payable at the Fiscal Agency of the state of Kansas, in the city of New York. This bond is one of a series of fifteen bonds of one thousand dollars each, and issued by virtue of and in accordance with the provisions of sections one, two, and three of chapter fifty of the Laws of 1879; being an act of the legislature of the state of Kansas, entitled "An act to enable counties, municipal corporations, the board of education of any city and school districts to refund their indebtedness," which said act took effect March 10th, 1879. And it is certified and recited that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been done, happened, and performed in regular and due form, as required by law. In testimony whereof, this bond has been issued and signed by the township trustee, attested and registered by the township clerk, and countersigned by the township treasurer of said township of West Plains, in the county of Meade, state of Kansas, this 2nd day of November, A. D. 1889. W. S. Hopkins, Township Trustee.

Attested and registered: M. S. Parsons, Township Clerk.

Countersigned: R. E. Turner, Township Treasurer.

as commercial paper. * * * Dealers in municipal bonds are charged with notice of the laws of the state granting power to make the bonds they find on the market. This we have always held."

Every purchaser of these bonds was bound to take notice of the requirements of the act under which they purported to be issued. No recitals in the bonds could absolve him from this obligation. The form of the bonds was not such as the act required, and therefore no holder thereof can claim to be a bona fide purchaser, no matter what recitals appear on the face of the bonds. *Anthony v. Jasper Co.*, supra; *Nesbit v. Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746.

In construing the act, every provision of it must be considered and given effect, and it must be construed in the light of the legislative history of the state bearing on the subject, and the result of that legislation and the evil sought to be cured by the new act. When so construed, it is obvious that it is not the purpose of the legislature to open anew this Pandora's box. But, if it was doubtful whether the legislature intended the bonds to be issued under this act should be negotiable, the doubt, as we have seen, must be resolved against their negotiability. *Brenham v. Bank*, supra.

One of the reasons assigned why the court should strain a point to hold bonds issued by municipal corporations negotiable, and thereby cut off all defenses, is that they "are made to raise money by their sale, and this object would be defeated," and their "ready salability and market value" impaired, by holding them nonnegotiable. But this argument has no application to this case. Under the act we are considering, bonds cannot be issued for borrowed money or for sale, but can only be lawfully issued in compromise of indebtedness existing prior to the passage of the act. The well-settled rule, as we have seen, is that a municipal corporation cannot issue negotiable paper "unless authority for that purpose is expressly given or necessarily implied for the execution of other express powers." *Hill v. Memphis*, supra. It is conceded the power is not expressly given by this act, and it is equally clear that its exercise is not necessary to the execution of the express power granted, which is merely to give a new evidence of debt in compromise of an old debt. It is a well-known fact that no reputable dealer in municipal securities will buy municipal bonds or put them upon the market until he has made inquiry into the legality and honesty of their issue. Not one of the principal cities in this circuit could sell its bonds to any dealer in such securities until he had examined, or caused to be examined, the statutes of the state and the ordinances and records of the city relating to their issue, and satisfied himself that the city not only had the power to issue the bonds, but that they were issued for a lawful and honest purpose. It is therefore only dishonest and corrupt officers and disreputable dealers, who divide with them the proceeds of their frauds, that profit by the business of issuing fraudulent municipal bonds. If bonds are honestly issued, for a legal purpose, they are good and valid, with or without recitals. Even where bonds are irregularly or illegally issued, if they were intended to evidence a legal and valid indebtedness, the debt may be collected from the municipality, although the bond itself is void, and the holder of the void bond will be sub-

rogated to the rights of the original creditor. It is apparent, therefore, that the only office performed by recitals in municipal bonds in any case is to give validity and effect to bonds issued without consideration and fraudulently. And the effect of the doctrine of the majority of the court in this case is to give validity to fraudulent bonds, and encourage their issue. Under the ruling of the majority of the court, the old industry of issuing fraudulent bonds will probably be revived in this state, and an act designed exclusively to afford relief against previous burdens of that character, and to prevent a repetition of such frauds, will be used, not only to increase such burdens, but, as in this case, to impose them where none ever existed before. To sum up: Under a carefully guarded act, which bears evidence in its every line of a settled purpose on the part of the legislators to limit the powers of the officers acting thereunder to the issue of nonnegotiable bonds in compromise of the then-existing indebtedness of the municipalities of the state, the majority of the court hold that it is open to the officers of every county, city, town, school district, and township in the state of Kansas to issue the negotiable bonds of the public corporations named, without any consideration, and for all manner of illegal purposes, and to any amount, and make them binding obligations by simply inserting in them the false recital that they were issued under the act mentioned; and that the purchasers of such bonds are not chargeable with notice of the requirements of the act under which they purport to be issued, nor with notice of what the records of the municipality disclose in relation to their issue. This is going much further than the supreme court of the United States has ever gone, and is in palpable conflict with the later decisions of that court which are cited in this opinion. The judgment of the circuit court should be reversed.

HILLBORN et al. v. HALE & KILBURN MANUF'G CO.

(Circuit Court of Appeals, Third Circuit. September 26, 1895.)

No. 6.

1. PATENTS—VALIDITY OF CLAIMS—EFFECT OF REJECTIONS AND CHANGES.

The fact that numerous changes in phraseology were made in the claims, from time to time, to suit the views of the examiner, and to distinguish the claims from those contained in prior applications, is no ground for defeating the patent, where the claims remained throughout the proceedings substantially the same, and were at no time inconsistent with those finally granted.

2. SAME—DISCLAIMER.

Where the patentee has admitted, by a disclaimer, that there were prior patents exhibiting structures having certain features found in his invention, the fact that, in a suit for infringement, defendants do not put in evidence any such prior structures, gives no weight to a suggestion that the admission was inadvertently made, for such admission might well be regarded by defendants as dispensing with evidence in that respect.

3. SAME—ANTICIPATION—INVENTION—MECHANICAL SKILL.

Invention held to exist, notwithstanding certain alleged anticipating devices, where the court was of opinion that there was no such obvious similarity that the one would, of itself, suggest the other to an ordinary mechanic.

4. SAME.

Where two structures belong to totally distinct departments of invention,—to practical arts that have no connection with or similarity to each other,—the subsequent inventor is not precluded from using well-known mechanical contrivances or devices, that have already become the common property of manufacturers.

5. SAME—FOLDING BEDS.

The Hale patent, No. 409,606, for an improvement in folding beds, *held valid and infringed.*

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Letters patent of the United States, No. 409,606, issued to Henry S. Hale on August 20, 1889, for an improvement in folding bedsteads. The entire title and interest in said letters patent, and in the invention therein described, were on January 15, 1891, by an instrument duly executed and recorded, sold and assigned by Hale to the Hale & Kilburn Manufacturing Company, a corporation of the state of Pennsylvania. On May 8, 1891, at the April term of the circuit court of the United States for the Eastern district of Pennsylvania, the said company filed a bill of complaint against Amos Hillborn, Samuel S. Ash, Josiah G. Williams, and John Hillborn, doing business as partners, under the name of A. Hillborn & Co.; charging them with an infringement of the rights of the complainant, as owner of the said patented invention, and praying for the usual relief. An answer and replication followed, and the case was so proceeded in that on May 27, 1892, a decree was entered granting the prayers of the bill, appointing a master to take an account, and enjoining the defendants from any further use, construction, or sale of the patented improvement; and on December 13, 1893, on the coming in and confirmation of the master's report, a final decree was entered, whereby the defendants were adjudged and decreed to pay the sum of \$140 as damages, and the costs of the suit. An appeal was taken to the circuit court of appeals for the Third circuit.

L. L. Bond, for appellants.

E. H. Hunter, for appellee.

Before SHIRAS, Circuit Justice, and ACHESON and DALLAS, Circuit Judges.

SHIRAS, Circuit Justice (after stating the facts as above). Henry S. Hale filed an application February 6, 1880, for letters patent for an improvement in folding bedsteads. The specification contained two claims, the first of which was allowed, and the second was rejected, on a reference to Kauffman's patent, No. 159,682, dated February 9, 1875, for a hinge. An interference was declared between Hale and A. B. Stevens. The application of the latter had been filed December 21, 1878. This interference resulted in Hale's favor, and calls for no attention. On September 8, 1884, the original specification, with its allowed claim, was canceled, and a new specification, with six claims, was filed; and on October 15, 1884, these six claims were renewed, in an amended form, accompanied by a new oath of invention. On December 5, 1884, the first claim, which was the original first claim, was again rejected; and reference was made again to the Kauffman patent, and to patent No. 151,020 (May 19, 1874), granted to Harrison & Heyman. The remaining five claims were also rejected, and reference was made to patents to Harrison & Heyman and to patent No. 158,384 (January 5, 1875), to M. S. McSwain. Several amendments were made to meet the objections,

and references made in the patent office; and finally, on August 5, 1889, the amended application of February 6, 1880, was allowed, and on August 20, 1889, letters patent were granted. It should also be mentioned that, while these proceedings were taking place in the patent office, Hale had been carrying on a contest with F. B. Williams under an interference declared between Hale's application and that of Williams. This contest was decided in Hale's favor on July 1, 1889.

The first matter pressed upon our attention by the learned counsel for the appellants is based on the numerous changes in his claims made by Hale during the progress of his application through the patent office. It is argued that the submission of the applicant to such repeated rejection upon references, and the consequent cancellation of his claims, render the patent absolutely invalid, as no distinction can be taken between the rejected and canceled claims and those finally allowed. To sustain this contention the following decisions of the supreme court are cited: *Royer v. Coupe*, 146 U. S. 524, 13 Sup. Ct. 166; *Knapp v. Morss*, 150 U. S. 224, 14 Sup. Ct. 81; *Corbin Cabinet Lock Co. v. Eagle Lock Co.*, 150 U. S. 40, 14 Sup. Ct. 28; *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627. Undoubtedly, these cases do establish the proposition that when an applicant acquiesces in the rejection of some claims, and accepts a patent for others, the claims allowed must be read and interpreted with reference to those rejected, and cannot be construed so as to cover either what was rejected by the patent office, or disclosed by prior devices; that where a patentee, on the rejection of his application, inserts in his specification, in consequence, limitations and restrictions, for the purpose of obtaining his patent, he cannot, after he has obtained it, claim that it shall be construed as it would have been construed if such limitations and restrictions were not contained in it. But we are unable to see that these principles are applicable to the case before us. It may well be that a patentee cannot be permitted to hold under his patent anything that he has clearly renounced and excluded from his inventions during the prosecution of his application. But surely it has never been held that mere changes of phraseology to suit the views of the examiner, and to distinguish the claims made from those contained in prior applications, to which reference has been made, can be held to defeat the patent, when granted. What is forbidden is the attempt, after a patent has been procured, surrendering or disavowing substantial claims or devices, to recover such renounced and abandoned claims by demanding a broad construction of those allowed. Our examination of the various changes and cancellations made in the present case has not shown us any such radical or important changes as to bring this patent under the condemnation of the cited cases. From the first to the last, as we read the history of the case, the claims (excepting the original second claim, which was wholly abandoned), while changed in number and in formal terms, were substantially the same, and at no time inconsistent with those finally granted. Many of the objections from time to time taken seem to us to have been trivial and unimportant. At any rate, we are not able to say that

this patent, if found to be otherwise valid, must be overthrown because of verbal changes made to meet those objections.

It is next contended that the court erred in holding that each and all of the claims of complainant's patent were good and valid claims. We incline to think that some of the claims cannot be sustained, if they are to be understood as claiming more than is contained in the 1st, 4th, 6th, 8th, and 9th claims. We do not, however, so understand them. They are simply redundant, and may be dismissed from consideration.

The next contention is the alleged want of novelty in the Hale invention. This part of the controversy will turn mainly on the effect that should be given to the Dutton patent (April 7, 1868), No. 76,423; to the Kauffman patent (February 9, 1875), No. 159,682; and to the first Hale patent (December 10, 1878), No. 210,777. Several other patents were referred to and discussed in the briefs, but, if the patent in question can stand the test suggested by the patents just specified, it will scarcely be necessary to consider each and all of the others. Hale concedes that his invention is merely an improvement in folding bedsteads, and relates to that "class of bedsteads which have a stationary supporting frame and a folding or swinging frame connected thereto, by means of interposed fulcra, in such manner that the folding member or frame can be placed in a substantially horizontal position, and can also be folded up into a substantially vertical position"; and he admits, in his disclaimer, that he is aware that "a number of prior patents show folding beds in which the folding or swinging sections and the stationary supporting sections are connected with each other by movable pivots, one on either side of the bed, the construction and arrangement of the parts being such that as the swinging part is being folded from a horizontal to a vertical position the pivots move towards the headboard, and also move upward; and hence I do not herein claim such construction." Accordingly, we find in the Dutton patent a fixed frame, a folding frame, and connecting devices, consisting of curved bars and straps, which operate so that the bedstead is raised and lowered from or on a variable or shifting fulcrum, and the headboard is made quite heavy, or has a weight attached, to serve as a counterpoise. In the Hale patent of 1878 we find a folding bedstead, with a permanent and a movable frame, pivoted to each other by means of a shaft or pins adapted to a slot or slots in one or other of the frames, in combination with rollers carried by the movable frame, and adapted to rails on the permanent frame. This construction has no combination or device which moves the movable frame backward or rearwardly as it ascends when the bed is being closed. The operation of the Dutton bed is the opposite to the operation of the patent in suit; that is, the movable part of the bed, in being folded, descends and moves forward, or away from the rear of the stationary part. It is true that there are two racks, one of which is secured to the stationary part, and the other to the movable part; but they do not themselves constitute the fulcra and fulcra seats by which the weight of the movable part is sustained by the stationary part, nor do they perform the functions claimed in the patent in suit, namely, the rising

and moving backward of the movable part upon folding it into the stationary part. In the Hale patent of 1878 we again find a movable and fixed frame, but the movements and theory of the mechanism are altogether different from those described in the Hale patent of 1889. There are no cogged racks, nor fulcrum and fulcrum seats. It has no means for causing the movable part to be simultaneously moved vertically and rearwardly, and therefore does not disclose the specific features of claims 4 and 6 in the patent in suit. In short, we do not find in either the Dutton patent or the Hale patent of 1878 a structure having a stationary and a movable frame, in which, while being closed or folded, the movable part is bodily raised and moved backward, by means of fulcrum seats upon the stationary frame and a series of independent fulcrum upon the movable part, so that the counterbalanced end of the movable frame clears the floor, and a portion of the counterbalance weight is located, when the frame is in a vertical position, partly in front of the pivot line. It is doubtless true that Hale admitted in his disclaimer that there were prior patents exhibiting structures in which, when in the process of folding from a horizontal to a vertical position, the pivots move towards the headboard, and also move upward, and that, as argued by the learned counsel for the appellant, Hale must be held to such disclaimer, notwithstanding the fact that the defense has failed to put any such structure in evidence. We cannot adopt the suggestion of plaintiff's expert, that this concession was inadvertent on the part of the patentee or of his attorney. Such an admission might well be understood by the defendants to dispense with evidence in that respect. But, while Hale is thus estopped from claiming such a compound movement, his admission does not forbid him from claiming, as new, devices intended to cause such movement.

It is further contended that Hale did not change or modify, in the patent in suit, any of the devices or parts contained in his prior patent of 1878, but only substituted for the pivots described in the 1878 patent the rack and pinion hinges of the Kauffman patent. By such substitution, it is argued, no invention was manifested, but only the exercise of ordinary mechanical skill; that the differences between the Hale and the Kauffman patent, in respect to the machinery connecting the two frames, arise merely from change of position. Considered simply as pieces of mechanism, separated from the structure with which they are intended to be combined, the Kauffman and Hale hinges have a superficial resemblance; but, when carefully compared, material differences are found, as well in the special devices employed, and in their mode of operation, as in the purpose or end sought to be accomplished. Thus, while it is true that the patent in suit has the same number of cogs in the pinion that the Kauffman has, and the same number of teeth in the corresponding plate, yet in the Hale structure the arm by which the pinion is secured to the movable part is directed away from the teeth of the pinion, while in the Kauffman the teeth of the pinion are directed towards the arm. Another and more important difference is that the extension from the pinion which supports the movable part in the Hale device must be capable of turning, so that when the pinion is at each end of the

slot it stands at an oblique angle to the slot or length of the plate containing the rack; but in the Kauffman it stands either parallel with the slot, and so as to close it, or at right angles thereto. If the arrangement or adjustment of the parts used in the Hale structure was applied to the Kauffman structure, which is intended for a door hinge, the door could not be opened, and the device would not operate. The argument that these differences could be overcome by a mechanic of ordinary skill, without calling for any exercise of the inventive faculty, is the one always resorted to in cases like the present. The task of distinguishing between invention and the power of adaptation possessed by a skillful mechanic is not always an easy one, nor have the courts apparently succeeded in formulating a proposition to cover all cases. While the statutes require that a patent, to be valid, must disclose invention and novelty, yet the degree or amount of invention required is not prescribed, and, from the nature of the case, cannot be. We content ourselves, in the present case, by expressing our opinion that the mechanical contrivances found in those two patents are not so obviously similar that the one would, of itself, suggest the other to an ordinary mechanic. It must further be observed that the purposes or aims of the two structures are wholly different. The Kauffman device is for a door hinge, which is so constructed as to cause the door to open and close in an ellipse, and thus the molding of the door at the axial end does not strike the frame or support. The object of the Hale invention, already sufficiently described, is for connecting the movable and fixed frames of a folding bed. Well-known cases are cited on behalf of the defendants, in which it has been held that the application of an old process or machine to a similar or analogous subject, with no change in the manner of application, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated. Without dissenting in the least from this doctrine, we do not regard it as applicable to the present case. It has never been held that where the structures compared belong to totally distinct departments of invention,—to practical arts that have no connection with or similarity to each other,—the subsequent inventor is precluded from using well-known mechanical contrivances or devices that have become the common stock of manufacturers. Such a view would, in the mechanical arts, restrict the operation of the patent statutes to the first and most striking efforts of invention, and leave no field open for the exercise of the inventive power in devising the numerous less conspicuous machines and apparatus that do so much to promote the convenience and comfort of daily life. These views render it unnecessary to consider whether the patent in suit could be sustained as a mere combination of old and well-known devices.

We are now brought to the question of infringement, and here we meet the argument that the patent in suit must, in order to be sustained, receive a strict or narrow construction, and that such a construction will not bring the defendants' folding bed within its reach. Undoubtedly, the patent in suit, having been preceded by numerous other patents for folding beds, calls for a narrower construction than

if Hale had been a pioneer in the art. Nevertheless, we think that, in any point of view, if the Hale patent be sustainable, the form of bed made and used by the defendants must be deemed an infringement. The defendants' expert concedes that in the Hillborn bed there is a stationary part attached to the stationary frame of the bed, having a series of teeth or fulcra adapted to successively engage the teeth or fulcra seats upon the stationary part, thereby causing the movable member to rise and move inward, and towards the back of the bed, when it is folded up, and that when the movable frame is folded into an upright position the counterbalancing weight lies below the pivot upon which the movable frame is supported, part of the weight lying in front, and part in the rear, of the pivotal line. An examination of the description of the Hillborn bed shows that the racks form a toothed, hinging mechanism, interposed between the swinging frame and its support, which rests upon the floor, and that these toothed devices constitute a series of fulcra or pivotal supports arranged in inclined positions, extending forward, so that part of them are nearer the rear wall or back of the bed than others are; the arrangement of parts being such that as the bed is let down, or unfolded for use, the commencement of such movement results in successively shifting its fulcrum, or the points of its pivotal support, further forward, whereby the leverage of the counterbalancing weight is increased, and is therefore made more effective in supporting the weight of the footboard and bedding. In this description are found every essential feature, both in construction and method of operation, of the patent in suit.

A further argument is based on the cases of *Railway Co. v. Sayles*, 97 U. S. 563; *Clements v. Apparatus Co.*, 109 U. S. 649, 3 Sup. Ct. 525; and *Electric Gaslighting Co. v. Boston Electric Co.*, 139 U. S. 502, 11 Sup. Ct. 586,—where it was ruled that in cases of reissue an enlargement of the claims could not avail against patents granted, or articles made and sold, between the time of the original application and the time of the final granting of the reissued patent. We think this contention is sufficiently disposed of by saying that the present is not a case of reissue containing new and different claims, and that, at any rate, we fail to perceive that Hale departed in any substantial particular from his application as first made.

It is claimed that as the death of Amos Hillborn, one of the defendants, was suggested on the 8th day of February, 1892,—two days after the record was closed,—and no action was taken upon such suggestion, and the bill was not dismissed, as to him or his estate, until the coming in of the interlocutory decree, May 27, 1892, so much of the costs as would have been due and payable by Amos Hillborn should not have been included in the decree. As the defendants were partners, and as the defense and its expenses were not affected or increased by the death of one, we are unable to see why the costs are not properly chargeable against the surviving partners. At all events, the question does not appear to have been raised in the court below, and we do not feel compelled to now consider it. The decree of the circuit court is affirmed.

UNITED STATES v. REDER.

(District Court, D. South Dakota. August 22, 1895.)

1. PUBLIC LANDS—CUTTING TIMBER FROM MINERAL LANDS—INDICTMENT.

On the trial of an indictment for cutting timber from the mineral lands of the United States for purposes other than those connected with building, agricultural, mining, or other domestic uses, contrary to the act of June 3, 1878, the intent is wholly immaterial, and it is only necessary to show that the prohibited acts were done.

2. SAME—REGULATIONS BY SECRETARY OF THE INTERIOR.

One who cuts and removes timber from the mineral lands of the United States, and sells the same, or the lumber manufactured therefrom, without taking from the purchaser any statement in writing as to the purposes for which the same is intended to be used, as required by the regulations made by the secretary of the interior under the authority of the act of June 3, 1878, is guilty of a violation of that statute, and subject to the penalties prescribed by it.

3. CRIMINAL LAW—PRESUMPTION OF INNOCENCE.

The presumption of innocence attends the accused from the beginning of the trial, through all its stages, to the final determination thereof.

4. SAME—CIRCUMSTANTIAL EVIDENCE.

To warrant a conviction upon circumstantial evidence alone, the facts proved must be such as are absolutely incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than his guilt.

This was an indictment against Odo Reder for cutting timber from the mineral lands of the United States, contrary to the provisions of the act of June 3, 1878.

Chauncey L. Wood, Special Asst. U. S. Atty.

W. G. Porter and B. R. Wood, for defendant.

EDGERTON, District Judge (charging jury). This case has been presented and defended with marked ability. I ask of you careful consideration of the law which will govern you. It has been claimed that the defendant is an old settler of the Black Hills, and that he is a good and valuable citizen, and that he did not know that he was violating the law, if he did violate it. These considerations will not excuse him in a court of justice. If you should find him guilty, they may properly be urged in mitigation of the sentence, but no man is excused from violating the law because he did not know what the law was.

In this case the defendant is indicted for a violation of the laws enacted for the protection of timber on public mineral lands of the United States. There are three counts in the indictment. In the first count the defendant is charged with having unlawfully felled and removed a large amount of timber, described as "pine trees," being and growing on the public mineral lands of the United States, in Custer county, in this state and district. And it is further charged in the first count of said indictment that said timber was not so felled and removed by the defendant for building, agricultural, mining, or domestic purposes, nor for the use of the United States navy, contrary to the statutes of the United States, and contrary to rules and regulations in pursuance thereof made by the secretary of

the interior. In the second count of the indictment the defendant is charged with having unlawfully felled and removed a large number of pine trees growing and being on the public mineral lands of the United States in Custer county, in this state and district; and that timber and trees so felled and removed, and the lumber so manufactured therefrom, was sold and disposed of by the defendant to divers persons and corporations, not then and there citizens and bona fide residents of the state of South Dakota, for use outside of the state of South Dakota, other than for the use of the United States navy, contrary to the statutes of the United States in such cases made and provided, and contrary to the rules and regulations in pursuance thereof made by the secretary of the interior. In the third and last count of the indictment it is charged that the defendant unlawfully felled and removed timber, to wit, a large number of pine trees, being and growing on the public mineral lands of the United States, in Custer county, S. D., which said timber, it is charged in the third count, so felled and removed, was by the defendant sent, shipped, and exported outside of the state of South Dakota, for use other than for the United States navy, contrary to the forms and effect of the statutes of the United States, and contrary to the rules and regulations in pursuance thereof made by the secretary of the interior. It is charged in each count of the indictment that this cutting and removing was done on the 4th day of May, 1894, and the indictment was found and returned on the 19th day of August, 1895. And the court now instructs you that, if you find from the evidence that this cutting was done at any time during a period of three years next before the day of the indictment, then it falls within the allegations and charges contained in the indictment as to time. To this indictment the defendant has pleaded not guilty, thus putting in issue all of the material allegations of the indictment.

By an act of congress of June 3, 1878, a right to take timber from public mineral lands for building, agricultural, mining, or other domestic purposes is specially created in favor of certain persons named in the act. The first section in that act provides as follows:

That all citizens of the United States and other persons, bona fide residents of the state of Colorado or Nevada, or either of the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said states, territories or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the secretary of the interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: provided the provisions of this act shall not extend to railroad corporations.

The third section provides as follows:

Any person or persons who shall violate the provisions of this act, or any rules or regulations in pursuance thereof made by the secretary of the interior, shall be deemed guilty of a misdemeanor, etc.

From this it will be seen that it is lawful for all citizens of the United States, and other persons bona fide residents of the state of

South Dakota and other states and territories named in the act, to fell and remove timber and other trees in any mineral district within this state for building, agricultural, mining, or other domestic purposes.

In this case it is alleged in the indictment and conceded by the defendant that the lands spoken of in the indictment are mineral lands of the kind mentioned in the act of congress above referred to.

Under the sanction and authority of the congress as expressed in the act in question, the secretary of the interior has made the following rules and regulations:

"By virtue of the power vested in the secretary of the interior by the 1st section of the act of June 3, 1878, entitled 'An act authorizing the citizens of Colorado, Nevada, and the territories to fell and remove timber on the public domain for mining and domestic purposes,' the following rules and regulations are hereby prescribed:

"(1) The act applies only to the states of Colorado and Nevada and to the territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, and Montana, and other mineral districts of the United States not specially provided for.

"(2) The land from which timber is felled or removed under the provisions of the act must be known to be of a strictly mineral character, and that it is 'not subject to entry under existing laws of the United States, except for mineral entry.'

"(3) No person not a citizen or bona fide resident of a state, territory, or other mineral district provided for in said act is permitted to fell or remove timber from mineral lands therein. And no person, firm, or corporation felling or removing timber under this act shall sell or dispose of the same, or the lumber manufactured therefrom, to any other than citizens and bona fide residents of the state and territory where such timber is cut, nor for any other purpose than for the legitimate use of said purchaser for the purpose mentioned in said act.

"(4) Every owner or manager of a sawmill or other person felling or removing timber under the provisions of this act shall keep a record of all timber so cut and removed, stating time when cut, names of parties cutting the same or in charge of the work, and describing the land from whence cut by legal subdivisions if surveyed, and as near as practicable if not surveyed, with a statement of the evidence upon which it is claimed that the land is mineral in character, and stating also the kind and quantity of lumber manufactured therefrom, together with the names of parties to whom any such timber or lumber is sold, dates of sale, and the purposes for which sold; and shall not sell or dispose of such timber or lumber made from such timber, without taking from the purchaser a written agreement that the same shall not be used except for building, agricultural, mining, or other domestic purposes within the state or territory; and every such purchaser shall further be required to file with said owner or manager a certificate, under oath, that he purchases such timber or lumber exclusively for his own use, and for the purposes aforesaid.

"(5) The books, files, and records of all mill men or other persons so cutting, removing, and selling such timber or lumber, required to be kept as above mentioned, shall at all times be subject to the inspection of the officers and agents of this department.

"(6) Timber felled or removed shall be strictly limited to building, agricultural, mining, or other domestic purposes within the state or territory where it grew. All cutting of such timber for use outside of the state or territory where the same is cut, and all removals thereof outside of the state or territory where it is cut, are forbidden.

"(7) No person will be permitted to fell or remove any growing trees of any kind whatsoever less than eight inches in diameter.

"(8) Persons felling or removing timber from public mineral lands of the United States must utilize all of each tree cut that can be profitably used,

and must cut and remove the tops and brush, or dispose of the same in such manner as to prevent the spread of forest fires. The act under which these rules and regulations were prescribed provides as follows:

"Sec. 3. Any person or persons who shall violate the provisions of this act, or any rules or regulations in pursuance thereof made by the secretary of the interior, shall be deemed guilty of a misdemeanor, (and upon conviction shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.)"

"(9) These rules and regulations shall take effect September 1, 1886, and all existing rules and regulations heretofore prescribed under said act, inconsistent herewith, are hereby revoked."

The government was the owner of all these lands, and as such owner had the right to withhold them from occupancy or sale, or had the right to determine on what terms they might be occupied; and when any party went on those lands he accepted the terms and conditions imposed by the government. When this defendant went on such lands, he accepted the terms imposed by the government, and agreed to all the provisions imposed. The act of congress above referred to confers the privilege upon the persons therein named to cut timber upon the public mineral lands of the United States for the purposes named in the act, under such rules and regulations as the secretary of the interior might prescribe. And, the secretary of the interior having prescribed the rules and regulations to which the court has just called your attention, it is only lawful to cut timber on the public mineral lands of the United States in accordance with the act of congress and such rules and regulations.

In this case I instruct you that it is incumbent upon the United States to satisfy you by the evidence beyond a reasonable doubt that the defendant did cut timber, as charged in the indictment, from the public mineral lands of the United States, for purposes other than for building, agricultural, mining, or other domestic purposes. The intention of the defendant is wholly immaterial; and if you believe from the evidence that the defendant did cut and remove timber growing and being upon the public mineral lands of the United States, in Custer county, in this state, for other than such purposes, then I instruct you that you find the defendant guilty as charged in the indictment, and I further instruct you that, if you find from the evidence beyond a reasonable doubt that the defendant shipped or exported any of the timber thus cut and removed by him from this state, then he is guilty of a violation of the act of congress that I have spoken of, and the rules and regulations in pursuance thereof made by the secretary of the interior, and it will be your duty to find the defendant guilty as charged in the indictment unless the defendant has satisfied you that such timber was so exported out of the state for the use of the United States navy.

The court further instructs you that the law provides by act of congress of March 3, 1891, as follows:

And in the states of California, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in

such state or territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed therefor by the secretary of the interior, and has not been transported out of the same.

The court therefore instructs you that if you find from the evidence that the defendant did fell and remove timber growing and being on the public mineral lands of the United States, in the county of Custer, in this state, but that such timber was so cut or removed for use in this state for agricultural, mining, manufacturing, or domestic purposes, under rules and regulations made and prescribed by the secretary of the interior, and has not transported any of it out of the state, then you will find the defendant not guilty as charged in the indictment.

You are instructed that, in order to find defendant guilty in manner and form as charged in the indictment, you must find beyond a reasonable doubt that all the acts constituting the offense charged in the indictment were committed within three years immediately preceding the finding the indictment upon which defendant is now being tried; that the prosecution and government must establish beyond a reasonable doubt every fact and element necessary to constitute the crime as charged in the indictment. You are instructed that in this case the law raises no presumption against the person, and, further, presumption of the law is in favor of his innocence, and that to convict of the crime alleged in the indictment, every material fact necessary to constitute such crime must be proved beyond a reasonable doubt; and, if you entertain any reasonable doubt upon any single fact or element necessary to constitute the crime, it is your duty to give the person the benefit of such doubt, and acquit him. You are instructed that it is incumbent upon the prosecution and government to prove every material allegation of the indictment as therein charged. Nothing is to be presumed, or taken by implication, against the defendant. The law presumes him innocent of the crime of which he is charged until he is proven guilty beyond a reasonable doubt, by competent and sufficient evidence; and, if the evidence in this case leaves upon your minds any reasonable doubt of defendant's guilt, the law makes it your duty to acquit him. You are instructed, further, that in the law the accused is always presumed to be innocent until his guilt is established by evidence; that the presumption of innocence starts with the charge at the beginning of the trial, and goes with him until the determination of the case; and to authorize and warrant the conviction his guilt must be established beyond a reasonable doubt, and mere preponderance of the evidence is not sufficient. You are instructed, further, that circumstantial evidence is legal and competent in criminal cases; and if it is of such a character as to exclude every reasonable hypothesis other than that the defendant is guilty, it is entitled to the same weight as direct testimony. You are instructed that what is meant by circumstantial evidence in criminal cases is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as tend to show the guilt or innocence of the party charged. You

are instructed as a matter of law that, where a conviction for a criminal offense is sought upon circumstantial evidence alone, the government must not only show beyond a reasonable doubt that the alleged facts and circumstances are true, but they must be such facts and circumstances as are absolutely incompatible upon any reasonable hypothesis with the innocence of the accused, and incapable of explanation upon any reasonable hypothesis other than that of the guilt of the accused; and that to authorize a conviction on circumstantial evidence the circumstances should not be only consistent with the prisoner's guilt, but they must be inconsistent with any other rational conclusion or reasonable hypothesis, and such as to leave no reasonable doubt in the minds of the jury of the defendant's guilt. If there is any one single fact proved to the satisfaction of the jury by preponderance of the evidence which is inconsistent with the defendant's guilt, this is sufficient to raise a reasonable doubt, and the jury should acquit the defendant.

If you find from the evidence that such timber was cut and removed for other than domestic purposes for use in the state, then you will find the defendant guilty as charged in the indictment. And the court further instructs you that the license or privilege conferred by the act of congress I have spoken of was not given, created, nor conferred for the purpose of speculations, but to permit persons to use for purely domestic purposes so much timber as their wants for domestic use might require from the public mineral lands of the United States; and if you find from the evidence beyond a reasonable doubt that the defendant cut and removed more timber from the public mineral lands in the United States in Custer county during three years next before the 19th day of August, 1895, than was necessary to supply his own domestic wants, and more than was necessary to supply the domestic wants of those to whom he sold it, as shown by the mutual written statement between buyer and seller as provided for in rules and regulations above spoken of, then I instruct you that you find the defendant guilty as charged in the indictment. In this case, if you find from the evidence that the lands in question are of the character spoken of in the indictment, and that the defendant felled and removed timber from such lands, and that he made sales of lumber manufactured from such timber to other persons, and took from the purchaser no statement nor writing of any character whatever, and the purchaser of such lumber took from the defendant no statement of any character whatever, either as to what the lumber was manufactured for or as to the use that the purchaser proposed to devote it to, then I instruct you that this was a violation of the act of congress and of the rules and regulations in pursuance thereof made by the secretary of the interior, and the defendant is guilty.

UNITED STATES v. SMITH.

(District Court, D. Minnesota, Sixth Division. October 1, 1895.)

CRIMINAL LAW—MAILING THREATENING LETTER—ACT CONG. SEPT. 26, 1888.

A postal card, sent by a creditor to his debtor, demanding payment of a note, and adding: "You have been fighting time all along. * * * I will garnishee and foreclose. But I do so dislike to do this if you will only be half white,"—is of such a threatening and defamatory character as to render the same nonmailable, within the purview of the act of congress of September 26, 1888 (Supp. Rev. St. p. 621).

This was an indictment against A. J. Smith under the act of congress of September 26, 1888, for depositing in the mail a defamatory and threatening postal card. Defendant demurred to the indictment.

E. C. Stringer, U. S. Dist. Atty.

David T. Calhoun, for defendant.

NELSON, District Judge. This is an indictment framed under the act of September 26, 1888, found in Supp. Rev. St. U. S. p. 621. The defendant is charged with depositing in the mail a postal card upon which terms and language of a defamatory and threatening character were written, calculated, by the terms, manner, and style of display, and obviously intended, to reflect injuriously upon the character and conduct of one A. B. Darling. The postal card is in the words following:

"Nov. 16-93.

"A. B. Darling, Herman, Minnesota—Gentlemen: You must do something on your note. I wish you to pay the int. and one hundred dollars of the principal. You have been fighting time all along, and now at the end you remit nothing. If I do not hear from you, I must be around. I will garnishee and foreclose. But I do so dislike to do this if you will only be half white. Rep.,

"Andrew J. Smith, Citizens' Bank of Sauk Centre, Sauk Centre, Minn."

If the defendant had merely requested payment of a part of the debt, and stated that, if not complied with, he would take legal steps by garnishee process or foreclosure to secure it, there would be some doubt about the language used being of such a threatening character as to render the postal card nonmailable, and within the purview of the law. But the latter part of the postal card contains an expression which manifestly was intended to reflect injuriously upon the character of Mr. Darling, when taken in connection with the preceding language used. No other construction can be put upon the following paragraph: "But I do so dislike to do this [garnishee and foreclose] if you will only be half white." The writer thus indicates that the person addressed was dishonest, and his reputation not spotless. Such imputation upon his character, expressed upon a postal card deposited in the mail, is a reflection prohibited by law. Demurrer overruled.

UNITED STATES v. AH POING.

(District Court, D. Oregon. September 24, 1895.)

No. 4,002.

CHINESE EXCLUSION ACT—REGISTRATION—IMPRISONMENT FOR CRIME.

Imprisonment upon arrest and conviction for crime is not a sufficient excuse for failure to register within the time limited by Acts Cong. May 5, 1892 (27 Stat. 25), and November 3, 1893, providing for the deportation of Chinese laborers who fail to register themselves within the periods provided by said acts, unless prevented by accident, sickness, or other unavoidable cause.

Daniel R. Murphy, U. S. Atty., and Charles J. Schnabel, Asst. U. S. Atty.

J. H. Dolph, for defendant.

BELLINGER, District Judge. This is a proceeding to deport the defendant, a Chinese laborer, who has failed to register as required by law. The facts in the case are agreed upon, and are as follows: Defendant was lawfully a resident of the city of Portland on May 5, 1892, the date of the passage of the act requiring Chinese laborers to register within one year. In December, 1892, he was arrested on a charge of felony, and confined in jail. On January 7, 1893, he was convicted, and sentenced to imprisonment in the penitentiary of the state for a period of three years, and was committed to such prison, where he remained until the commencement of this proceeding. The act of May 5, 1892 (27 Stat. 25), provides for the deportation of any Chinese laborer found in the United States at the expiration of one year from the passage of the act without the certificate of residence provided for therein, unless it is shown that such laborer was prevented from obtaining such certificate by reason of accident, sickness, or other unavoidable cause, and that he was a resident of the United States at the time of the passage of the act. On November 3, 1893, congress amended this act so as to extend the time for registration for a period of six months. Does the imprisonment of the defendant on a conviction for felony excuse his failure to register? It is contended that a condition which unavoidably prevents registration is unavoidable cause within the meaning of the registration act; but if the condition is not unavoidable, the excuse does not exist. It is a fundamental rule that a party will not be permitted to take any advantage of his own wrongful act, and upon the same principle a party will not be permitted to plead to his own advantage a disqualification which is the necessary result of a crime committed by him. The duty of registering was imposed upon the defendant before his arrest, and the opportunity to register was open to him at that time. True, the time had not yet expired within which he was required to register, and it is not against him that he had not theretofore registered; but, while every moment of the prescribed time was open to him for that purpose, if he chose to throw a part of it away by his voluntary act, necessarily having that effect, and committed in violation

of law, he is not excused in his failure to register. Crime, and the penalties which follow it, can never excuse the performance of a duty enjoined by law. The deportation of the defendant in accordance with the provisions of the act of May 5, 1892, as amended, is ordered.

UNITED STATES v. JONES.

(District Court, D. Nevada. September 3, 1895.)

No. 820.

1. GRAND JURORS—EXCUSING BY COURT OF OWN MOTION.

Complaint cannot be made of the excusing of grand jurors by the court of its own motion, where those substituted were not disqualified, especially where counsel, though present, made no objection to the action of the court.

2. SAME—GROUNDS OF OBJECTION.

Federal courts, of their own motion or that of counsel, may enforce other objections than prescribed by state statutes, to grand jurors.

3. INDICTMENT—ABATEMENT.

An indictment will not be abated on a charge that a witness gave the grand jury hearsay evidence; that he referred to books of which, though in his possession, he was not the legal custodian; and that he gave his opinion to them as an expert,—especially where the charge is merely on information and belief.

4. INDICTMENT—JOINDER OF OFFENSES.

Under Rev. St. § 1024, providing that where there are several charges against a person for the same act, or for two or more acts connected together, or for two or more acts of the same class of crimes, which may be properly joined, the whole may be joined in one indictment in separate counts, an indictment may contain a count under section 5456 referring to the felonious taking away by any one of anything belonging to the United States, from any place, and a count under section 5460, referring to the felonious taking and embezzlement of the metals at the United States mint by a person to whose charge they were committed; and it is immaterial that one might be classed as larceny, and the other as embezzlement, or that the punishment is different.

5. SAME—DESCRIPTION OF PROPERTY.

An indictment for larceny or embezzlement sufficiently describes the property as "gold metal * * * of the value of \$23,000."

John T. Jones was indicted under Rev. St. §§ 5456, 5460. Heard on motion to quash indictment, plea in abatement, and demurrer.

On the 23d day of August, 1895, a "true bill" of indictment was found by a grand jury against defendant, containing two separate counts, the first charging that the defendant, on the 15th day of June, 1893, and before the finding of this indictment, "did unlawfully and feloniously take, steal, and carry away from the United States mint at Carson City, state and district of Nevada, personal property, to wit, gold metal, which said personal property belonged to the United States of America, and which said personal property was of the value of \$23,000; the said unlawful and felonious taking and carrying away being with the intent, then and there, to steal the said property, and defraud the United States of America thereof," etc. Rev. St. U. S. § 5456. The second charging "that said John T. Jones, on the 30th of June, 1892, and continuously thereafter until the 9th day of April, 1895, was a person employed by the government of the United States of America in and about the United States mint at Carson City, state of Nevada, to wit, the said John T. Jones was at the said dates, and during all of said time, employed as the assistant melter and refiner, and was the assistant melter and

refiner of said United States mint, and during said employment, and on the 15th day of June, 1893, there was committed to the charge of said John T. Jones, assistant melter and refiner as aforesaid, at the Carson mint aforesaid, for the purpose of being coined, gold metal belonging to, and which was the property of, the United States of America, and which said gold metal was of the value of \$23,000; and the said John T. Jones, assistant melter and refiner of the United States mint at Carson City, Nevada, as aforesaid, employed at said United States mint as aforesaid, did on the 15th day of June, 1893, the said gold metal, of the value of \$23,000, committed to his charge as aforesaid, at the time aforesaid, and at the United States mint at Carson City, state of Nevada, for the purpose of being coined as aforesaid, unlawfully and feloniously take and embezzle, with intent then and there to defraud the United States of America thereof," etc. Rev. St. U. S. § 5460. Defendant filed a plea in abatement to said indictment, and moved the court to quash and set it aside, upon the following, among other, grounds: First. That the grand jurors were not impeached according to law, in this: That, of the jurors returned as served by the marshal, 23 names were drawn from the jury box, and took their seats, and were sworn to answer questions touching their qualifications to serve as grand jurors; that they possessed the qualifications prescribed by law; that five of such persons were excused by the court of its own motion, without any challenge being interposed either by the United States attorney, or by the attorneys of the defendant, or attorneys for other persons held to answer before the grand jury, who were present in court at the time. Thereafter, five other persons were selected, and the grand jurors so selected were duly sworn, and found the indictment against defendant. The plea in abatement and motion to quash further state: "That this defendant is informed and believes, and so alleges the fact to be, that it was and is not the law, the custom, or the practice, in the state of Nevada, to examine any grand juror as to any qualification or disqualification, except those mentioned in sections 3788 and 4065 of the General Statutes of Nevada, or to allow any exceptions other than those mentioned in section 3796 of the General Statutes of Nevada. That defendant believes, and so alleges the fact to be, that if the said twenty-three grand jurors first called into the jury box had been sworn as a grand jury, or had a grand jury been selected from said twenty-three persons according to the law and practice of the state of Nevada, no indictment would have been found against him. Second. That as this defendant is informed and believes, and so alleges the fact to be: While said charge against this defendant was pending before the said grand jury the U. S. district attorney called as a witness in behalf of the government, and against this defendant, one Andrew Mason, of New York. That said Andrew Mason was and is the superintendent of the U. S. assay office in the city of New York, in the state of New York, and was the special agent of the treasury department of the government of the United States to make examinations and investigations concerning certain alleged shortages and deficiencies in the U. S. mint at Carson City, Nevada. That said Andrew Mason, with the acquiescence of, and without objection by, the U. S. district attorney, gave a large amount of hearsay testimony before said grand jury; stating to said grand jury what he had heard and what he had been told concerning said mint shortage, and concerning this defendant, and gave his conclusions therefrom, and also his opinions concerning the same, and concerning the alleged or supposed connection of this defendant with such shortage. That said Andrew Mason testified before said grand jury as an expert in all mint matters and accounts, and as an expert assayer and melter and refiner of gold and silver, without the order, knowledge, or permission of this court, and without it having been in any way ascertained that he was competent to testify as such expert. That said Andrew Mason also produced before said grand jury books and documents, and testified therefrom, of which said books and documents he was not the lawful or proper custodian. That said Andrew Mason, with the acquiescence of, and without objection from, the U. S. district attorney, testified before said grand jury concerning investigations and examinations, and concerning assays of gold and silver, made by him, or under his direction, in the U. S. mint at Carson City, Nevada, and stated and gave to said grand jury his conclusions and opinions drawn from

said investigations, examinations, and assays, and testified before said grand jury, in substance and effect, and in words, that there was no doubt but that defendant, John T. Jones, was the guilty culprit, and further testified, in substance and effect, and in terms, that he had caught one thief, and that he desired to catch another, and that there was no doubt but that defendant, John T. Jones was the thief, or that there was no doubt that defendant, Jones, was a thief. That while before said grand jury, and after expressing his opinions or giving his conclusions, said Andrew Mason frequently said to the grand jurors: "This is the way it looks to me. How does it look to you?"—or used words of similar import. That affiant is informed and believes, and so alleges the fact to be, that the charge against him was considered and ignored by said grand jury on August 22, 1895, and was reconsidered, and the indictment herein found, on August 23, 1895, and that if said illegal and inadmissible hearsay testimony had not been given, and said unwarrantable and inadmissible opinions, conclusions, and statements had not been given and made before said grand jury, by said Andrew Mason, no indictment would have been found by said grand jury against this defendant. Third. That there are two offenses or charges embraced in said indictment, which could not be connected together, and which could not arise out of the same transaction, which are not of the same class of crimes, and which are improperly joined, to wit, larceny and embezzlement. That, under the instructions and admonitions of the court concerning the secrecy that it is proper to observe as to the deliberations of the grand jury, grand jurors would be loath to make affidavits concerning the evidence given before them, and that defendant has doubts as to the propriety of endeavoring to procure such affidavits without leave of court."

Trenmor Coffin, William Woodburn, and Torreyson & Summerfield, for defendant.

Charles A. Jones, U. S. Atty., and Robert M. Clarke, Special Counsel, for the United States.

HAWLEY, District Judge (orally). 1. The court did not err in excusing certain grand jurors of its own motion. One was excused because he was a surety upon the bond of defendant for his appearance in court. Another, because he had left the state, with his family, without the intention of returning, and had sought and obtained employment in another state, and had simply returned to this state on a temporary visit. Another was a witness in the mint cases. The others had either formed or expressed opinions of the guilt or innocence of the defendants in the mint cases. There is no pretense that any of the grand jurors who were sworn and found the indictment were disqualified to serve or were in any respect improper persons. If any disqualified juror had been placed upon the panel, it might be urged that it would injuriously affect the whole panel; but, if all the individuals selected and sworn were in all respects unobjectionable, it is difficult to see how the defendant can maintain any objection on the ground that certain other persons were excused from serving. U. S. v. Gale, 109 U. S. 65, 70, 3 Sup. Ct. 1. In State v. Kelly, 1 Nev. 226, the court said:

"When there is any probability that a juror is disqualified, and the court is unable to determine it, by reason of its inability to establish the fact constituting such disqualification, as in this case, it is not required to hazard the regularity of its proceedings by permitting such person to sit as a juror."

See, also, State v. Larkin, 11 Nev. 326.

The rule is well settled that for any good cause shown the court may, without challenge from either party, excuse a juror, of its

own motion, before he is sworn, and if an impartial jury is thereafter obtained the defendant cannot complain. *State v. Larkin*, 11 Nev. 326, and authorities there cited; *State v. Pritchard*, 15 Nev. 79; *State v. Crutchley*, 19 Nev. 369, 12 Pac. 113; *People v. Murphy*, 45 Cal. 143; *People v. Colson*, 49 Cal. 679; *People v. Atherton*, 51 Cal. 495. In *State v. Bradford*, 57 N. H. 198, where certain grand jurors were excused, the court said:

"The court has so long exercised the power of excusing jurors for reasons that have been deemed satisfactory, without its power to do so being questioned, that it must be regarded as firmly settled that the court has such power, and that the exercise of it in the discretion of the court will not ordinarily be revised."

The reason upon which these decisions are based is that when a competent jury, composed of the requisite number of persons, has been impaneled and sworn, the purpose of the law is accomplished; that although, in selecting the jury, a competent person has been rejected, yet, if another competent person has been selected in his stead, no injury has resulted to the prisoner. It is certainly no ground of error for the court even to be more cautious and strict in securing an impartial grand jury than the law actually requires, by rejecting a juror on grounds which might not be technically sufficient to sustain a challenge for cause. Neither the government nor the accused can complain, so long as an impartial jury is obtained. *Levy v. Wilson*, 69 Cal. 111, 10 Pac. 272. Moreover, the defendant and his counsel were present in court when the grand jury was impaneled, and had the opportunity of taking objections to the action of the court in excusing the grand jurors, or to object to any other juror or jurors on the panel. When the court asked the question whether they had any objections, none were made. If there were any valid objections to the action of the court in excusing jurors, or any objection to any grand juror on the ground of prejudice, bias, partiality, ignorance, or incompetency, or other cause, the defendant ought, in justice and fairness, to have brought the same to the attention of the court before the jurors were sworn. In *Boulo v. State*, 51 Ala. 19, where the provisions of the state statute prohibited pleas in abatement to be filed on the ground of the disqualification of any grand juror, the court said:

"There is no reason for apprehending that, under our statutes, any right of persons accused will be prejudiced by the selection and impaneling of an improper grand jury. On the court is devolved the duty of ascertaining that each juror possesses the requisite qualifications, as a preliminary to giving in charge to the jury the duties they are required to perform. This duty the court uniformly observes, thereby guarding against the introduction of persons not fit or qualified to serve. Any person, as *amicus curiæ*, can suggest the unfitness of any juror; and, if necessary, the court would hear evidence, and determine the question."

See, also, *Com. v. Smith*, 9 Mass. 109; *People v. Romero*, 18 Cal. 93; *U. S. v. Palmer*, 2 Cranch, C. C. 11, Fed. Cas. No. 15,989; *State v. Easter*, 30 Ohio St. 543.

The real contention of the defendant is that the court had no power to excuse any grand juror for any cause whatever, unless he came within the disqualification or exemptions mentioned in

sections 3788, 4065, 3796, of the General Statutes of Nevada,—in other words, the court had no authority to excuse any juror, of its own motion, unless he was a minor, an alien, an insane person, or a prosecutor,—and that the state statutes furnished the only guide for the action of the court. If the first portion of the contention is correct, then it would follow that if the accused person, whose case was to come before the grand jury had been on the list drawn from the jury box, the court would have been compelled to accept him as a grand juror, and to have allowed him to act as a juror in all cases except his own. If 12 of the grand jurors had testified that they had formed and expressed opinions that the defendant was guilty, and that they should vote in favor of an indictment without hearing any further evidence, the court would have no power to excuse them, or either of them. If it was brought to the attention of the court, in a reliable manner, that one or more of the jurors had offered, in advance of being sworn, that he was willing to sell his vote, for any sum of money, to either party, the court would have no power, authority, or jurisdiction to excuse the juror. These illustrations are sufficient to show the absurdity of the defendant's contention. Such results would be utterly subversive of every principle of justice; would be contrary to the spirit and genius of free institutions; would be a reproach to any court that would permit such a practice to be pursued, and a dark blot upon the jurisprudence of any country. There is no law that gives an accused person the absolute right to have grand jurors accepted by the court who have formed and expressed unqualified opinions that he is innocent. There is no law, rule, or practice that compels the court to accept any grand juror to be on the panel who has formed and expressed the opinion that the accused is guilty. But, if such persons were selected without any objections being made, it would be no ground for setting aside the indictment. In *State v. Hamlin*, 47 Conn. 95, 114, cited and relied upon by defendant, the court said:

"The authorities which have been cited show conclusively that objections to grand jurors on the ground that they have formed and expressed opinions of the guilt of a person accused of crime, before they were impaneled and sworn, cannot be pleaded in abatement to the indictment."

The action of the court in the present case was strictly within the lines of the decisions of the supreme court of Nevada; but, even if it was not, it would not necessarily follow that any error had been committed. The state law is not absolutely controlling. *U. S. v. Tallman*, 10 Blatchf. 21, Fed. Cas. No. 16,429. In *U. S. v. Benson*, 12 Sawy. 477, 482, 484, 31 Fed. 896, Mr. Justice Field, in discussing objections to grand jurors raised by plea in abatement to the indictment, said:

"It is true that in considering objections to grand jurors, or to their action, the federal courts are not restricted to such as are specifically designated in the legislation of the state. The provisions of the statute passed to bring offenders against the laws to trial are not to be construed so as to defeat their purpose. The various proceedings prescribed are the means designed, not merely to protect the accused, but also to protect the public, and are to be enforced, on the one hand, so as to secure to the accused a full

and fair trial, and, on the other hand, so as not to prevent the punishment of crime. Notwithstanding, therefore, the federal courts require for their jurors similar qualifications with those of jurors in the state courts, and enforce like objections and challenges to them, they still have the power—and it is their duty to exercise it, either on their own motion, or on that of counsel—to enforce any other objections to jurors which, from their nature, if well founded, would necessarily unfit them to act. * * * In all criminal proceedings the federal courts will so exercise their inherent powers that, so far as it is possible, notwithstanding the forms of procedure prescribed, the rights of the accused will not be impaired, nor the ends of justice defeated.”

The apprehensions, therefore, of one of the learned counsel, as to the fearful consequences which may follow in other cases if the indictment be sustained in this case in the face of his objections, may be considered with composure and dismissed.

2. There are exceptional cases where an indictment might be quashed, or a plea in abatement sustained, on the ground of improper conduct upon the part of the grand jurors. If the grand jury required the accused to appear, and compelled him to be sworn and to testify touching the charge against him, the indictment might be set aside. *State v. Froiseth*, 16 Minn. 296 (Gil. 260). If a witness who was incompetent, or disqualified from giving evidence, under the law,—as, for instance, if the wife of the accused testified before the grand jury,—the indictment might be quashed. But it is only in rare and exceptional cases that motions to quash, or pleas in abatement, have been sustained by the court on the ground that illegal testimony was received by the grand jury. To permit an inquiry of this sort would open the door to great abuses. It would afford opportunity to tamper with the jury. It would lessen the respect due to the forms and solemnities of judicial proceedings.

“It could only be in a very clear case, where it could be made to appear manifestly, and beyond every reasonable doubt, that an indictment apparently legal and formal had not in fact the sanctions which the law and the constitution require, that the court would sustain a motion to quash or dismiss it, upon a suggestion of this kind.” *Low's Case*, 4 Greenl. (Me.) 446.

In *U. S. v. Terry*, 14 Sawy. 49, 39 Fed. 355, Hoffman, J., said:

“An exception to the general rules of law, which forbid a record to be contradicted, a grand juror to disclose the proceedings of the jury, or to impeach its findings, will only be allowed in rare and extraordinary cases, and where the matters, if true, worked a manifest and substantial injury to the defendant, which the court, in the interest of justice, is bound to redress.”

The general rule is, as stated in the authority last cited—

“That matters which contradict the record, or which are, if true, only provable by testimony of the jurors, who must be permitted to disclose what their terms of the oath and the general rules of law require them to keep secret, and the effect of which is to impeach their verdict, cannot be set up in a formal plea in abatement.”

In the present case the motion to quash and plea in abatement are based solely upon information and belief. The sources of such information are not given. It is not even asserted that there was not sufficient competent testimony to authorize the finding of an indictment, but defendant does interpose his belief “that if the hearsay testimony, opinions, and statements of the witness Mason

had not been given, that no indictment would have been found." It is not claimed that Mr. Mason, who gave the testimony complained of, before the grand jury, was an incompetent or disqualified witness under the law. The only charges are that he gave some hearsay testimony; that he was not the legal custodian of certain books and documents which he had in his possession, and referred to in his testimony; and that he was an expert, and gave his opinions to the jury. No case has been cited which enunciates any principle of law that would authorize the court to set aside the indictment upon any such grounds. It is undoubtedly true that all investigations before grand juries ought to be conducted within the well-established rules of evidence, and the best evidence of which the case is susceptible ought to be presented, and hearsay testimony excluded. The grand jurors in the present case were directly charged by the court to only receive legal evidence, and to exclude hearsay, suspicions, or mere reports. They were also charged that, to justify the finding of an indictment, they should be convinced from the evidence presented to them that the accused person is guilty: "In other words, you ought not to find an indictment, unless you believe that the evidence presented to you, unexplained and uncontradicted, would warrant a conviction before a petit jury." It does not appear by any competent proof that any illegal evidence was received. But it may be assumed that grand jurors sometimes ask questions that might lead a witness to give some hearsay testimony. In *State v. Logan*, 1 Nev. 516, the court discussed this question at considerable length, and it was there stated that the admission of evidence not strictly legal will authorize the setting aside of an indictment is a proposition which seems to have no authority to sanction it, and, if adopted, "would only be an impediment to the execution of criminal justice; for it is evident that, under the present practice, not one indictment out of five could be found, where it could not be shown that some illegal proof was received." It was further stated that where there is the slightest legal evidence the court cannot inquire into its sufficiency, or set it aside, because some illegal evidence was received with it, and then announces the doctrine that "to authorize the setting aside of an indictment, even where there was no legal evidence at all to sustain it, that fact must appear by proof independent of the testimony of the grand jurors." If the state practice is controlling, as claimed by counsel, then it necessarily follows that the motion and plea, so far as this ground is concerned, should be denied. The general principles announced in *State v. Logan* have been, in one form or another, approved in a great number of decided cases. *State v. Hamilton*, 13 Nev. 389; *Hope v. People*, 83 N. Y. 419; *State v. Fowler*, 52 Iowa, 103, 2 N. W. 983; *Creek v. State*, 24 Ind. 152; *State v. Fassett*, 16 Conn. 457; *U. S. v. Reed*, 2 Blatchf. 466, Fed. Cas. No. 16,134; *U. S. v. Brown*, 1 Sawy. 531, Fed. Cas. No. 14,671. In *State v. Hamlin*, 47 Conn. 115, the court said:

"The allegations in that part of the defendant Davis' plea in abatement which is now under consideration could not, if they are true, be proved, except

by the testimony of the grand jurors themselves. The grand jurors could not have been allowed to give testimony in respect to them. * * * The demurrer to the plea cannot be allowed to operate as an admission of the truth of the allegations pleaded, or to have any other operation or effect than an objection or exception to the filing and allowance of the plea."

3. Section 1024, Rev. St. U. S., reads as follows:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

This statute leaves the question to the court to determine whether, in any given case, a joinder of two or more offenses in one indictment against the same person "is consistent with the settled principles of criminal law." *Pointer v. U. S.*, 151 U. S. 396, 14 Sup. Ct. 410. It is evident that under this decision the joinder of the two counts furnishes no ground whatever in support of defendant's plea, or motion to quash. If it should appear at any time that by the joinder of the two counts the defendant might be embarrassed in his defense, the court would have the right to compel the prosecution to elect under which count it shall proceed. But it is apparent from the decision that the court is justified in forbearing at this time, before the disclosure of any facts, to compel an election by the prosecution between the two counts; and if, upon the trial, it should be developed that the accused was not embarrassed in his defense by the union of the counts in one indictment, and that none of his substantial rights would be in any manner prejudiced by the refusal of the court to compel the prosecutor to elect upon which of the counts he will proceed, the court will be justified in such refusal. Counsel, in my opinion, have failed to comprehend, to some extent, at least, the true meaning of section 1024. There are three separate subdivisions in the statute, under either of which authority is given to unite several counts in the same indictment: (1) When there are several charges against any person for the same act or transaction; (2) when there are several charges against any person for two or more acts or transactions connected together; (3) when there are several charges against any person for two or more acts or transactions of the same class of crimes or offenses. The arguments were principally directed to the third subdivision, whereas the case comes directly under the other two. The act or transaction, or acts and transactions, of which the defendant is accused, is the felonious taking from the United States mint at Carson of gold metal of the value of \$23,000, the property of the United States, etc. There are two sections of the Revised Statutes which directly refer to such acts or transactions, under which the person guilty of any such act or acts is liable to punishment, under the provisions of which the present indictment was found. The first count is framed under the provisions of section 5456, which refers generally to all classes of cases where any person feloniously takes and carries away any kind or description of

personal property belonging to the United States, whether it is taken from the post office, the subtreasury, or the mint, or from any officer having in his possession any personal property of the United States. The punishment provided for in this section is "by a fine of not more than five thousand dollars, or by imprisonment at hard labor not less than one nor more than ten years, or by both such fine and imprisonment." The second count is framed under the provisions of section 5460, for the felonious taking and embezzlement of the metals at the United States mint which were committed to the defendant's charge. The punishment provided for in this section is imprisonment "at hard labor for a term not less than one year nor more than ten years," and a fine "not more than ten thousand dollars." These offenses were properly joined by separate counts in the same indictment. Upon the face of the indictment, the act or transaction of which the accused stands charged is the felonious taking from the mint of gold metal of the value of \$23,000, the personal property of the United States, contrary to the provisions of the statute in such case made and provided. Whether under a general definition the language of the first count might be classed as larceny, and in the second as embezzlement, is immaterial. It is for the same act or transaction, or acts and transactions connected together. Numerous illustrations of the principles governing this class of cases might be found under the various provisions of the statute relating to offenses against the postal laws, the revenue laws, the custom laws, or laws against counterfeiting, etc. In all these, and many other, cases, there are various separate and distinct offenses which may, under the statute in question, and by the practice of the United States courts, be set forth in different counts in the same indictment, and the fact that the punishment is different for the offense mentioned in one or more counts from the others does not prevent all the offenses being set forth in separate counts in the same indictment. The defendant may be convicted upon one or all of such counts, and, if it appears to the satisfaction of the court that the counts upon which he is convicted relate to one act and transaction, then one general sentence may be given upon the indictment; and, if the sentence thus given is within the statute upon any count, it will be valid. If the defendant is convicted upon different counts relating to separate and distinct transactions or offenses, then sentence may be passed upon each count, or the court may pass sentence under one count, and suspend sentences on the others until the first sentence is executed. In *Ex parte Hibbs*, 11 Sawy. 459, 26 Fed. 421, the court said:

"In cases arising out of the same act or transaction, or two or more acts or transactions connected together, where there are several counts in the indictment, it will depend on the circumstances of the case whether, on a general verdict of guilty as charged in the indictment, the defendant may be sentenced to more than the maximum punishment for one of the offenses charged. But in the case of two distinct offenses, arising out of two distinct acts or transactions, however closely related in point of time or place, the trial is for distinct offenses, of which the defendant may be found guilty, and receive the maximum punishment for each. * * * The act authorizing the joinder of offenses in one indictment, and the consolidation of separate indictments for distinct offenses, was intended to promote the speedy

and economical administration of justice in such cases, in the interest both of the government and the defendant, and not practically to merge two or more distinct offenses into one, for the benefit of the latter."

The statute is much broader than any of the statutes of the respective states, so that the decisions cited under the statutes of different states have but little bearing upon the question at issue here. In *U. S. v. O'Callahan*, 6 McLean, 597, Fed. Cas. No. 15,910, the court said:

"A count for embezzlement on 39 Geo. III. c. 85, may be joined with a count for a larceny on 2 Geo. II. c. 25, because these offenses are felonies; and a count for embezzling bank notes upon 39 Geo. III. c. 85, may be joined with a count for larceny at common law."

And numerous English authorities are cited in support of this position. See, also, 1 Whart. Cr. Law, 978.

Touching the general question as to what counts may be united in one indictment, see *Ingraham v. U. S.*, 155 U. S. 436, 15 Sup. Ct. 148; *In re Lange*, 13 Blatchf. 548, Fed. Cas. No. 8,065; *U. S. v. Stetson*, 3 Woodb. & M. 164, Fed. Cas. No. 16,390; *U. S. v. Burns*, 5 McLean, 24, Fed. Cas. No. 14,691; *U. S. v. Bennett*, 17 Blatchf. 357, Fed. Cas. No. 14,572; *U. S. v. Dickinson*, 2 McLean, 325, Fed. Cas. No. 14,958; *U. S. v. Wentworth*, 11 Fed. 53; *U. S. v. Blaisdell*, 3 Ben. 133, Fed. Cas. No. 14,608; *People v. Bogart*, 36 Cal. 245; *Womack v. State* (Tex. Cr. App.) 25 S. W. 772; *Brown v. People*, 39 Mich. 37.

4. The indictment contains a sufficient description of the property alleged to have been stolen and embezzled from the United States mint. All that is necessary, in this respect, is that the property must be described with sufficient certainty to enable the court to determine that the property is, in law, the subject of the crimes alleged in the indictment, and to enable the jury to discern that the property proved to have been feloniously taken is the same which is mentioned in the indictment. In *Dunbar v. U. S.*, 156 U. S. 185, 191, 15 Sup. Ct. 325, the description of "prepared opium, subject to duty by law, to wit, the duty of \$12 per pound," was held sufficient in an indictment for smuggling. In the course of the opinion the court said:

"The rule is that if the description brings the property in respect to which the offense is charged clearly within the scope of the statute creating the offense, and at the same time so identifies it as to enable the defendant to fully prepare his defense, it is sufficient."

See, also, *U. S. v. Claffin*, 13 Blatchf. 178, Fed. Cas. No. 14,798, which was an indictment for smuggling, and the language used to identify the goods, and which was held sufficient, was as follows: "Certain goods, wares, & merchandise, to wit, a large quantity of silk goods, to wit, six cases containing silk goods, of the value of \$30,000."

The following (among other) descriptions of personal property have been held sufficient in indictments for larceny: "One watch," without stating whether it was gold, silver, or brass. *Williams v. State*, 25 Ind. 150. "Three head of cattle," without stating the particular species. *People v. Littlefield*, 5 Cal. 355. "One book," without stating its title or character. *State v. Logan*, 1 Mo. 532; *Turner v. State*,

102 Ind. 426, 1 N. E. 869. Numerous other authorities might be cited of like import.

The request to call grand jurors for the purpose of giving testimony is refused, motion to quash indictment denied, plea in abatement dismissed, and demurrer to indictment overruled.

UNITED STATES v. PENA et al.

(District Court, D. Delaware. September 23, 1895.)

No. 2.

1. CRIMINAL LAW—SETTING ON FOOT MILITARY EXPEDITION—REV. ST. § 5286.

Rev. St. § 5286, imposing a penalty upon "every person who, within the territory of the United States * * * sets on foot * * * any military expedition * * * against * * * any foreign prince or state * * * with whom the United States are at peace," does not prohibit the shipping of arms or ammunition or military equipments to a foreign country, nor forbid one or more individuals, singly or in unarmed associations, from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries, or between different parties in the same country.

2. SAME—ELEMENTS OF THE OFFENSE.

A military expedition, within the statute, means a military organization of some kind, designated as infantry, cavalry, or artillery, officered and equipped, or in readiness to be officered and equipped, for active hostile operations; and preparing the means for such an organization would come within the statute, but to complete the offense it must be shown to have been done within the United States, and that the expedition was to be carried on from thence against the dominions or territory of a foreign state; and the mere fact that persons of the same nationality as others who are carrying on an insurrection in a foreign state, with which such persons are believed to be in sympathy, have gathered arms, and prepared to ship them, secretly, and under suspicious circumstances, is not alone sufficient for the conviction of such persons under the statute, without proof that such persons have set on foot a military expedition within the United States against such foreign state.

Lewis C. Vendergrift, U. S. Atty.

Herbert H. Ward, George Gray, Horatio S. Rubens, and Leon J. Benoit, for defendants.

WALES, District Judge (charging jury). The defendants, Braulio Pena and the 20 other persons who are named in this indictment, are charged with having violated section 5286 and section 5440 of the Revised Statutes of the United States. These sections read as follows:

"Sec. 5286. Every person who, within the territory or jurisdiction of the United States begins, or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace, shall be deemed guilty of a high misdemeanor, and shall be fined not exceeding three thousand dollars, and imprisoned not more than three years."

"Sec. 5440. If two or more persons conspire either to commit any offence against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect

the object of the conspiracy, all the parties to such conspiracy shall be liable to a penalty of not less than one thousand dollars and not more than ten thousand dollars, and to imprisonment not more than three years."

The indictment contains 37 counts, which have been framed in such manner as to cover the specific and alternative offenses described in the law. Several of the counts in the indictment, as it was originally returned by the grand jury, were found to be defective on being demurred to, but sufficient remain to put the defendants on trial. The counts for a conspiracy have not been pressed, and, indeed, no separate or distinct evidence was produced in support of them. The charges against the defendants are of a grave and important character, involving serious consequences to themselves, if proved, and directly affect the good faith of the government of the United States in preserving inviolate its treaty obligations and the laws of comity existing between all civilized countries. It will be your duty, therefore, to carefully examine and consider the testimony which you have heard, and to decide fairly and impartially on the guilt or innocence of the accused. And in order to assist you both in the investigation of the facts and in their application to the law of the case, the court will first direct your attention to the meaning and purpose of section 5286, which has just been read to you. Briefly, this section is a portion of what is known as the "Neutrality Act," which was passed by congress as far back as April 20, 1818, and was, in fact, a declaration on the part of the government that it would, so far as its authority extended, prevent any part of its territory from being used as a basis for hostile military operations against any nation or country with which it was at peace. From the date of its passage to the present time many occasions have arisen calling for the enforcement of the law, and the government has always been vigilant and prompt, as it has been in the case now before us, in bringing parties accused of violating any of its provisions to trial. Not only the judicial branch, but also the state department, of the government, and its diplomatic representatives, have been frequently engaged in the interpretation of this act, so that its provisions may be said for the most part to have received a settled construction. And this remark applies particularly to section 5286. This section is designed to prohibit the beginning or setting on foot, or providing or preparing the means for, any military expedition or enterprise within the territory of the United States, to be carried on from thence against the territory or dominions of any foreign prince or state, or of any colony of people with whom the United States are at peace.

The first count in the indictment is a general one, following the language of the law. The successive counts specify the different modes and ways by and in which the defendants are alleged to have violated the law, but you will notice that each count charges either that the defendants began, or set on foot, or provided the means for a military expedition or enterprise to be carried on against the dominions of the king of Spain, or against the Island of Cuba, "then and there being the territory of the king of Spain." This section of the neutrality act does not prohibit the shipping of arms, or ammunition or of military equipments to a foreign country, nor does it even forbid

one or more individuals, singly or in unarmed associations, from leaving the United States for the purpose of joining in any military operations which are being carried on between other countries, or between different parties in the same country. In such cases the shipper and the volunteer would run the risk, the one of the capture of his property, and the other of the capture of his person. But in neither case would there be the setting on foot or providing the means for carrying on a military expedition from the territory of the United States within the meaning of this section. With this instruction as to the design and scope of the law, your inquiry will now be directed to the evidence which has been produced to establish the guilt of the defendants. In the first place, you will take notice of the proclamation of the president of the United States, dated the 12th day of June, 1895, which recites the existence in the Island of Cuba of "serious civil disturbances, accompanied by armed resistance to the authority of the established government of Spain, a power with which the United States are and desire to remain on terms of peace and amity." The proclamation also recites the substance of section 5286, which prohibits the citizens of the United States, as well as all other persons within and subject to its jurisdiction, from taking part in such disturbances adversely to such established government," * * * by setting on foot, or providing, or preparing the means for military enterprises to be carried on from the United States against such government." The proclamation concludes by warning all such citizens and persons to abstain from every violation of the law referred to, and enjoins upon all officers of the United States charged with the execution of the law the utmost diligence in preventing violations thereof, and in bringing to trial and punishment any offenders against the same. And here, gentlemen, it is proper to observe that, whatever may be the immediate outcome of the present trial, the prosecuting officer has done no more than his duty in preferring these charges, and in bringing the defendants before a jury to ascertain their guilt or innocence. Not to have done so would, perhaps, have amounted to official delinquency, for there were, at least *prima facie*, strong grounds for believing that the defendants had subjected themselves to the penalties of the law. It is now for you to decide whether they have done so or not.

The proof shows that on the 29th day of August, in the present year, the defendants assembled in Wilmington, and under cover of night went on board the tugboat *Taurus*, lying at Market street wharf, in the *Christiana*, and which some one of their number had previously chartered. On the same night they shipped on board the tug 27 boxes of freight, some of which had been brought from Philadelphia by Bush & Sons' Company, and the others had been carried from the store of De Soto Bros., in Wilmington, by the Charles Warner Company. The captain of the tug was ordered by Ralph De Soto, one of the defendants, to go out into the Delaware river, and to steam up and down the river between the mouth of the *Christiana* and Gordon Heights, until he should hear the signal of three whistles from a steamship outward bound, when he was at once to run the tug alongside, and transship the boxes. The tug

went back and forth on the river until long after daylight on the morning of the 30th of August without hearing any signal from the expected steamship, and until the agent of the owners of the Taurus came on board at Gordon Heights, and, fearing that he had done wrong in hiring the tug to the defendants, directed them to give it up. At the request of the defendants, some of them, with their boxes of freight and with their personal effects, were landed at Pennsgrove, in New Jersey. Here the boxes were left on the pier, to be forwarded to the address of De Soto Bros., Philadelphia, while the defendants were waiting for a passage to the same place, either by boat or railroad. The tug Taurus had just left the pier when the tug Meteor appeared, having on board the United States marshal for the district of Delaware, accompanied by a strong force of deputies. The marshal ordered the Taurus to turn back. The boxes were seized, and placed on the Taurus, and brought to Wilmington. The defendants were arrested by the marshal without any warrant, but they made no resistance, and entered no protest. The contents of the boxes, on examination, were found to consist of rifles, carbines, ammunition, haversacks, canteens, etc. There were no names or marks on the boxes to indicate to whom or where they were to be delivered. On a hearing before a United States commissioner the defendants were held to bail for their appearance at the coming term of this court.

Such, gentlemen, is the history of this case, as far as the evidence goes. There is no proof that the boxes were to be sent to the Island of Cuba, or that the defendants intended to take passage on an outward-bound vessel, which was destined for the same place. All that depends on conjecture and suspicion only. In fact, there was some evidence to negative any such inference. You will remember that, on the 29th of August, three steamships cleared at the port of Philadelphia for the West Indies, namely, the Holquin, for Port Antonio; the Laurodo, for Port Moran; and the Buckminster, for Havana. The Laurodo, in consequence of needed repairs to her boilers, did not sail until the 3d of September, but her captain and owner testified that they had no knowledge of any contract or arrangement to take men or freight on board after leaving Philadelphia. There is also an absence of evidence of any agreement or understanding being had with the master or owner of either of the other vessels. On this proof you have to say whether the defendants, or any of them, are guilty in manner and form as they stand indicted; that is, did all or any of them begin or set on foot, within the jurisdiction of the United States, or provide or prepare the means for, any military expedition or enterprise, to be carried on from thence against the dominions of the king of Spain? The suspicious movements of the defendants on the night of the 29th of August, the devious and mysterious manner in which the arms and ammunition were brought to Wilmington, and taken out on the Taurus, to be transhipped to an unknown outward-bound steamer from Philadelphia, the omission of the defendants to make any explanation of their designs,—all these circumstances may reasonably excite

suspicion of wrongdoing. The appearance of the defendants, their nationality, their silence under arrest, the fact of an existing insurrection in Cuba, and the belief that they are in sympathy with the insurrectionary party, unsupported by other evidence, would not be sufficient to warrant a verdict of guilty. Before you can find such a verdict, you must be satisfied beyond a reasonable doubt by the proofs in the case—First. That the defendants, within the jurisdiction of the United States, began or set on foot, or provided the means for, a military expedition or enterprise. Second: And that such expedition or enterprise was to be carried on from the United States against the territory or dominions of the king of Spain. A military expedition or enterprise means a military organization of some kind, designated as infantry, cavalry, or artillery, officered and equipped, or in readiness to be officered and equipped, for active hostile operations; and the preparing the means for such an organization would undoubtedly come within the inhibition of the law. But this would constitute only one element or part of the offense charged against the defendants. To complete the offense, it must also be proved that the means were provided within the United States, and that the expedition was to be carried on from thence against the dominions or territory of the king of Spain.

You have heard the evidence, and the court has now given you such instructions in reference to the meaning of the law as will enable you to form a right decision on the facts; and it is only necessary to add that you must not allow public opinion or popular sympathy to influence your deliberations. A people struggling for freedom always attracts the admiration and awakens the ardent wishes for its success of the citizens of this republic, but thus far, in our history, it has been the policy of our government to abstain from rendering any active or material assistance to either party or faction in such contests, and the United States are bound by the most sacred obligations to prevent its own citizens or any other persons from making use of its territory for hostile operations against any government with which we are at peace. You have already been informed that the conspiracy counts have not been pressed by the district attorney, and you are now further instructed that, unless the defendants shall be found guilty on one or more of the other counts, they cannot, on the same evidence, be convicted of a conspiracy.

UNITED STATES ex rel. DEIMEL v. ARNOLD, United States Marshal.

DEIMEL et al. v. STROHEIM et al.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1895.)

Nos. 221 and 228.

1. PRACTICE—WAIVER OF JURY—REVIEW OF FINDINGS—ILLINOIS STATUTE.

The Illinois statute of June 17, 1893 (Laws Ill. 1893, p. 96), providing that no person shall be imprisoned for nonpayment of a fine or judgment except on trial by jury, or after a waiver of a jury in a particular form, does not prevent the trial of a case by a federal judge without a jury

upon an oral stipulation, or a written stipulation in a form different from that provided by the statute; and in such case there can be no review of the facts on writ of error.

2. PROCESS—CAPIAS AD SATISFACIENDUM—POWER OF FEDERAL COURTS.

The power of the federal courts to issue the writ of *capias ad satisfaciendum* for the enforcement of their judgments is derived from section 14 of the judiciary act of 1789 as re-enacted in Rev. St. § 716, and from the process act of 1789, in connection with early enactments by the state on the subject, and is not affected by the statute of Illinois of June 17, 1893, limiting the right to process against the person.

Appeal from the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was an application for a writ of habeas corpus by Rudolph Deimel, alleging himself to be illegally restrained of his liberty by John W. Arnold, United States marshal for the Northern district of Illinois. The circuit court denied the writ. Relator appeals. With this was heard a writ of error sued out by Joseph Deimel and Rudolph Deimel to review a judgment against them in an action for deceit, brought by Julius Stroheim and Salo J. Stroheim.

Hiram T. Gilbert, for appellant.

T. A. Moran, Adolf Kraus, and I. H. Mayer, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. These cases were submitted together. Rudolph Deimel, the relator in the first, and one of the appellants in the second case, applied to the circuit court for the writ of habeas corpus, alleging that he was held in unlawful imprisonment by virtue of a writ of *capias ad satisfaciendum* issued on a judgment rendered against him by that court on the 23d day of July, 1894, in an action on the case for deceit, wherein Julius Stroheim and Salo J. Stroheim were plaintiffs and the relator and another were defendants. It is averred as ground for the application that the judgment was the result of a trial by the court without a jury, and that neither the relator nor his codefendant, "either or both of them, ever executed a formal waiver in writing of a trial by jury" in the cause, and that under the act of June 17, 1893 (Laws Ill. 1893, p. 96), whereby it is provided "that no person shall be imprisoned for non-payment of a fine or a judgment in any civil, criminal, quasi criminal, or qui tam action, except upon conviction by jury; provided, * * * that when such waiver of jury is made, imprisonment may follow judgment of the court without conviction by jury," the writ of *capias ad satisfaciendum* was unauthorized, and the imprisonment of the relator was illegal. The record of the case shows that on January 9, 1893, the issues having been made up, a stipulation entitled in the cause and signed by the names of attorneys for the plaintiffs and defendants respectively was filed, which reads:

"It is hereby stipulated and agreed by and between the parties that a trial by jury in the above-entitled cause shall be waived, and that the cause shall be submitted to the court for trial to be tried by Judge Grosscup."

The trial, commencing March 28th, was had before Judge Bunn, district judge of the Western district of Wisconsin, who had been designated to hold the court, and his findings of fact, entered of record July 23, 1894, contain the following recital:

"This cause coming on now to be heard before the court without the intervention of a jury, a jury having heretofore been expressly waived by stipulation in writing of all the parties hereto, which said stipulation was heretofore duly filed herein by the attorneys of record for the parties to this suit with the clerk of this court."

And the entry of judgment, made the same day, contains this recital:

"On the stipulation in writing of all the parties hereto heretofore duly filed herein by the attorneys of record for the parties to this suit with the clerk of this court, this cause is submitted to the court for trial without the intervention of a jury."

A bill of exceptions, signed the 23d day of August, and filed September 17, 1894, a copy of which was attached to and made a part of the petition, shows, among other things, that on several occasions after the 1st day of January and before the 28th day of March, 1894, both of the defendants in open court, by their counsel, expressly consented and agreed that the cause might and should be tried before Judge Bunn without a jury, and that with such consent, given in open court by counsel for both parties, the cause had been set peremptorily for hearing before Judge Bunn on March 28, 1894, but on that day, when the case was called, and before entering upon the trial, the defendants, by counsel, in open court "objected to the trial of the cause before Judge Bunn," basing their objection solely and exclusively upon the stipulation of January 9, 1893, already quoted, which was produced and read, and which, the bill states, "was the only stipulation or waiver in writing filed in said cause for the submission of said cause for trial without a jury."

The writ having been granted, issued, and served upon the marshal, that officer made return that he held the petitioner by virtue of the writ of *capias ad satisfaciendum* aforesaid, a copy of which was set out in the return; and afterwards, the cause having come on to be heard on the motion of the petitioner to be released from imprisonment, the court, upon consideration of the petition, the return of the marshal, and the evidence adduced, consisting of the bill of exceptions set out in the petition, which was admitted over objection, the docket entries of the findings and judgment upon which the writ of *capias ad satisfaciendum* issued, and a copy of that writ, denied the motion, and ordered the petitioner remanded to the custody of the marshal. These rulings are assigned as error in the first case.

In the other case,—No. 228,—wherein was rendered the judgment on which the writ of *capias ad satisfaciendum* was issued, it is shown by a bill of exceptions that on November 28, 1894, the defendants moved the court to correct the entry of the judgment as made July 23, 1894, so as to show that the stipulation referred to in the recital waiving a jury was signed, not by the parties, but by their attorneys of record, and in support of this motion, were allowed, over objection, to read the bill of exceptions, the substance of which has already been

stated; and the plaintiffs having offered in evidence the findings of fact signed by the judge, the court overruled the motion. It appears by another bill of exceptions that on the 20th day of December, 1894, both parties being present by attorneys, the defendants moved the court to recall and quash the writ of *capias ad satisfaciendum*, and in support of the motion, besides showing the issue of the writ, made proof of the arrest thereunder of the defendant, of the proceedings on the application for the writ of *habeas corpus*, as already detailed, of the appeal taken to this court, and also offered in evidence the bill of exceptions, before mentioned, and, the plaintiffs having put in evidence the judgment entry, the court overruled the motion.

The errors assigned in this case are upon the finding that the jury had been waived by stipulation in writing by the parties, upon the recital to the same effect in the entry of judgment, upon the trying of the cause by Judge Bunn without a jury, and upon the overruling of the motion to correct the entry of judgment.

It has been conceded in argument that there was no error in the mere fact of trial, without a jury, by the judge who presided. That was warranted by the oral consent shown to have been given by counsel in open court,—saying nothing of the written stipulation which was upon file. The other assignments are equally unavailing. If, as contended by counsel for the plaintiff in error, the written waiver of a jury was upon condition that the trial should be before the particular judge named, and the trial before another judge was lawful only because of the oral consent thereto, still there can be no review touching either the finding or the judgment. It has been often so decided. *Kearney v. Case*, 12 Wall. 275; *Madison Co. v. Warren*, 106 U. S. 622, 2 Sup. Ct. 86; *Bond v. Dustin*, 112 U. S. 604, 606, 5 Sup. Ct. 296; *Spalding v. Manasse*, 131 U. S. 65, 9 Sup. Ct. 649. And where there has been a written waiver of the right to try by jury, it is equally well determined that there can be no inquiry upon writ of error into questions of fact,—the review in such cases being limited to rulings of the court in the progress of the trial and, when there has been a special finding, to the determination of the sufficiency of the facts found to support the judgment. *Distilling & Cattle Feeding Co. v. Gottschalk Co.*, 66 Fed. 609, 13 C. C. A. 618, and cases cited. "The most appropriate evidence of a compliance with the statute is a copy of the stipulation in writing, filed with the clerk. But the existence of the condition upon which a review is allowed is sufficiently shown by a statement in the finding of facts by the court, or in the bill of exceptions, or in the record of the judgment entry, that such a stipulation was made." *Bond v. Dustin*, 112 U. S. 607, 5 Sup. Ct. 296. The finding being unassailable, it follows that the judgment, which is in strict conformity with the finding, is not open to dispute.

Was reviewable error committed when the court refused to correct the entry in conformity with the facts as stated in the bill of exceptions? The bill of exceptions being in the record, was any correction of the entry necessary? For the purposes of a writ of error, or direct attack upon a judgment, it is not disputed that the statements of a bill of exceptions are to be taken as true, and controlling of in-

consistent recitals of docket entries, which are made by a clerk; but when the attack is collateral, as it is when the validity of a judgment is questioned in an application for the writ of habeas corpus, it is contended by counsel for the appellee, on authorities cited, that "the judgment recitals and findings of the court cannot be questioned" on the strength of a bill of exceptions, or other evidence dehors the record. This point we need not decide. If the rule be as contended, it was no obstacle in the way, but rather constituted a strong reason for granting the motion to correct the entry of judgment, if the proposed correction were a material one. The correction, if necessary, might have extended to the finding of facts, which was spread of record the same day the judgment was rendered. It is not clear that a ruling upon such a motion is reviewable upon writ of error (*Boyle v. Zacharie*, 6 Pet. 648; *McCargo v. Chapman*, 20 How. 555; *Ex Parte Flippen*, 94 U. S. 348); but, however that may be, we are of opinion, on grounds to be stated presently, that the proposed correction, if made, would not have affected the character of the judgment or of the writs by which it might be enforced. While, therefore, the court, during the term at which the judgment was entered, as we think, might well have amended the entry so as to remove all dispute of its correctness, its refusal to do so was harmless.

It remains to consider, in the habeas corpus case, whether the court erred in remanding the appellant to the custody of the marshal. The question recurs whether, in that case, it was competent to show by the bill of exceptions in the other case, in contradiction of the finding of facts and of the recital in the judgment entry, that there had been no formal waiver of the jury executed by the parties. Unless that evidence was admissible, the finding and entry were conclusive that there had been such waiver, and that the imprisonment of the petitioner was not in violation of the statute of which he claimed the benefit. The controlling and more important question, however, is whether that statute of the state of Illinois is applicable to judgments of the courts of the United States, sitting in Illinois. We are of opinion that it is not applicable, and prefer to rest our decision upon that ground, rather than upon a technical view of the admissibility or force of evidence, or upon the other proposition of counsel for the appellee, that the formal waiver required by the statute of the state is one which may be executed by the attorney of the party. A review, in detail, of the various acts of congress authorizing and regulating process out of the courts of the United States is unnecessary here. Section 14 of the judiciary act of 1789 authorized the courts to issue "the writs of scire facias, habeas corpus and all the other writs not specially provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." In *United States Bank v. Halstead*, 10 Wheat. 51, 55, it was said:

"That executions are among the writs hereby authorized to be issued cannot admit of a doubt. They are indispensably necessary for the beneficial exercise of the jurisdiction of the courts. * * * The precise limitations and qualifications of this power, under the terms, agreeable to the principles and usages of law, is not, perhaps, so obvious. It doubtless embraces writs sanctioned by the principles and usages of the common law. But it would

be too limited a construction, as it respects writs of execution, to restrict it to such only as were authorized by the common law. It was generally known to congress that there were in use in the state courts writs of execution other than such as were conformable to the usages of the common law. And it is reasonable to conclude that such were intended to be included under the general description of writs agreeable to the principles and usages of law."

It follows that under this provision of the act establishing federal courts, which remains in force as section 716 of the Revised Statutes, those courts had from the beginning the power to issue the writ of *capias ad satisfaciendum*. That writ is expressly mentioned in the process act, enacted five days after the passage of the judiciary act, and in later legislation on the same subject; and whatever restrictions there may be upon the use of the writ must be found directly or indirectly in the federal statutes. If state legislation has any bearing, it is because congress has so provided. Section 914 of the Revised Statutes, known as the "Conformity Act," even if it had not been declared to be inapplicable to remedies upon judgments (*Lamaster v. Keeler*, 123 U. S. 376, 8 Sup. Ct. 197), could not be deemed to give effect to this statute of Illinois, because, by section 649 of the Revised Statutes, the stipulation for the waiver of a jury may be filed either by the parties or their attorneys, and the finding of the court upon those facts, whether general or special, it is provided "shall have the same effect as the verdict of a jury." See *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. 724. It has been suggested that this provision has reference only to the right of appeal, but manifestly that is not so, since that right is given and limited by another section, namely, section 700 of the Revised Statutes. There is nothing to the contrary in *Kearney v. Case*, 12 Wall. 275, or in *Gilman v. Telegraph Co.*, 91 U. S. 603. Once process has issued, section 914, it has been declared, is applicable to the conduct of the officer in the execution thereof. *Wayman v. Southard*, 10 Wheat, 1. Section 916 of the Revised Statutes entitles a party recovering a judgment in any common-law cause "to similar remedies upon the same, by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held," etc.; but that provision, by its terms, is inapplicable to an execution against the body of the debtor. If, however, the writs against person and property be regarded as governed by the same rule, and required to conform in the first instance to local legislation, both have been authorized by the laws of Illinois from the earliest days, and, as issued out of the federal courts, they are not governed or affected by changes in the state law on the subject, unless the changes have been adopted by general rules of those courts. Imprisonment for debt has been forbidden on process issuing from a court of the United States in any state where by the local law imprisonment for debt has been or shall be abolished, and all modifications, conditions, and restrictions upon such imprisonment provided by the laws of any state are made applicable to federal process to be executed therein (Rev. St. § 990); but "imprisonment for debt," as used in this and like statutory or constitutional provisions, means debts arising out of contract, and does not extend to actions for tort, nor to fines or penalties arising from a vio-

lation of the penal laws of the state. It was so held by the supreme court of Illinois in *Kennedy v. People*, 122 Ill. 649, 13 N. E. 213; and to the same effect are *Hanson v. Fowle*, 1 Sawy. 497, Fed. Cas. No. 6,041; *U. S. v. Walsh*, 1 Abb. (U. S.) 66, Fed. Cas. No. 16,635; *Ex parte Bergman*, 18 Nev. 331, 4 Pac. 209; *Harris v. Bridges*, 57 Ga. 407; *McCool v. State*, 23 Ind. 131; *Long v. McLean*, 88 N. C. 4; *Lathrop v. Singer*, 39 Barb. 396; *Cooley*, Const. Lim. (4th Ed.) 422 (341).

The appeal in the first case is dismissed, and the judgment in the other case affirmed at the cost of the relator and appellant.

BURNELL v. CHOWN et al.

(Circuit Court, N. D. Ohio, W. D. October 22, 1895.)

No. 1,266.

1. COPYRIGHT—STEPS TO OBTAIN—PLEADING.

An averment that a printed title of a book was furnished to the librarian of congress by complainant, and that "thereafter, within the time and in the manner prescribed by law, your orator did all the things required by law to be done in order to secure to himself the full enjoyment of all rights and privileges" granted by the copyright laws, is insufficient to show title. It must be directly averred that, within 10 days after publication, two copies of the book were deposited in the office of the librarian of congress.

2. SAME—INFRINGEMENT—COMPILATION SHOWING FINANCIAL STANDING.

Complainant conceived and put in operation a scheme for collecting, classifying, and putting in convenient form information in respect to the financial standing of business men in towns or counties, with a key thereto, the same being intended for the use of business men in the same locality or district. Defendants, by means of the same method of collecting, classifying, etc., obtained, by their own original efforts, like information in respect to the standing of parties in a different county. *Held*, that this was not an infringement of complainant's right of copyright, under the statute, or of his common-law right of property in his own compilation, in case the mere private and limited circulation thereof should be considered as not amounting to a publication. *Perris v. Hexamer*, 99 U. S. 674, applied.

This was a bill in equity by A. S. Burnell against C. M. Chown, E. G. Chown, and the Chown Commercial Company, to enjoin an alleged infringement of a copyright.

The bill avers that the plaintiff is a citizen and resident of the state of Iowa, that he conceived the plan of gathering and imparting the information referred to in the opinion, and used the same by circulating bound copies of said information to subscribers in various localities. He charges that the defendant, after having fully acquainted himself with the plaintiff's conception and plan of adapting the same to the uses of business men, went to the city of Lima, in the county of Allen, in the Northern district of Ohio, and there, without license or authority from the plaintiff, and with the purpose and intent of infringing upon his rights, began the work of collecting information and imparting the same to business men in that county.

The key which plaintiff used in his work is as follows:

- N—Prompt pay, and financially good.
- P—Prompt pay, regardless of means.
- W—Slow pay, but financially good.
- G—Slow pay, and limited means.
- H—Require cash on delivery.

The defendants' key, it is averred, is composed as follows:

- A—Prompt pay, and good for large amounts.
- B—Prompt pay, and good for moderate amounts.
- C—Prompt pay, and good for small amounts.
- L—Slow pay, but good for large amounts.
- M—Slow pay, but good for moderate amounts.
- X—Require cash on delivery.

James M. Brown, Walter F. Brown, and D. C. Henderson, for plaintiff.

M. A. Hoagland, for defendants.

RICKS, District Judge. This is a bill, filed by the plaintiff, asking for an injunction to prevent the defendants from appropriating, or in any manner using, "the conception, idea, book, and record of obtaining, collecting, classifying, putting into convenient form, and making record thereof, for the uses of business men, the experiences of business men with men in dealing with them on credit, and of leasing, selling or delivering such experiences and records to any person whatever," which ideas, conceptions, etc., are fully set out in the bill. The bill avers, in substance, that the plaintiff conceived the idea of gathering, from personal investigation and labor, the standing of citizens, with respect to their credit, in certain localities, sometimes embracing cities, sometimes counties, and sometimes a wider territory. The standing and credit of these citizens were expressed by letters and numbers, in a manner which served as a key, and from which business men within the same territory, dealing with such citizens, might at a glance ascertain their credit, their financial standing, their promptness in the payment of their debts, and such other information of that character, useful to merchants, manufacturers, and dealers. This information, so arranged, was put in the form of bound volumes, either typewritten or printed, and sold to subscribers only. The matter was intended for the special and private information of the persons who purchased this compilation. The averment of the bill is that one of the defendants served for a number of years in the office of the plaintiff, there learned of this conception, idea, plan, and arrangement for collecting and imparting this information, and afterwards associated with him the other defendants, who made a similar publication for use in Ohio and elsewhere. The bill avers, in one part, that a printed title of this book was furnished the librarian of congress, under the copyright law, and subsequently avers that "thereafter, within the time and in the manner prescribed by law, your orator did all the things required by law to be done in order to secure to himself the full enjoyment of all rights and privileges granted by the laws of the land governing copyrights." A demurrer was filed to this bill. One of the grounds for demurrer is that the bill does not aver what was done by the plaintiff in order to entitle him to the benefit and protection of the copyright laws of the United States, and reference is more particularly made to the paragraph just quoted as being a conclusion of law, and wholly insufficient to show that the plaintiff has complied with the statutory requirements in order to entitle him to protection under

the copyright laws. In view of the closing part of the brief for the plaintiff, I do not know that it is necessary to pass upon this question; but, being left still uncertain as to whether the plaintiff relies upon his common-law rights or statutory rights for protection, I proceed to consider this ground of demurrer. The copyright act provides explicitly just what authors and publishers shall do in order to entitle them to protection under that act. One of these requirements is that, within 10 days after publication, two copies of the book shall be deposited in the office of the librarian of congress. I think this is a fact which must be averred in order to show affirmatively that the plaintiff has complied with the statute.

Plaintiff's solicitor, in the closing paragraph of his brief, says:

"But all the foregoing authorities are in cases for infringement of copyright under the statute. Our case is one where the scheme, plan, and conception of the author, which is being appropriated by the defendants, has never been published, and although he has taken steps to protect himself if he should publish the same, yet, never having published the same, all his common-law rights are preserved in full force."

It may therefore be proper to consider this controversy with reference to plaintiff's rights at common law.

The American Trotting Register Association, in 1894, filed a bill in this court to restrain W. H. Gocher and A. W. Parrish from publishing a list of trotters and pacers having made a record of 2:30 or better. The bill proceeded upon the charge that the complainant had compiled such a list of horses, published in what is known as "Wallace's Year Books," which compilation was the result of original information and facts gathered from original sources by complainant's industry, and at its expense. In the answer, the defendants claimed that all the facts stated in complainant's books were obtainable from other independent sources, and exhibited to the court a large number of publications which contained lists of trotters and pacers having the records stated by complainant. Affidavits were filed on both sides, which proved that, while the defendants might have been able to compile all of their information from original sources, yet it was apparent, from the evidence, that they did not do so, but availed themselves of the industry of the complainant, and did use tables which it compiled at great expense and labor. In that case, this court held:

"A mere compilation of facts is protected by the copyright law, as well as original matter showing invention. There are numerous cases which hold that any compilation, or any tables or statistics, which are the result of the author's industry, and which are gathered at his expense, cannot be bodily used by an infringer. Although the same facts could be gathered by the infringer, he must do so at his own expense, and as the result of his own industry. It would be wrong to permit him to extract bodily from a copyrighted book tables, facts, and statistics, and hand them over to the printer in the form the copyrighter has prepared them, merely because it was more convenient for the printer. If he were permitted to do this, he would avail himself directly of the industry and expense to which the person who copyrighted the work was subjected." 70 Fed. 237.

In this case, the plaintiff has gone to original sources of information, and by great industry and by some originality has compiled this information, and has conceived a plan by which it could be imparted

in a very clear and speedy way for the information of those who purchased the right to use it. But it will hardly be contended that, because John Smith gathered information as to the credit, business methods, standard for prompt payment of debts, etc., of all the citizens of the city of Toledo, and arranged a plan by which this information might be imparted, by the use of a key, to the merchants of the city of Toledo, that therefore James Jones could not, by his own industry, research, and labor, gather similar information as to men in Cuyahoga county, and impart that information by some similar plan or key to the merchants of Cuyahoga county. The latter cannot be said to have copied the production of the former. Conceding that he followed the same general plan of John Smith, he nevertheless gathered his information as the result of his own industry and research, and at his own expense. The only thing that he has patterned after is the general plan of imparting this information to those who purchased the production of his labor. Would he, by doing this, violate the law?

In the case of *Perris v. Hexamer*, 99 U. S. 674, the supreme court held:

"The right of an author or a publisher, under the copyright law, is infringed only when other persons produce a substantial copy of the whole, or of a material part, of the book or other thing for which he secured a copyright. Where, therefore, the owners of a copyright for maps of certain wards of the city of New York, surveyed under the direction of insurance companies of said city, which exhibit each lot and building, and the classes as shown by the different coloring and characters set forth in the reference, brought his bill to restrain the publication of similar maps of the city of Philadelphia, held, that the bill could not be sustained."

Chief Justice Waite, in delivering the opinion of the court, after stating the facts, said, with reference to the map of the city of New York:

"The maps were made after a careful survey and examination of the lots and buildings in the enumerated wards of the city, and were so marked with arbitrary coloring and signs, explained by a reference or key, that an insurer could see at a glance what were the general characteristics of the different buildings within the territory delineated, and many other details of construction and occupancy necessary for his information when taking risks. They are useful contrivances for the dispatch of business, but of no value whatever except in connection with the identical property they purport to describe."

"The defendant made the necessary examination and survey, and published a similar series of maps of Philadelphia. At first, he used substantially the same system of coloring and signs, and consequently substantially the same key, that had been adopted by the complainants, but afterwards he changed his signs somewhat, and, of course, changed his key. The question we are to consider is whether the publication of the defendant infringes the copyright of the complainants, and we think it does not. A copyright gives the author or publisher the exclusive right of multiplying copies of what he has written or printed. * * * It needs no argument to show that the defendant's maps are not copies, either in whole or in part, of those of the complainants. They are arranged substantially on the same plan, but those of the defendant represent Philadelphia, while those of the complainant represent New York. They are not only not copies of each other, but they do not convey the same information."

Now, while this is a case under the copyright law, the principle is the same under the common law, and it seems to me it is applicable

to the case under consideration. The defendant, in this suit, has adopted the same plan for gathering his information, and the same plan for imparting his information. But the information does not concern the same persons, is not to be used by the same persons, and is concerning a people living in a territory entirely different from that covered by the plaintiff's publication. The most that can be claimed on behalf of the plaintiff is that the defendant has appropriated his scheme, device, conception, and idea for gathering and imparting this particular information. Many books copyrighted share the same fate, without infringement. An author conceives a plot for a novel. He locates his characters, surrounds them with scenery, climate, productions, and customs peculiar to that locality. He weaves the thread of his novel, and has his characters born, married, and die, according to his plot. His book is copyrighted and accepted by the public as one of thrilling interest, and thousands and tens of thousands of copies are sold. Another author selects his characters, locates them in a different climate or country, with different surroundings, has substantially the same plot as to their birth, life, and death, and the book meets with equally popular reception. One is in no respect a copy of the other; yet the second writer unquestionably adopted the design, the scheme, the plot, and many of the ideas of the former. The framework and the outlines are the same, the book is the product of as much industry, knowledge, and literary ability as the former, but is not, within legal terms, an infringement.

But it is contended that this information, so gathered and compiled by the plaintiff, has never been published; that it is his own private property, and he has a right to protect himself against this publication. Conceding that, according to the averments of the bill, there has been no publication of the plaintiff's work, within the meaning of the law, the work has nevertheless been put in the form of a book or manuscript for convenient reference and use, and has been circulated among those who have purchased copies of it. Whether this is a legal publication or not is immaterial. As before stated, in my judgment, they have not made a copy of it which would be an infringement under the copyright law, or an invasion of the plaintiff's rights under the common law. Even if this is unpublished, and still private manuscript, the defendants have not copied it, any more than the map of Philadelphia was a copy of the map of New York, in the case cited in 99 U. S. In that case, the defendant's map had a key, had arbitrary signals and signs by which the information was imparted to those who bought the map, just as in this case the defendants use a key similar in plan to the plaintiff's, and his general plan for imparting the information they have gathered. In the latter case there is no more a copy than there was in the case of the map.

The defendants are not appropriating to any extent, or in any respect, the result of the labor, research, and industry of the plaintiff, by which the information for his publications or manuscript has been gathered. They have simply availed themselves of the plan by which this information was ascertained and imparted, and have shown just as much industry, have gone to sources of original information, and have at great expense compiled their information, and

used it. Admitting that they have gathered this information and seek to impart it upon the same plan which the plaintiff has conceived and originated, that conception is not a matter which can be protected by either the copyright law or the common law. For these reasons, I think the demurrer must be sustained, and the bill dismissed.

**MOORE MANUFACTURING & FOUNDRY CO. v. CRONK HANGER CO.
et al.**

(Circuit Court, N. D. New York. October 15, 1895.)

No. 6,325.

PATENTS—INFRINGEMENT SUITS—BILL BY LICENSEE—NECESSARY PARTIES.

A patentee entered into an agreement by which he "licenses, empowers, and authorizes the said company to make, use, and sell for use throughout the United States" any devices secured by his letters patent, "the said license and authority to exist only for six years"; and, "in case said company desires it, they may terminate said license and their liability under it by serving a written notice upon" said patentee. *Held* that, in an action for infringement, the grantee cannot sue without joining the patentee as a party complainant.

This was a bill by the Moore Manufacturing & Foundry Company against the Cronk Hanger Company and others for alleged infringement of a patent.

Benedict & Morsell, for complainant.
Charles H. Duell, for defendants.

COXE, District Judge. The amended bill contains the written agreement under which the complainants assert title to the patents in suit. It provides as follows:

"The said Moore [the patentee] hereby licenses, empowers and authorizes the said company [the complainants] to make, use and sell for use throughout the United States, exclusive of all others, any and all of the devices secured by letters patent of the United States issued to said Moore, * * * the said license and authority to exist only for six years from and after the 1st day of August, 1893. * * * In case said company desires it, they may terminate said license and their liability under it, by serving a written notice upon said Moore that they so elect, and paying to him all royalties due thereunder up to the date of service of such notice."

The ground of demurrer is that the complainants are licensees merely and cannot maintain the bill alone,—Moore being the owner of the legal title and a necessary party to the suit. The instrument referred to is, upon its face, a license. It calls itself a license over and over again. This fact, though not controlling, is significant as showing the intent of the parties. The license is not for the full term of the patents, but six years only, a part of the consideration being the yearly payment, in semi-monthly installments, of \$3,000, "as royalty or license fees." The complainants have the right at any time to terminate "said license." It is a personal license merely. There are no words permitting a transfer by the complainants. *Walter A. Wood Harvester Co. v. Minneapolis-Esterly Harvester Co.*, 61 Fed. 256; *Nail Factory v. Corning*, 14 How. 193. It does not give the complainants all that Moore possessed. The patent "grants" to

Moore "the exclusive right to make, use and vend the invention throughout the United States and the territories thereof." The agreement "licenses, empowers and authorizes" the complainants "to make, use and sell for use throughout the United States the devices secured," etc. This peculiar phraseology cannot be ignored. In thus departing deliberately from the language of the statute it is clear that the parties meant something. Just what they meant it is not necessary now to determine. Is it possible that the patentee wished to reserve the right to license others to sell the patented devices manufactured by the complainants? It may be that he did not wish to have the goods sold by complainants to large jobbers, and by them resold to consumers. He may have intended in this way to retain the right to sell here for foreign use. The complainants can make and use the invention, but they cannot sell it except for use in the United States. By restricting sales to those only who use the patented device, a right granted to Moore is withheld from the complainants. Were this otherwise, the words "for use" would not have been added to the familiar language of the statute. These are, of course, exceedingly technical considerations, but the question is a narrow one and demands such distinctions. The court does not attempt to interpret the instrument or intend to say that it is capable of a construction in accordance with the foregoing intimations. It is enough that it places an obvious limitation upon the grant of the patent; that Moore is not completely ousted by the transfer; that some rights still remain in him; that for some purposes he may maintain an action against infringers.

Without elaborating the subject further it is thought that the defendants' contention is upheld by the following authorities: *Waterman v. Mackenzie*, 138 U. S. 252, 11 Sup. Ct. 334; *Birdsell v. Shaliol*, 112 U. S. 485, 5 Sup. Ct. 244; *Oliver v. Chemical Works*, 109 U. S. 75, 3 Sup. Ct. 61; *Mitchell v. Hawley*, 16 Wall. 544; *Clement Manuf'g Co. v. Upson & Hart Co.*, 40 Fed. 471; *Hatfield v. Smith*, 44 Fed. 355; *Rice v. Boss*, 46 Fed. 195; *Still v. Reading*, 9 Fed. 40; *Rob. Pat.* § 1099. Even if it be conceded that the question is doubtful, it would still seem for the manifest interest of the complainants to eliminate it from the record by joining the patentee as a party complainant.

The demurrer is sustained. The complainants may amend within 20 days if so advised.

FULLER & JOHNSON MANUF'G CO. v. BENDER et al.

(Circuit Court, N. D. New York. October 15, 1895.)

No. 6,320.

1. PATENTS—WHAT CONSTITUTES INVENTION.

There is no invention in simply adding to a transplanting machine, comprising a combination of old elements, a new element consisting of a fertilizer hopper, which is simply transferred from another machine, in which it was previously used for the same purpose.

2. SAME—TRANSPLANTING MACHINES.

The Alward patent, No. 423,200, for improvements in transplanting machines, is void as to claim 1, for want of invention in the combination covered thereby.

This was a suit by the Fuller & Johnson Manufacturing Company against John O. Bender and others for alleged infringement of a patent relating to transplanting machines.

C. H. Duell, for complainant.

C. W. Smith, for defendants.

COXE, District Judge. The first claim of letters patent, No. 423,200, granted March 11, 1890, to C. G. Alward for improvements in transplanting machines, is alone involved. It is as follows:

"(1) A transplanting-machine comprising a frame mounted on carrying-wheels, a ground-opener connected to said frame, a fertilizer-hopper having its discharge-spout in the line of travel of the ground-opener, and a water-tank having a discharge-pipe leading to the path of the ground-opener, as set forth and shown."

The defenses are defect of parties, abandonment, lack of novelty and invention and non-infringement.

The defense principally relied upon is lack of invention. This only will be considered. The claim contains the following elements: (1) A frame mounted on carrying wheels. (2) A ground opener connected to said frame. (3) A fertilizer hopper having its discharge pipe in the line of travel of the ground opener. (4) A water tank having a discharge pipe leading to the path of the ground opener. These are claimed broadly and are not limited to any special form of construction. It is conceded that each element was old at the date of the Alward patent and that all were combined in a transplanting machine, except the fertilizer hopper. This combination is shown in the Smith reissue, No. 10,982. The patent to Pease, No. 223,065, for a fertilizer hopper, shows all of the elements of the claim except the water tank.

The defendants' expert tersely states the situation when he says: "The Smith patent lacks simply the fertilizer hopper to make it the same as complainant's case, and the Pease patent lacks simply the water tank attachment to make it the same as complainant's case." It is obvious, then, that a farmer, who should place the Smith water tank on the Pease machine or the Pease fertilizer hopper on the Smith machine would have the Alward combination complete. Would the farmer who did this become an inventor? If not, Alward's claim cannot stand, for he did nothing more. He transferred the old Pease hopper to the old Smith transplanter. The question cannot be stated more fairly than by the learned counsel for the complainant. He says: "The new element which Alward added was that of the fertilizer hopper having its discharge spout in the line of travel of the ground-opener." It is argued that to do this required an exercise of the inventive faculties, but, after careful consideration of the question in its various aspects, the court is constrained to dissent from this proposition. The use of the hopper and the tank would naturally and spontaneously occur to any man who felt the need of both phosphate and water in the cultivation of his plants. If he were using the old transplanter, and the necessity for a fertilizer became apparent, what would be more natural than that he should place on his machine the old fertilizing device which stood ready at his hand?

If it be invention to do this, where is the line to be drawn? Each one who transfers to the machine some convenient contrivance is entitled to a patent for a new combination. Suppose, for instance, it should be found that the plants thrive best with two varieties of fertilizer, and some one should add a second hopper to the Alward machine, he would be entitled to a patent for that, and so on, ad infinitum.

Alward's achievement is correctly characterized by the defendants' expert. He says:

"Thus to transfer the fertilizer hopper from the Pease machine to either one of the transplanting machines to which I have referred it would simply have to be detached, lifted off the one machine and attached to the other without any change of the hopper or its valves. * * * To do this would require simply ordinary mechanical skill and would involve no invention. * * * I see no novelty in putting upon a transplanting machine, having all the other essential features, a fertilizer hopper and connections, which are old in themselves and only require the mere act of transferring from one machine to another. In thus transferring the fertilizer its discharge pipe would be nothing but a duplication of the water tank discharge pipe."

The law is clear that Alward's contribution to the art, as embodied in the claim in controversy, is not patentable.

In *Richards v. Elevator Co.*, 158 U. S. 299, 15 Sup. Ct. 831, the claim was similar in many respects to the claim at bar. It was held bad on demurrer. In affirming the judgment the court says:

"It is not claimed that there is any novelty in any one of the elements of the above combination. They are all perfectly well known, and if not known in the combination described, they are known in combinations so analogous that the court is at liberty to judge of itself whether there be any invention in using them in the exact combination claimed. * * * Unless the combination accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well-known function, the result is not a patentable combination, but an aggregation of elements. Indeed, the multiplicity of elements may go on indefinitely without creating a patentable combination, unless by their collocation a new result is produced. * * * Not a new function or result is suggested by the combination in question."

See, also, *Aron v. Railway Co.*, 132 U. S. 84, 10 Sup. Ct. 24; *Griswold v. Wagner*, 68 Fed. 494, 499; *Fox v. Perkins*, 3 C. C. A. 32, 52 Fed. 205; *Briggs v. Ice Co.*, 8 C. C. A. 480, 60 Fed. 87; *Steiner Fire Extinguisher Co. v. City of Adrian*, 8 C. C. A. 44, 59 Fed. 132; *National Progress Bunching-Machine Co. v. John R. Williams Co.*, 44 Fed. 190; *Lauferty v. Manufacturing Co.*, 67 Fed. 1015.

It follows that the bill must be dismissed.

FULLER & JOHNSON MANUF'G CO. v. NAGLEY et al.

(Circuit Court, N. D. New York. October 15, 1895.)

C. H. Duell, for complainant.
C. W. Smith, for defendants.

COXE, District Judge. As precisely the same questions are involved as in the preceding case (*Fuller & Johnson Manuf'g Co. v. Bender*, 69 Fed. 999), the bill must be dismissed.

DOZE v. SMITH.

(Circuit Court of Appeals, Eighth Circuit. August 19, 1895.)

No. 577.

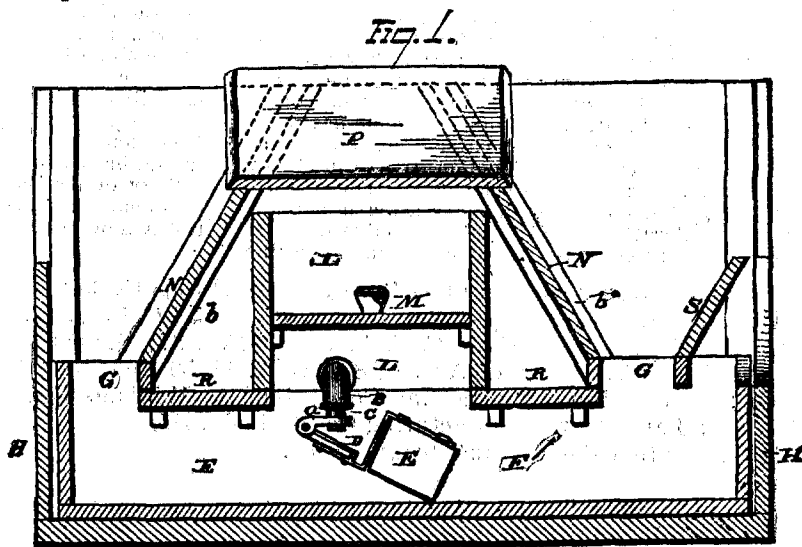
PATENTS—VALIDITY AND INFRINGEMENT—EQUIVALENTS—WATERING TROUGHS.

The combination described in the fourth claim of the Campbell patent, No. 221,031, for an improvement in troughs for watering stock, if patentable at all, does not disclose invention of such a character as will entitle it to the benefit of the doctrine of equivalents; and it must be confined to the precise form described. 66 Fed. 327, affirmed.

Appeal from the Circuit Court of the United States for the Southern District of Iowa.

This was a bill in equity by John E. Doze against Alpheus Smith for alleged infringement of a patent relating to troughs for watering stock. The circuit court dismissed the bill. 66 Fed. 327. Complainant appealed.

The subjoined drawing, to which reference is made in the opinion, is a longitudinal sectional view of an improved device for watering stock, for which letters patent of the United States, No. 221,031, were issued to John S. Campbell on October 28, 1879, under an application filed September 3, 1879. The case is sufficiently stated in the opinion.



A. B. Cummins (Carroll Wright, on the brief), for appellant.

C. W. Steele (Lewis Miles, on the brief), for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. This was a suit to restrain the infringement of United States letters patent No. 221,031, that were

issued to John S. Campbell on October 28, 1879, and were subsequently assigned to J. E. Doze, the appellant, who was the complainant in the circuit court. The patent covers an alleged improvement in a watering trough for watering stock. The invention may be sufficiently described as follows: The inlet pipe, by means of which water is introduced into an ordinary watering trough, is provided with a float valve, marked "E" in the foregoing drawing, which operates in the customary way to open or close the inlet pipe to which it is attached when the water in the trough falls below or rises above a certain level. The valve mechanism, which is usually placed at about the center of the trough, is protected by an air chamber, marked "L" in the drawing, which consists of a square box seated upon the trough. The lower end of the box is left open. A removable cover, marked "M," is fitted within the box or air chamber so as to permit the box to be filled for a considerable distance from the top downward with sawdust or other suitable packing material, to prevent freezing. On both sides of the box last described, the top of the trough is covered closely for some distance with boards, marked "R, R," which are fitted in the top of the trough. These boards are termed by the inventor "horizontal partitions," and the function they are said to perform is to prevent air from entering beneath the bottom of the box into the air chamber in which the float valve is located. At both ends of the trough for a short distance the trough is left uncovered, so that stock can have access to the water. These uncovered portions of the trough, marked "G, G," in the drawing, are provided with a rim, and are termed "drinking caps." From the drinking caps to the top of the box which incloses the valve mechanism, boards, marked "N, N," are set on an incline, so as to permit the intervening space between said inclines and the so-termed "horizontal partitions" to be closely packed with sawdust or some other suitable packing substance. It seems to have been contemplated by the inventor that the drinking trough in question should be surrounded on all sides by a curb, and that the space between the curb and the sides of the trough should be packed with some suitable substance so as to guard against freezing. It will also be observed that besides the removable cover, M, the air chamber, or box which is seated on the trough, is provided with an exterior cover or cap, marked "P" in the drawing.

The device which is supposed to be an infringement of the claims of the above-described patent is a watering trough that was constructed by the defendant for use on his farm in the state of Iowa. The defendant's watering trough differs from the improved watering trough described in the Campbell patent chiefly in the following respects: The two sides of the box shown in the foregoing drawing, which forms the air chamber in which the valve mechanism is located, do not rest upon the upper edge of the trough, like the box described in the Campbell patent, but extend downward into the trough for some inches below the level of the water. These projecting sides of the box are of the same width as the trough, and are closely fitted into the trough, the result being that they form a "water seal," which effectually excludes the outer air from the valve

chamber. The defendant's watering trough is covered for some distance on both sides of the air chamber, but suitable drinking spaces are left at each end. It is so constructed that the entire trough, except the drinking spaces, may be covered with earth to prevent the water in the valve chamber from freezing.

It is contended in behalf of the appellant that the watering trough last described, which was constructed by the defendant, is an infringement of the second and fourth claims of the Campbell patent. The record shows, however, that on the hearing of the case in the circuit court the complainant did not contend that the second claim of the patent was infringed, but waived all the claims of his patent except the fourth. In view of that fact, he must be limited to the same claim in this court. The question for consideration, therefore, is whether the defendant's device is an infringement of the fourth claim of the Campbell patent. That claim is expressed in the following language:

"Fourth. In a device for watering stock, the combination, with a trough having a drinking cap fitted on its top, of valve feed mechanism and an open-bottom chamber located over the latter, together with a horizontal partition fitted in the top of the trough between said drinking cap and chamber, whereby air is prevented from entering the bottom of the latter, substantially as set forth."

It is noticeable at a glance that the device employed by the defendant to exclude the outer air from the air chamber in which the valve mechanism is located is quite different from that described in the Campbell patent. The defendant excludes the air by extending the sides of the box forming the air chamber below the level of the water in the trough, thus forming a water seal, whereas the patentee excludes the air by covering the top of the trough between the air chamber and the drinking caps with boards fitted closely in the top of the trough. It is doubtful, we think, whether the patentee ever contemplated forming a water seal for the purpose of excluding the outer air from the valve chamber. He says in his specification, and this is all that is said on that point: "Horizontal partitions, R, are fitted in the top of the trough, and extend from the inner end of each drinking cap to the chamber L. Said horizontal partitions, R, prevent air from entering beneath the bottom of the chamber L at its end between said chamber and the surface of the water in the trough." But whether the float valve was intended to be so adjusted as to maintain the water in the trough and in the water caps at a higher level than the bottom of these so-termed "horizontal partitions," R, R, so as to form a water seal for the valve chamber, is not stated. In view of the fact that the specification is silent on that point, we might very well conclude that the horizontal partitions were simply designed to cover the trough, and to support the exterior packing, and that the inventor had no well-defined purpose of making the horizontal covering of the trough serve as a water seal to exclude the outer air from the valve chamber. The appellant contends, however, that the so-termed "horizontal partitions" of the patented device and the projecting sides of the box forming the air chamber of the defendant's device perform the same function, in

that they both serve to exclude air from the valve chamber. It is accordingly insisted by the appellant that the projecting sides of the air chamber in the defendant's device are a mechanical equivalent for the horizontal partitions described in the Campbell patent, and that the fourth claim of the patent is therefore infringed. We should feel more disposed to sustain this contention if we were better satisfied that the fourth claim of the Campbell patent covers a combination which possesses patentable novelty. It is apparent from the description of the device heretofore given that all of the four elements mentioned in the fourth claim, to wit, the trough having a drinking cap, the valve feed mechanism, the open-bottom air chamber, and the horizontal partitions fitted in the top of the trough, are each individually old. The flushing boxes now generally in use in water-closets contain two of the most important elements of the combination described in the Campbell patent; namely, a box or trough to hold water, and a float valve to control the flow of water into the box from the inlet pipe. It certainly did not require the exercise of much inventive skill to add the other elements of the combination; namely, the open-bottom box to cover the valve mechanism and prevent freezing, and the horizontal partitions or covers set in the top of the trough between the air chamber and the drinking spaces at each end of the trough. While it is not necessary at the present time to decide that the conception of the combination covered by the fourth claim of the patent merely involved an exercise of ordinary mechanical skill, and that the device is for that reason destitute of patentable novelty, yet it is manifest, we think, that in a case of this kind the doctrine of mechanical equivalents cannot be invoked for the purpose of giving the claim greater scope. The patentee should be limited, we think, to the precise form of device which he has described and claimed. Entertaining these views, we agree with the circuit court in holding that, as the defendant does not make use of the horizontal partitions which form one of the integral elements of the patented combination, he is not guilty of an infringement. The decree of the circuit court is accordingly affirmed.

PILE DRIVER E. O. A.

MUELLERWEISSE et al. v. PILE DRIVER E. O. A.

(District Court, E. D. Michigan. November 7, 1894.)

1. ADMIRALTY JURISDICTION—STATE STATUTES.

A federal court sitting in admiralty cannot enforce a lien given by a state statute upon a floating structure, unless the same is of such a character as to be a subject of admiralty jurisdiction.

2. SAME—SUBJECTS OF ADMIRALTY JURISDICTION—FLOATING PILE DRIVER.

A pile driver consisting of a floating platform, carrying a derrick, engine, and pile-driving apparatus, and also furnished with a wheel by which it may propel itself about the bay or harbor, from one place of work to another, and which in its present condition is not fitted for purposes of transportation, is not a subject of admiralty jurisdiction; and contracts to furnish it with supplies are not maritime contracts enforceable in the admiralty.

In Admiralty.

This was a libel against the pile driver E. O. A. to enforce an alleged lien for supplies.

Moores & Goff, for libelants.

J. W. Finney, for claimants.

SWAN, District Judge. The libel in this cause was filed to recover for supplies furnished at Alpena, Mich., to the pile driver E. O. A., during each month of 1890, beginning with March, and during the months of January, February, and March, 1891. The amount claimed is \$431.48, with interest. The libel alleges "that, at the several times therein mentioned, said vessel was a vessel of five tons burden and upward, and used for commerce and navigation, and thence hitherto had been and is as to said libelants a vessel owned wholly by persons residing in the state of Michigan"; that the supplies were furnished at Alpena at the request of the master of the E. O. A., and on his representation that "the said vessel stood in need of the supplies, * * * in order to render her seaworthy and competent to proceed on her intended voyages and trips"; and "that, by the laws of the state of Michigan, libelants have a lien on said vessel for said materials and supplies." The answer denies the jurisdiction of the court, and avers that the pile driver is a vessel of five tons burden and upward, as alleged in said libel, but denies that said pile driver is competent to perform any voyages or trips of a nature to subject the craft to the admiralty and maritime jurisdiction of this court, and denies that the pile driver had any master during the times mentioned in the libel. It further pleads that the pile driver is a platform or a float upon which is erected the ordinary derrick and appliances for the use of a pile-driving hammer, and a small stationary engine to run said hammer; that said float and appliances are not used in commerce and navigation, but are used simply for the purpose of driving piles about the docks in the harbor of Alpena and in Alpena river; and that the person in charge of the pile driver, with his family, has lived thereon during the time in said libel mentioned; and, upon information and belief, charges that all the supplies were furnished for the use of the person in charge of said pile driver and his family, upon his individual credit, and largely during the winter months, while navigation was closed. The further defenses set up in the answer are not necessary to be considered in the view taken of the case.

The character and uses of the E. O. A. are substantially as set forth in the answer. She was also equipped with a rudder and steering wheel in addition to the appliances used for the business of pile driving and dock building. It is also established that the person in charge of and who operated the hammer lived on board the E. O. A. with his family; and the schedule attached to the libel shows that the supplies for which this lien is claimed consist wholly of provisions and articles necessary to housekeeping. This scow or floating platform upon which the pile driver was erected was about 60 feet long, 20 feet beam, and 2½ feet deep, and, so far as its carrying capacity was con-

cerned, was therefore of upward of five tons burden. The E. O. A. was not enrolled or licensed. The engine and boiler, the main use of which was to operate the pile hammer, were never inspected, nor was the man in charge of the craft, whose duty it was to operate the hammer, ever licensed as a master, nor did he profess to be a seaman. The only crew ever carried by this platform were Knight, who claimed to be the owner and operator of the pile driver; his wife, who did the cooking; his son, a young man who had not attained his majority; and, when necessary, another workman, who assisted in the operation of the hammer. In the performance of the work for which this structure was intended and for which it was engaged during all the times mentioned in the libel, the craft was propelled by a stern wheel connected by a beveled gear with a portable engine, the main use of which was to operate the hammer; and, to save expense of towing, the engine was used, when thus connected with the stern wheel, to move the platform from point to point in Alpena bay or Alpena river, wherever docks were to be built or piles driven. It also appears that four or five years before the supplies, or any part of them, were furnished, the scow or platform on which the pile driver was erected had been used on two occasions to transport gravel and cedar ties. For that purpose the pile-driver apparatus was removed from the platform and put ashore; and that in the winter, when ice prevented the movement of the scow, the apparatus, when required for use, was taken off the scow, and operated upon the ice or on the shore, as occasion required.

Upon the foregoing state of facts, the only inquiry is whether or not a court of admiralty has jurisdiction to enforce the contract pleaded in the libel. It is true that the libelants claim to have a lien for the supplies furnished under and by virtue of the water-craft law of the state of Michigan (2 How. Ann. St. c. 285); but, inasmuch as the true limits of admiralty jurisdiction must determine libelants' right of recovery, and as no state law or act of congress can make that jurisdiction broader or narrower than the judicial power may determine its limits to be (*The Lottawana*, 21 Wall. 576), it follows that, unless the structure proceeded against is the subject of admiralty jurisdiction, the fact, if it be a fact, that the state law confers a lien upon it for supplies and materials, is immaterial.

While it is probably true that this pile driver might be capable of a tort upon navigable waters, in this cause the jurisdiction is dependent upon the nature of the contract. "In actions of contract the agreement sued upon must be maritime in its character. It must pertain in some way to the navigation of a vessel, having carrying capacity, and employed as an instrument of travel, trade, or commerce, although its form and means of propulsion are immaterial." *A Raft of Cypress Logs*, 1 Flip. 543, Fed. Cas. No. 11,527; *The General Cass*, 1 Brown, Adm. 334, Fed. Cas. No. 5,307. The fact that a structure floated on the water does not make it a ship or a vessel. *Cope v. Dry-Dock Co.*, 119 U. S. 627, 7 Sup. Ct. 336; *The Pulaski*, 33 Fed. 383; *The Hendrick Hudson*, 3 Ben. 419, Fed. Cas. No. 6,355.

In the last case it is said:

"The fact that the structure has the shape of a vessel, or has been once used as a vessel, or could by proper appliances be again used as such, cannot affect the question. The test is the actual status of the structure as being fairly engaged in commerce or navigation."

It is true that the E. O. A. had carrying capacity, and was of more than 20 tons burden; but the fact remains that her only use and employment during all the time mentioned in the libel was not in commerce and navigation. The two exceptional occasions, on one of which she carried a quantity of sand, and on another a few cedar poles, by removing for that purpose the apparatus for pile driving, were her only ventures in transportation. Since then her sole employment has been the driving of piles and building of docks. The transportation of the hammer, and, for its operation, of the portable engine, and their support and floatage while in use, were the sole functions of this scow or platform. When ice prevented the use of the scow, it also took its place as the base of operations of the pile driver, when the scow's only use was to furnish lodging and dining facilities for the operator of the hammer and his family. The engine propelled the structure to the place of its labors, and was then used to operate the pile driver.

Much stress is laid upon the relation of wharves and docks to commerce as justifying the claim made by the libelants, and in support of the contention that the use of the pile driver was within the definition of commerce and navigation as generally understood. But this position is untenable. While docks and wharves are indispensable to the conduct of commerce, yet other industries have a still closer relation to commerce, and yet are clearly outside the pale of admiralty cognizance. The same argument that would sustain the jurisdiction of a claim against the machinery for building a dock because a dock is an inseparable adjunct of commerce would compel the recognition of the claim of the lumberman or the foundryman who furnishes the materials for the construction of a vessel, of the shipwright who builds her, and of the machinist and boiler makers who supply her engines and boilers. But these are claims enforceable only in the common-law courts, or under special statutes of the several states. *Edwards v. Elliott*, 21 Wall. 553; *The Jefferson*, 20 How. 393; *Roach v. Chapman*, 22 How. 129. I have not overlooked the case of *The Hezekiah Baldwin*, 8 Ben. 556, Fed. Cas. No. 6,449, in which the vessel proceeded against was employed in the transfer, by the elevator which she carried, of cargoes from one vessel to another. The jurisdiction is maintained on the same principle that controls in the recognition of the services of the stevedore and the use of a lighter as an aid to commerce and navigation. In *The Alabama*, 19 Fed. 544, affirmed on appeal in 22 Fed. 449, the scows used for the carriage of the mud excavated by the dredge in connection with which they were employed were engaged in an obviously maritime service, and were none the less vehicles of commerce because the article they transported was not a merchantable commodity, but simply material of no value.

Their service was purely maritime transportation. The case of *The Pioneer*, 30 Fed. 206, which sustains a lien upon a dredge because it was capable of use in navigation without its machinery, although its only use was to transport the shovel and machinery with which it was equipped, is irreconcilable with the cases of *The Hendrick Hudson*, 3 Ben. 419, Fed. Cas. No. 6,355; *The Pulaski*, 33 Fed. 383; *Ruddiman v. A Scow Platform*, 38 Fed. 158; *The Big Jim*, 61 Fed. 503.

For the reasons stated, the *E. O. A.* is not the subject of admiralty jurisdiction, and the contract for the supplies in the libel claimed to have been furnished is not a matter of admiralty cognizance. The libel must therefore be dismissed; and as the want of jurisdiction does not appear upon its face, but was raised by the answer and shown by the proofs, the claimants are entitled to their costs. *Lowe v. The Benjamin*, 1 Wall. Jr. 187, Fed. Cas. No. 8,565.

THE NEBRASKA.

Appeal of MILWAUKEE DRY DOCK CO.

(Circuit Court of Appeals, Seventh Circuit. October 7, 1895.)

No. 191.

1. MARITIME LIENS—WAIVER—GIVING SECURITY.

A maritime lien is waived by accepting notes or other securities extending the time of payment beyond the time within which, by the general maritime law or by statute, the lienor is allowed to enforce the lien.

2. SAME—STALE LIENS—VESSELS ON THE GREAT LAKES.

In respect to vessels navigating the Great Lakes, the general maritime rule limiting the time within which a lien must be enforced to the particular voyage has been modified so as to fix the limitation by the seasons of navigation.

3. SAME—WAIVER—TAKING MORTGAGE AND NOTES.

Where one having a maritime lien upon a vessel navigating the Great Lakes libeled her, and had her taken in custody, but afterwards voluntarily released her and dismissed the libel, by agreement with her owner and her mortgagees, accepting a mortgage and notes extending the time of payment 18 months, which would carry it beyond the close of the season of navigation following that in which she was at the time engaged, *held*, that this was a waiver of the maritime lien as to subsequent innocent lienors, notwithstanding that the notes contained an express provision that the lien should not be waived, which provision, however, was not incorporated in the mortgage.

Appeal from the District Court of the United States for the Northern District of Illinois.

This was a libel by Frank Hoffman against the steam propeller *Nebraska* to enforce a lien for supplies. Various parties intervened, asserting claims against the vessel, among them the Milwaukee Dry Dock Company. This company filed exceptions to the order of distribution recommended by the master's report, and the exceptions being overruled, and a decree being entered, postponing its claim to

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others which absorbed all the proceeds (61 Fed. 514), it appealed the cause to this court.

In April, 1892, the steamer Nebraska, a freight boat built in 1868, enrolled at the port of Buffalo, was owned by Hume, Galvin & Tyler. In that month they sold the steamer to Edward D. Comings, of Chicago, for the sum of \$40,000, taking upon the vessel to secure \$37,000 of the purchase money, a mortgage duly recorded in the office of the collector of customs at the port of Buffalo. Comings purchased the vessel with the purpose of changing her into a passenger boat to carry passengers during the World's Columbian Exposition at Chicago, from the port of Chicago to the exposition grounds. Upon the purchase the vessel proceeded from the port of Buffalo to the port of Chicago. Prior to her arrival at the port of Chicago, the appellant, the Milwaukee Dry Dock Company, learning of the purchase and its object, entered into negotiations with Comings at the city of Chicago to make the necessary alterations in the vessel at its dry dock at the city of Milwaukee, and an agreement was arrived at by which the steamer was to be sent to Milwaukee to have the necessary changes made at the dry dock of the Milwaukee Dry Dock Company. About the 1st day of May, 1892, the vessel proceeded in ballast to Milwaukee, and upon her arrival was placed in the dry dock and stripped. Extensive repairs and alterations were found to be necessary to render her fully seaworthy and fit for a passenger boat, and were made at a cost of some \$15,623.25, upon which a payment of \$1,000 only was made. There is testimony tending to show that, prior to these repairs, and before the boat had left Chicago for Milwaukee, the president of the Milwaukee Dry Dock Company, upon inquiry, learned that Comings was pecuniarily irresponsible, and the company declined to extend credit for the work, and that afterwards, and about the time of the commencement of the work, Comings agreed that the company should have a lien upon the vessel for the work to be done upon her. About the 25th day of July the company allowed Comings to sail the boat to Ludington upon an excursion, upon his promise to return her to Milwaukee, which he did. On the 27th day of July, 1892, the Milwaukee Dry Dock Company exhibited a libel against the vessel in the district court of the United States for the Eastern district of Wisconsin to establish a maritime lien upon the vessel for the value of the changes and repairs so made by the company. The vessel was arrested on that day by the marshal upon process issued upon the libel, and remained in his custody until August 20th, 1892, when the libel was dismissed and a warrant of restitution was ordered to issue.

Soon after the arrest of the vessel the mortgagees, Hume, Galvin & Tyler, had a conference at Milwaukee with Comings and the Milwaukee Dry Dock Company, and it was thereupon agreed, on the 20th day of August, 1892, that Comings should, and he did, give the mortgagees a bill of sale of the boat, which had been enrolled at the port of Chicago on the 12th day of July, 1892, and they on their part agreed to give the Milwaukee Dry Dock Company their promissory notes, secured by a mortgage upon the steamer, for the amount due to that company, which should be payable in three installments, on or before the 6th days of July, September, and December, 1893, respectively, with interest. Hume, Galvin & Tyler agreed with Comings to extend the time of payment of the notes given by Comings to them; to pay, or postpone the payment of all other claims upon the vessel; that the vessel should be employed in the excursion and passenger business in and about the city of Chicago so long as she profitably could be under the direction and management of Comings, but that they should employ a purser who should receive the earnings of the boat and apply the same, first to her running expenses, and the balance to a trustee named, to be paid by him on account of the debt to the dry dock company so assumed by them. In pursuance of that agreement Hume, Galvin & Tyler executed and delivered to the Milwaukee Dry Dock Company their three several promissory notes,—one for \$5,545.53 payable on or before July 1, 1893, one for \$5,000 payable on or before September 1, 1893, and one for \$5,000 payable on or before December 1, 1893; each of such notes containing the following: "It is agreed and understood by and between the makers and payee of this note that the same is given in consideration of

work and material furnished and done for the propeller 'Nebraska' for which material and labor the Milwaukee Dry Dock Co. has a lien for the value thereof. And it is further agreed by and between the makers of this note and the payee that the payee, by accepting this note and extending time of payment of their demand, in no wise waives its lien upon said vessel for the said work and material so done and furnished to the said propeller 'Nebraska' aforesaid. This note is secured by a mortgage upon the said propeller 'Nebraska' of even date herewith. It is also agreed between the makers and payee of this note that in case the said propeller 'Nebraska' shall be attached and sold upon any claim before this note becomes due, then and in that case this note shall become immediately due and payable." The mortgage given to secure these notes contained no reference to the agreement quoted from the note with respect to the nonwaiver of the lien upon the vessel by reason of the acceptance of the note. This mortgage was recorded at the port of Buffalo, the residence of the mortgagors, on the 22d day of August, 1892.

Upon the consummation of the agreement and the execution and delivery of the notes and mortgage, the libel was dismissed upon the motion of the libellant, the appellant here, and possession of the vessel was surrendered pursuant to the agreement. The steamer thereafter continued to run in and out of the port of Chicago until July 3, 1893, when a libel was exhibited against the vessel in the district court of the United States for the Northern district of Illinois by one Frank Hoffman to recover for supplies furnished the vessel in April and May, 1893. The steamer was arrested upon process issued upon that libel and sold on the 19th day of September, 1893, upon a writ of venditioni exponas issued out of that court, for the sum of \$13,000, to one A. M. Joy, and the proceeds covered into the registry of the court. A number of claims for supplies furnished subsequently to the 20th of August, 1892, were presented to the court, and on the 11th day of October, 1893, the Milwaukee Dry Dock Company filed its intervening petition setting forth its claim as above stated, and copies of the notes executed by Hume, Galvin & Tyler, and also certain other claims for advances not here in controversy, and praying for the payment of its claim out of the proceeds of the sale of the vessel. It is asserted in this petition that the last date of furnishing materials by the dry dock company to the steamer Nebraska was July 21, 1892. On the 8th day of November, 1893, the Independent Fuel Company, furnishing supplies during the season of 1893 filed objections to the demand of the Milwaukee Dry Dock Company, setting forth the facts substantially as above stated, and claimed—First, that the alterations and changes were in fact a reconstruction of the vessel, and that the cost is not by the maritime law a lien upon the vessel or her proceeds; and, secondly, that any supposed lien for the repairs became merged in the mortgage and notes given for the claim by Hume, Galvin & Tyler, and that the Milwaukee Dry Dock Company was entitled to rank in distribution simply as a mortgagee. A certain other claimant filed similar exceptions to the allowance of the claim of the Milwaukee Dry Dock Company. The matter of the classification of the claims filed against the proceeds was referred to a master, who reported that certain claims for wages to the amount of \$675.08 were entitled first to be paid; secondly, certain foreign claims, to the amount of some \$10,000 should be next paid; and, thirdly, claims ranking as domestic claims, among which was included that of the Milwaukee Dry Dock Company for the changes and repairs before referred to. The Milwaukee Dry Dock Company filed exceptions to the report, insisting that its claim should be classed as a foreign demand, and rank as a maritime lien against the fund, and be preferred to all claims and demands except those of equal rank contracted during the season of 1892 in the port of Milwaukee. The court overruled the exceptions, and directed distribution of the fund substantially in accordance with the master's report, from which ruling this appeal is taken; the Milwaukee Dry Dock Company insisting by its assignment of errors that the court erred in not placing its claim and demand on the footing of a foreign lien, and in classifying it as a domestic lien.

George C. Markham, for appellant.

William H. Condon, George C. Fry, C. E. Kremer, Abram M. Pence, George A. Carpenter, and Robert Rae, for appellees.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

JENKINS, Circuit Judge, after statement of the foregoing facts, delivered the opinion of the court.

Upon the assumption that the contract with respect to the repairs and alterations of the Nebraska was maritime in character, and that by express agreement with the owner the appellant was accorded a maritime lien upon the vessel therefor,—questions which we do not determine,—and that the work was performed in a foreign port, we are yet of the opinion that the appellant, under the circumstances of the case, ought not to be permitted to share in the distribution of the proceeds arising from the sale of the vessel, upon equality with claims subsequently arising against the vessel. There are certain principles established in the admiralty by which, as we think, the allowance or disallowance of this claim should be judged, and which should be stated and considered before passing to the peculiar circumstances under which this claim is presented.

It is to be observed that continuing secret liens upon vessels are discouraged in the admiralty, because they tend to encumber commerce. While doubtless such liens are necessary aids of navigation, it is equally true that they should not be permitted to be unduly and unnecessarily extended, nor allowed to remain dormant and unknown, to the injury of innocent third persons. It was asserted by Judge Betts, more than half a century ago, "that it is a principle common to the maritime law, wherever it is administered, that all liens upon vessels are temporary and evanescent, and cannot be continued any longer than until a reasonable opportunity has been offered for their enforcement." *The Utility*, 1 Blatchf. & H. 218, Fed. Cas. No. 16,806. Courts of admiralty, equally with courts of equity, demand vigilance in the assertion of rights. Where the rights of others have intervened, a claimant may not remain inactive with respect to the assertion of his claim, and cannot be permitted to unduly extend the time of its payment. He cannot be allowed, by his conduct or by his silence, to induce or allow innocent parties to part with their property upon the credit of the vessel, and as against such claims to assert a dormant lien. It was well asserted in *The Lillie Mills*, Spr. 307, Fed. Cas. No. 8,352, that "when the rights of third persons have intervened the lien will be regarded as lost, if the person in whose favor it existed has had a reasonable opportunity to enforce it and has not done so. It is the well-settled rule in admiralty." So, also, the principle is declared in *The Key City*, 14 Wall. 653, 660, that laches or delay in the judicial enforcement of maritime liens will, under proper circumstances, constitute a valid defense. The effect to be given to the delay depends upon the peculiar circumstances of the case. The cases are numerous which support and follow this doctrine. Many of them will be found assembled in *The Bristol*, 11 Fed. 156.

It is true that it has been held that one does not waive his lien by the mere fact of taking the promissory note of his debtor for the claim. Most of the cases to which we were referred upon that point seem to proceed upon the doctrine that, to enable the claimant under such

circumstances to assert his lien, the note received should be surrendered (*Ramséy v. Allegre*, 12 Wheat. 611; *Andrews v. Wall*, 3 How. 573; *The Kimball*, 3 Wall. 45; *The Emily Souder*, 17 Wall. 666, 670; *The St. Lawrence*, 1 Black, 523, 531; *The Eclipse*, 3 Biss. 99, Fed. Cas. No. 4,268), unless possibly the note is valueless (*The Bird of Paradise*, 5 Wall. 545, 561). We cannot perceive the force of the reason for the surrender of the note, since, if the note be not taken in payment, but merely as collateral and further security for the debt, there would seem to be no propriety, as against other claims upon the vessel, in allowing the secured claimant to share in the proceeds upon surrender of his additional security, because such surrender can in no way benefit the other claimants upon the proceeds, and operates only to release the additional debtor. It would, we think, be more equitable to require such secured creditor first to pursue and exhaust his collateral security. However that may be, we think the rule declared should be qualified in this, that the time of payment granted by the note should not extend the term of payment of the debt beyond the period within which by the law the lien should be prosecuted; for, if the lienor may be indulged in granting such time of payment as he may elect, he would thereby be permitted to retain a dormant lien upon the vessel, to the injury of the subsequent lienors, and to the sustaining of stale demands. If, therefore, time of payment be granted beyond the time declared by statute or general law for the assertion of the lien, the lienor has disqualified himself to prosecute the lien within the permitted time, and it is gone. *Peyroux v. Howard*, 7 Pet. 324; *The Highlander*, 4 Blatchf. 55, Fed. Cas. No. 6,475; *Green v. Fox*, 7 Allen, 85; *Bailey v. Hull*, 11 Wis. 289; *Schmidt v. Gilson*, 14 Wis. 514; *Dey v. Anderson*, 39 N. J. Law, 199.

It has also been held that the mere taking of a mortgage upon the res, to secure the note given for the claim, may not be, of itself, a waiver of the claim. *The D. B. Steelman*, 48 Fed. 580. It may seem somewhat inconsistent to accept a subordinate for a superior lien, retaining at the same time a claim for the superior. In *Kornegay v. Styron*, 105 N. C. 14, 11 S. E. 153, it was held that the taking of the mortgage was a waiver of the lien, and estopped the lienor to assert the lien. We need not here determine the question. It is sufficient to say that in *The D. B. Steelman*, supra, Judge Hughes, reviewing the decisions in *The Ann C. Pratt*, 1 Curt. 340, Fed. Cas. No. 409, *Stapp v. The Swallow*, 1 Bond, 189, Fed. Cas. No. 13,305, and *Dudley v. The Superior*, 1 Newb. 176, Fed. Cas. No. 4,115, distinguished the case then in hand from those, pointing out the fact that there the claimant had taken notes for the amount of his lien, extending the time of payment for a period not exceeding four months, and a mortgage upon an undivided one-half interest in the vessel, and observes:

"If, however, the taking of the mortgage be attended by acts inconsistent with the lien, or prejudicial to other maritime creditors (for instance, if the credit given by it be so long as to make the claim it is intended to secure stale, in the sense of the maritime law), or if the execution of the mortgage be in manner such as to make it conflict with the rights of maritime creditors whose claims are of equal dignity with that secured by the mortgage, then it

would be inequitable to allow to the mortgagee the benefit of two remedies against the ship, and his taking the mortgage would be held as waiving the maritime lien."

And he further observes, with respect to the case there involved, that:

"It is not the case of a voluntary abandonment of the remedy in admiralty for a resort to the inconsistent and different remedy of attachment and personal judgment in a state court. Nor, in this case, has there been a sleeping by the claimant upon his mortgage so long as to allow his claim to grow stale, to the prejudice of the rights of maritime lien creditors whose claims are fresh."

The period within which a maritime lien should be enforced has not been determined with precise definiteness. The subject has, however, frequently been under deliberation, and the considerations which should induce to a short period of limitation have been strongly presented. A longer period is allowed as against the owner of the vessel than as against a subsequent innocent purchaser or subsequent innocent lienor. With respect to vessels navigating the high seas, from an early time the limit has been by the voyage. *The Charles Carter*, 4 Cranch, 332. And liens for wages, supplies, and bottomry arising upon a subsequent voyage are given priority to those arising upon a previous voyage, unless peculiar circumstances should demand equality in their payment. *The Paragon*, 1 Ware, 331, Fed. Cas. No. 10,708; *Porter v. The Sea Witch*, 3 Woods, 75, Fed. Cas. No. 11,289. But with respect to lake and harbor navigation a different rule has prevailed. Upon the Great Lakes the time has been limited by the seasons of navigation, and not by the voyage, and claims of equal rank arising during each season are paid pro rata, without respect to the particular voyage. In the open harbors, where there is no close of the season of navigation, a limit of 40 days has been determined. *Stillman v. The Buckeye State*, Newb. 111, Fed. Cas. No. 13,445; *The Detroit*, 1 Brown, Adm. 141, Fed. Cas. No. 3,832; *The Hercules*, 1 Brown, Adm. 560, Fed. Cas. No. 6,400; *The Dubuque*, 2 Abb. (U. S.) 20, 32, Fed. Cas. No. 4,110; *The Delos De Wolf*, 3 Fed. 236, 239; *The J. W. Tucker*, 20 Fed. 129, 134; *The Proceeds of The Gratitude*, 42 Fed. 299; *The Samuel Morris*, 63 Fed. 736.

The rule with respect to the Great Lakes and harbors is a modification of the general maritime law, which adjusted liens by the voyage. The rule is somewhat arbitrary, as would be any rule that was a departure from the rule of the general maritime law. It was, however, rendered necessary in the interest and for the protection of maritime liens, and because of the shorter voyages upon the lakes; and the rule as applied to the Great Lakes commends itself to our judgment as wise and proper. In these days of swift and easy communication by telegraph and telephone between all ports of our country, the reasons upon which maritime claims are upheld have lost somewhat of their cogency, and while it is not within our province to disturb the settled law of the admiralty, as held in this country, we think we should be doing violence to the spirit of the law and the genius of the times by extending, instead of restricting, the period within which secret liens upon vessels may be asserted.

Coming now to the consideration of the facts in this case, and judging them in the light and spirit of the principles which have been stated, we observe that from the first the appellant distrusted the responsibility of Comings, and insisted that for the repairs and alterations which should be made the appellant should have a lien upon the vessel. We need not stop to consider the nature of the lien that was in the contemplation of the parties, for we proceed upon the assumption that it was a maritime lien that was contemplated. It is also manifest that the appellant did not propose to allow the vessel to get beyond the reach of process from the courts of the district within which repairs were made. The repairs were completed on the 21st day of July, 1892. On the 27th of July the appellant exhibited a libel against the vessel under which she was arrested and held in the custody of the marshal until the 20th day of August. Up to this time there was exhibited upon the part of the libelant a determined, energetic prosecution of its claim. At this date the mortgagees appeared upon the scene, and an arrangement was arrived at, in effect that Comings, the owner, should, and he did, execute a bill of sale of the vessel to the mortgagees, and that the mortgagees should, and they did, execute their notes to the appellant for the amount of their claim, secured by mortgage upon the vessel. There was also an agreement between Comings and the mortgagees by which the vessel should be operated by Comings in connection with the Columbian Exposition, so long as it should prove profitable, but that the financial affairs of the vessel should be conducted by the original mortgagees, now owners of the boat, and that the net proceeds of operation should be paid over to a trustee for the payment of the note given by Hume, Galvin & Tyler to the appellant. It is in dispute whether the appellant was informed of the agreement between Hume, Galvin & Tyler and Comings. It does not appear, however, that the appellant knew that Galvin or Tyler were to give their personal attention to the management of the boat and its finances. Upon the consummation of the agreement the appellant voluntarily dismissed the libel which it had exhibited, and consented to the release of the vessel by the marshal, and its surrender to Hume, Galvin & Tyler. The notes which the appellant accepted extended payment of the debt,—a portion until July 1, 1893, a portion until September 1, 1893, and another portion until December 1, 1893. We have thus the case where one, having a maritime lien for the enforcement of which he had invoked the power of a court of admiralty, caused the vessel to be taken and held in custody, and then voluntarily surrendered his position and the custody of the vessel which the court had taken, and permitted its surrender to the original mortgagees, accepted their notes in payment of the debt, extended payment for a period of about 15 months, on the average, and placed himself in such position that he could not assert his lien, if he had one, until the close of the second season of navigation after the work was done. We think that, under such circumstances, the appellant ought not to be permitted to assert its claim against subsequent innocent lienors. We do not think it our duty in the interest of commerce thus to foster the maintenance of secret liens.

We do not think it right, when one has thus invoked the power of the court to enforce an asserted right, and had voluntarily abandoned the proceeding, accepting the obligation of third parties for the debt,—parties who are not satisfactorily shown by any means to be unable to meet their obligation in whole or in part,—that he should be allowed to be reinstated in his original right, to the detriment of those who have subsequently and innocently furnished supplies for the operation of the vessel, contemplated and made possible by his action. The case is somewhat analogous to the case of a vessel libeled, and released upon stipulation to pay the debt. In such case, as against subsequent parties, courts remand the claimant to his remedy upon the stipulation.

We have not failed to consider that by the notes received it was stipulated that their acceptance should not be construed as a waiver of the appellant's lien upon the vessel, but we do not think that that stipulation should be permitted to avail as against subsequent innocent purchasers or lienors, however valid and effectual it might be as against the owner and mortgagees of the vessel. The appellant certainly held itself out to the world as abandoning its lien, and the assertion of it in the courts of admiralty, and as willing to accept for the debt the notes of Hume, Galvin & Tyler, with their mortgage upon the vessel as security. This mortgage was silent as to the stipulation for retention of the lien. It gave no notice of it, and its existence was hidden in the breasts of the contracting parties. It cannot be permitted that one may thus play fast and loose with the rights which the law accords him. It cannot be allowed that a lienor, under the circumstances here disclosed, may surrender the possession of the vessel, accept a mortgage upon it for his claim, and the notes of third persons extending the time of payment beyond the period which the law permits for the enforcement of the right, and still retain his lien. To uphold such conduct would, in our judgment, work great injustice, and prove most injurious to commerce.

The decree will be affirmed.

THE SHREWSBURY.

ELEY et al. v. THE SHREWSBURY.

(District Court, N. D. Ohic, W. D. July 12, 1895.)

1. MARITIME LIENS—SUPPLIES AND MATERIALS—HOME AND FOREIGN PORTS.

Persons having the entire possession of a vessel, under a contract of purchase, and using her for the transportation of merchandise and passengers, are to be regarded as her owners, so that the port of their residence will be her home port, notwithstanding that, by the contract of sale, title was not to pass until full payment of the purchase money, and that the vessel was still enrolled at the port of the sellers.

2. SAME—HIRING OF VESSEL—STATE STATUTES.

Where a vessel is hired to take the place temporarily of another vessel engaged in performing regular trips, there arises against the latter vessel a lien for the contract price, under a state statute giving a lien for claims arising out of "any contract for the transportation of goods or persons." Rev. St. Ohio, § 5880.

3. SAME—CLAIM FOR WHARFAGE.

Wharfage being expressly made a lien by the Ohio statute, and being strictly a maritime lien, the same may arise in favor of a part owner of a vessel, and may be enforced in the hands of his assignees.

4. SAME—SUPPLIES.

Supplies furnished, not directly for the use of the crew and passengers, but to the persons having a lunch counter and bar upon the boat, give rise to no lien under the provision of the Ohio statute which relates to "provisions and articles of food supplied for the use of the crew and passengers, to be consumed in the use and navigation of the boat." Rev. St. Ohio, § 5880.

5. SAME—CARRIAGE FOR ANOTHER VESSEL—IMPLIED CONTRACT.

Where a vessel carries passengers under tickets issued by another vessel, according to an arrangement fixing a tariff therefor, a lien arises under the Ohio statute, against the latter vessel, for the tariff price.

These were libels filed by John M. Eley and others against the steamer Shrewsbury to enforce alleged liens for supplies, and for claims arising out of certain contracts.

R. R. Kinkade, for libellant Eley.

R. M. McKee, for Woodruff & Anderson.

I. N. Huntsberger, for Toledo Foundry & Mach. Co., Henry P. Tobey, Edward G. Ashley, Vulcan Iron Works, M. I. Wilcox Cordage & Supply Co., Stollberg & Parks, Vrooman, Anderson & Bateman, Catawba Island Dock Co., J. N. Dewey & Co., and R. Brand Co.

A. W. Eckert, for W. F. Brenzinger.

F. N. Sala, for C. Tallmadge & Co.

F. W. Rickenbaugh, for La Salle & Koch, Breyman Bros., Wm. W. Wales, Nathaniel A. Haughton, and Christian Umbehaum & Son.

Goulder & Holding, for Cleveland & Buffalo Transit Co., Victor Manuf'g Co., F. O. Little Electrical Construction & Supply Co., Charles P. Walsh, and John O'Day.

Beard & Beard, for Maumee Baking Co.

Andrew Farquharson, for Kirschner Bros.

Moses G. Bloch, for G. W. Fonner.

RICKS, District Judge. This case is a proceeding in admiralty, and now comes before the court upon exceptions to the report of Special Master George A. Bassett, who has, in accordance with an order of reference heretofore made, filed his report as to the several claims and liens asserted against the steamer Shrewsbury, as set forth in his report and the testimony accompanying it. The briefs of counsel give evidence of great industry and ability in examining the authorities which they seem to think are controlling, in this case, and I have read them very carefully, with great profit, and have been very much aided by them in reaching the conclusion in this case.

There are a few general principles which must control us in this case, and they may as well be stated at the outset of this opinion. The following statement of facts, briefly expressed by the master in his report, is necessary for the proper application of these principles of law:

"On or about the 8th day of June, 1893, Charles Hubbard and Sherman Canfield, residents of Toledo, Ohio, entered into a written contract with the Buffalo & Niagara River Navigation Company, a corporation organized under the laws of the state of New York, with its principal place of business at Niagara Falls, in said state, whereby the said Hubbard & Canfield agreed to purchase the steamer Shrewsbury of said navigation company for the gross sum of \$45,000, the terms of which contract more fully appear as Exhibit G, hereto annexed. That in pursuance of said contract, and on their making a down payment of \$2,500, said Hubbard & Canfield were to have said vessel delivered to them in good order, with all her equipments, and such other parts as belonged to said steamer, etc. * * * That on or about the 10th day of June, 1893, said navigation company did deliver said steamer to Hubbard & Canfield, and thereafter the master and crew employed by said Hubbard & Canfield proceeded from Buffalo with said steamer, with the intention of taking her to the city of Toledo, in the state of Ohio, where she duly arrived on the 13th of June, 1893."

The master then proceeds to state that from and after that day she plied regularly between the ports of Toledo and Put-in Bay, until she was seized under the process of this court.

Proctors for the claimants contend that said contract for the sale of said steamer provided that the title thereof should remain in the vendors until certain conditions were complied with; that said conditions never, in fact, were complied with; and that, therefore, the title to the steamer never passed from the vendor. If this proposition be true, both in fact and in law, then the owners of said boat were residents of the state of New York, and the said boat was a foreign, not a domestic, craft when running between the ports of Toledo and Put-in Bay. The liens for supplies and material furnished her were therefore not delivered at her home port, and therefore became maritime liens whenever they were necessary, and furnished at the solicitation of the master. But I prefer to accept the conclusion of the master, that the parties who had possession of this boat during the time she carried on the business of transportation of merchandise and passengers between Toledo and Put-in Bay were entitled to the custody of the boat, and to operate the same, and that they were residents of the state of Ohio, and that, therefore, she was a domestic vessel, and that the liens now claimed against the same

were made such liens by virtue of section 5380 of the Revised Statutes of Ohio, which reads as follows:

"Any steamboat or other water craft navigating the waters within or bordering upon this state shall be liable, and such liability shall be a lien thereon, for all debts contracted on account thereof by the master, owner, steward, consignee or other agent, for materials, supplies or labor in the building, repairing, furnishing or equipping of the same, or for insurance, or due for wharfage, and also for damages arising out of any contract for transportation of goods or persons, or for injuries done to persons or property by such craft, or for any damage or injury done by the captain, mate, or other officer thereof, or by any person under the order or sanction of either of them, to any person who is a passenger or hand on such steamboat or other water craft, at the time of the infliction of such damage or injury."

The scope and effect of this statute, and the rights conferred upon parties who have furnished materials or supplies by reason thereof, are very clearly set forth by Mr. Justice Gray in the case of *The J. E. Rumbell*, 148 U. S. 1, 13 Sup. Ct. 498. In that opinion, speaking for the supreme court, he says:

"Whenever the statute of a state gives a lien, to be enforced by process in rem, against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States."

After reviewing and discussing the question at great length, the learned justice, speaking for the court, says:

"According to the great preponderance of American authority, therefore, as well as upon settled principles, the lien created by the statute of a state, for repairs or supplies furnished to a vessel in her home port, has the like precedence over a prior mortgage that is accorded to a lien for repairs or supplies in a foreign port under the general maritime law, as recognized and adopted in the United States. Each rests upon the furnishing of supplies to the ship, on the credit of the ship herself, to preserve her existence and secure her usefulness, for the benefit of all having any title or interest in her. Each creates a *jus in re*,—a right of property in the vessel, existing independently of possession, and arising as soon as the contract is made, and before the institution of judicial proceedings to enforce it. The contract in each case is maritime, and the lien which the law gives to secure it is maritime in its nature, and is enforced in admiralty by reason of its maritime nature only."

It therefore becomes only necessary to examine the master's report for the purpose of ascertaining whether he has properly classified the several claims filed, and correctly decided whether or not they were liens within the law.

Under the head of a "General Finding," on page 8 of the master's report, is a list of libelants entitled to and having a lien against the steamer, and the amounts set opposite their respective names, which list the court finds to be correct. Following the said list of libelants is another list of libels for materials and repairs furnished to and made upon the steamer, while lying at the port of Buffalo, and which he finds to be liens upon the vessel under the New York and Ohio statutes, and the same are approved by the court.

The libel of J. N. Dewey & Co. is taken by the master and considered separately, and he finds that the same is a lien under the Ohio statute, being a claim for damages arising out of "any contract for

the transportation of goods or persons." In this finding the master seems to be sustained by a construction of the water-craft law made by the supreme court of Ohio in the case of *The Monarch v. Marine Railway & Dry-Dock Co.*, reported in 7 Ohio St. 478. This is a construction of an Ohio statute by the highest court of the state, and is persuasive in this case. The steamer *Douglass* was hired to take the place of the *Shrewsbury* while disabled. Without the aid of the *Douglass*, or some other boat, the *Shrewsbury* would have been unable to perform her trips, and such disability might have made the boat liable to serious claims for damage. The claim seems to be a very just one, is sustained by the Ohio statute as before stated, and is allowed.

The court approves the master's finding upon the libel of William W. Wales.

The master reports against the libel of Woodruff & Anderson, who claim as assignees of Sherman Canfield on a claim for wharfage. He reasons that Canfield himself, being a part owner of this boat, could not have asserted this claim against the boat, and that his assignees stand in no better position, or have no better legal rights than the assignor has, and that, therefore, their libel cannot be sustained. In this I think the master has reached a wrong conclusion. The claim for wharfage is especially named in the Ohio statute as one for which a lien is given upon the vessel. Wharfage is strictly a maritime lien. It might be preferred against the boat without reference to the relation of the libellant to the owners of the boat. It is a lien good in the hands of whoever holds it, for the amount justly due, and could be enforced against the vessel itself, without reference to the ownership thereof. It is urged by the proctor for the claimants that this claim for wharfage could not have been made on the credit of the boat, because Canfield was in fact the lessor of the dock, and knew the character of the title he had to the boat, and the relations he sustained to the claimants. This would all be true if the claim was not strictly a maritime claim. A lien for wharfage is made, under the general maritime law, a lien next in rank to wages. It is a necessary privilege for the steamer to have in order to carry on its business, and, being made a lien by the Ohio statute, I think it is enforceable without reference to the relation which Canfield holds to the claimants. I think, in this case, therefore, the libel of Woodruff & Anderson must be allowed, and the finding of the master upon this libel is overruled and set aside.

As to the libels of the Maumee Valley Baking Company, the R. Brand Company, Nathaniel A. Houghton, Chris Umbehaum & Son, Kirschner Bros., and G. W. Fonner, the master's findings are approved and confirmed. My first impression in reference to these claims was that the Ohio statute covered claims only for supplies used in the building, repairing, furnishing, and equipping of the boat. The statute, as published and punctuated in the Revised Statutes, would seem to bear this construction, but I find that the statute is construed by the supreme court of Ohio, in the case of *The Huron v. Simmons*, 11 Ohio, 460. In that opinion the statute is quoted as published in Swan's St. 1841, p. 209; the punctuation is different,

and, as therein published, fully supports the construction put upon it by the supreme court of Ohio, which is, that the statute was made for the protection of those who furnished "provisions and articles of food supplied for the use of the crew and passengers, to be consumed in the use and navigation of the boat." The opinion refers to the difficulty of collecting such claims against boats on the canals, and that the clear intention of the statute was to give a lien against the boat itself for such merchandise. But, impliedly, the supplies so referred to were to be of a character suitable for the use of the crew and passengers in the navigation of the boat. These supplies, it seems from the evidence before the master, were not in fact furnished the boat for the use of the crew, but were furnished to the persons who had the lunch counter and the bar, and furnished passengers liquors and refreshments. I do not think such supplies were contemplated by the legislature of Ohio as entitled to the protection of a lien upon the boat.

In his "General Finding," the master has sustained the libel of the Cleveland & Buffalo Transit Company for the sum claimed. The proctors for claimant contend that this is not right, and that there is no lien, either maritime or statutory, for this sum. They contend that there was no contract between the Shrewsbury and the Cleveland & Buffalo Transit Company by which it agreed to transport passengers for a stipulated sum, for which it should have a lien upon the boat. Mr. Norman, in his testimony, which I have read, admits that there was no written contract between the Shrewsbury and his company, but he says there was a tariff agreed upon, and describes the system under which the tickets were issued. Whenever a passenger rode upon the libelant's boats, and produced a ticket issued by the Shrewsbury, an implied contract certainly arose between the Shrewsbury and the libelant that the former would pay the latter the tariff price agreed upon for such passage. The libelant earned the passage money, and the Shrewsbury received the pay for the same. I think, therefore, a lien ought to be given the libelant for the passage money so earned. I think such a lien is covered by the Ohio statute.

In passing upon all these claims, I have felt that a very strong equity exists to hold every claim valid, possible under the law. The vendors sold this boat, received some \$22,000 upon the purchase money, and within a year have received the boat back again, for failure of the vendees to comply with their contract. Under these circumstances, the court ought to sustain the claims of all libelants, where any principle of law can be found to justify it. The master's report in this case has discussed the principles involved in a very intelligent and logical manner. Both in the preparing of the report, and the arrangement of the evidence, the master has been of material service and aid to the court. The report is confirmed, except as herein expressly stated.

CLEVELAND, C. C. & ST. L. RY. CO. v. SAUNDERS.

(Circuit Court of Appeals, Seventh Circuit. January 10, 1895.)

No. 132.

Error to the Circuit Court of the United States for the Southern District of Illinois.

John T. Dye, for appellant.

B. S. Organ, for appellee.

Dismissed, per stipulation of counsel.

DAVIS & RANKIN BLDG. & MANUF'G CO. v. DRIVER.

(Circuit Court of Appeals, Seventh Circuit. January 18, 1895.)

No. 54.

Error to the Circuit Court of the United States for the District of Indiana.

Geo. Shirts, for plaintiff in error.

Claypool & Claypool, for defendant in error.

Dismissed, per stipulation of counsel.

INDUSTRIAL LAND DEVELOPMENT CO. v. HUNTER.

(Circuit Court of Appeals, Third Circuit. August 6, 1895.)

Error to the Circuit Court of the United States for the District of New Jersey.

No opinion. Docketed and dismissed, pursuant to the sixteenth rule.

JOHNSON v. OLSEN.

(Circuit Court of Appeals, Seventh Circuit. February 23, 1895.)

No. 212.

Appeal from the Circuit Court of the United States for the District of Indiana.

No opinion. Dismissed, pursuant to the twenty-third rule, for failure to print record.

LEETE v. NONESUCH FIBRE CO. et al.

(Circuit Court of Appeals, Third Circuit. September 17, 1895.)

Appeal from the Circuit Court of the United States for the District of Delaware.

J. H. Hoffecker, Jr., for appellant.

Dismissed, on motion of counsel for appellant, at costs of appellant.

MARTINETTE v. PEDRICK.

(Circuit Court of Appeals, Third Circuit. September 17, 1895.)

Error to the Circuit Court of the United States for the District of New Jersey.

Aaron V. Dawes, for defendant in error.

Dismissed, pursuant to the sixteenth rule.

THE RICHARD STOCKTON.

NORTON et al. v. NORTON.

(Circuit Court of Appeals, Third Circuit. September 18, 1895.)

Appeal from the District Court of the United States for the District of New Jersey.

Dismissed, pursuant to the twenty-second rule.

RICKORDS et al. v. CITY OF HAMMOND

(Circuit Court of Appeals, Seventh Circuit. October 7, 1895.)

No. 266.

Appeal from the Circuit Court of the United States for the District of Indiana.

Walter Oles and Chas. E. Griffin, for appellants.

Peter Crumpacker, for appellee.

Dismissed, per stipulation of counsel.

TOWN OF EAGLE v. HORNICK.

(Circuit Court of Appeals, Seventh Circuit. May 26, 1895.)

No. 165.

Error to the Circuit Court of the United States for the Northern District of Illinois.

Hiram T. Gilbert, for appellant.

A. M. Pence and Geo. A. Carpenter, for appellee.

Dismissed, per stipulation of counsel.